Office of the Inspector General

Commonwealth of Massachusetts

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Inspector General

Completion of the Greenfield Middle School Renovation Project: Building Committee Oversight

September 2000 - August 2001

February 2003

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Executive Summary

Introduction

In September 2000, Representative John Merrigan and Senator Stanley Rosenberg requested that the Office of the Inspector General assist the Town of Greenfield in its efforts to facilitate the completion of a troubled project to renovate the Greenfield Middle School, which was being overseen by a Town building committee. They were concerned that the project was over budget and behind schedule; that the Town's relationship with the contractor, Interstate Construction Corporation (ICC), had deteriorated to the point that the Town had fired ICC; and that the middle school students were being displaced for a third consecutive year. They emphasized the importance of moving the project forward as quickly as possible.

The Office took immediate steps to respond to this request. In September and October 2000, the Office met with the Town Administrator, the Town Counsel, the Town Council President, the Chairman of the Building Committee, a member of the Board of Selectmen serving on the Building Committee, and representatives of the Building Committee and the Town Council. Office staff toured the site of the unfinished school and obtained copies of major contracts and other selected project records.

On October 17, 2000, Representative Merrigan and Senator Rosenberg convened a meeting of state and local officials in downtown Greenfield for the purpose of assisting the Town in completing the Greenfield Middle School project. In addition to the legislators and Office staff, representatives of the Department of Education (DOE) and the Division of Capital Asset Management (DCAM) attended the meeting. Town officials attending the meeting included the Town Council President, a member of the Board of Selectmen, the Superintendent of Schools, and the Building Committee Chairman. Several days earlier, on October 13, DCAM had granted a request from the Building Committee for a limited emergency waiver of the advertising and bidding provisions of M.G.L. c. 149 to enable the Building Committee to secure and mitigate damage to the school building. The Building Committee had entered into negotiations

with the surety of the terminated contractor for completion of the project, but the outcome of those negotiations appeared uncertain. At the October 17 meeting, DCAM's Associate General Counsel advised the Town representatives to initiate certain measures in the event that the Building Committee did not reach agreement with the surety and, thus, needed to request an emergency waiver from DCAM to complete the project.

After the October 17 meeting, the Office met with DCAM officials on several occasions regarding the emergency waiver requests submitted by the Building Committee. The Office supported DCAM's decision to grant the requested waivers and assisted DCAM in developing reasonable and realistic waiver conditions to be met by the Building Committee in completing the project.

During the ensuing months, the Office requested project-related documents from the Building Committee but deferred interviews with project participants until the school building was substantially complete. After the project reached substantial completion on August 10, 2001, the Office obtained additional project documents and conducted interviews with project participants.

The Office's review focused primarily on the period from September 1, 2000, shortly after the Building Committee terminated ICC, through August 31, 2001. The principal objectives of the Office's review were to determine whether the Building Committee complied with legal requirements, including the conditions set forth in the emergency waivers granted by DCAM, during the completion phase of the project and to evaluate the adequacy of the Building Committee's oversight of the project during this period. This report does not address or take a position regarding reimbursement of project expenditures by the Department of Education. The Office's review was conducted in accordance with generally accepted government auditing standards.

Findings

1. Between September and December of 2000, the Greenfield Middle School Building Committee spent more than $213,000 on construction services

procured under no-bid, time-and-materials contracts that lacked performance bonds and other statutorily required protections.

- **The Building Committee contracted for building-related construction services without bidding, seeking an emergency waiver, or complying with other M.G.L. c. 149 requirements.**

- **The Building Committee contracted for public works construction services without bidding, seeking an emergency waiver, or complying with other M.G.L. c. 30, §39M requirements.**

- **Project records did not include weekly payroll reports from the contractors for the work they performed under these contracts.**

2. **The Building Committee's floor remediation contractor was paid $175,549 before the Building Committee executed a written contract or obtained a performance bond for the floor remediation work.**

3. **The construction management contract executed by the Building Committee was inconsistent with the designer selection law and with the Building Committee's recently adopted designer selection procedures.**

4. **Although the Building Committee appears to have complied with the informal bidding requirements specified in the DCAM emergency waiver, the bid documentation provided to DCAM was incomplete.**

   - **Project records indicated that the Building Committee's construction manager sought competitive prices on contracts with new contractors after December 11, 2000.**

   - **Bid documentation provided to DCAM and the Office was incomplete for three of the nine construction contracts with new contractors.**

5. **Three of the nine construction contracts with new contractors lacked performance and payment bonds required under M.G.L. c. 149.**

6. **None of the nine construction contracts with new contractors included statutorily required provisions governing payment of prevailing wages, change orders, payment procedures, financial reporting, or interpretation of specifications.**

7. **Although the Building Committee required its legal counsel and its records manager to sign each construction contract, neither appears to have reviewed the contracts for compliance with applicable laws.**

8. **Project records did not include weekly payroll reports for five contractors.**

9. **The Building Committee's business relationship with its owner's representative lacked basic contracting safeguards.**

   - **The Building Committee did not execute a written contract with the owner's representative.**
   - **The Building Committee's decision to pay the owner's representative through the Building Committee's design contract cost the project more than $14,000 in unnecessary administrative expenses.**
   - **The Building Committee approved, and the Town Accountant issued, a $30,910 illegal payment to the owner's representative during the review period.**
   - **The Building Committee did not monitor the cost of the services provided by the owner's representative.**

10. **The Building Committee purchased excess school furniture and equipment.**

11. **The Building Committee's subcommittees did not fully document their official actions, as required by the open meeting law.**

    - **The Building Committee's Executive Committee did not prepare minutes of its meetings until December 2000.**
    - **The Building Committee's FF&E Subcommittee did not prepare minutes of its meetings.**

Conclusion and Recommendations

The task of completing the troubled Greenfield Middle School renovation project after the Building Committee terminated the project contractor, Interstate Construction Company (ICC), in August 2000 posed a substantial challenge. The Greenfield Middle School ultimately reopened for the 2001-2002 school year, an accomplishment for which the Building Committee deserves credit, along with the state legislators, other state officials, and other Town officials who provided assistance and guidance to the project.

There is no state law that requires the creation of a building committee for the purpose of overseeing a local construction project. Nevertheless, like many other Massachusetts cities and towns, the Town of Greenfield decided to create a building

committee to contract for and oversee the renovation of the Greenfield Middle School. The Building Committee, like other local building committees, was comprised of citizens and Town officials, many of whom had other jobs and obligations, volunteering their time in order to serve their community. The Office does not question the dedication or integrity of these public servants. It would be understandable if many or most Committee members were unfamiliar with the statutory requirements detailed in this report and were unable to devote the necessary time to administering the Building Committee's consultant contracts.

Nevertheless, by delegating full responsibility and spending authority for the project to the Building Committee, the Town conferred on the Building Committee the obligation to conduct its business in accordance with applicable laws, to provide effective fiscal and managerial oversight, and to ensure public accountability and transparency in the expenditure of public funds. The findings summarized in this report show that the Building Committee did not fully meet these obligations during the period covered by this review.

Specifically, the Office's review showed that the Building Committee executed numerous contracts that did not comply with legal requirements. After DCAM granted the first two waivers, the Building Committee instituted a formal contract approval process that required the Building Committee's legal counsel and records manager to sign each contract. However, the Office found that this contract approval process did not function as an effective legal safeguard: the approved contracts did not contain statutorily required provisions and, in some cases, did not include statutorily required performance bonds.

The Office's review also showed that the Building Committee did not employ sound business practices in obtaining the services of its owner's representative. While the Building Committee's decision to engage the services of an owner's representative was justifiable, the Building Committee's expenditure of more than $100,000 in project funds for these services during the period covered by this review without a written contract specifying the owner's representative's responsibilities and fees was not. In addition to

incurring unnecessary processing fees in order to pay the owner's representative through the project architect, the Building Committee violated state law by authorizing a payment to the owner's representative without executing a legally procured contract.

The Office reviewed the available documentation for the Building Committee's purchase of excess furniture and equipment for the school. However, the records provided to the Office did not contain meeting minutes reflecting the work of the subcommittee responsible for the purchases, documentation of the Building Committee's priorities, approved plans and equipment lists, or any other records showing how and why the Building Committee decided to purchase the furniture and equipment that proved unnecessary.

The report findings underscore the importance of ensuring that building committees, like other public entities, are provided with the necessary training and information on the legal requirements with which they are required to comply, the sound business practices that they are expected to implement, and the importance of maintaining complete, accurate meeting minutes and other project records. Legal violations expose jurisdictions to the costs and delays of legal disputes. In addition, Massachusetts law prohibits payment by a governmental body of services rendered in violation of a public procurement law. Thus, a building committee that selects consultants and contractors without regard for the competitive requirements of M.G.L. c. 7, §§38A½-O; M.G.L. c. 149; M.G.L. c. 30, §39M; and M.G.L. c. 30B could find itself in the position of having to seek special legislative authorization in order to pay a consultant or contractor for services rendered.

Moreover, certain basic public contracting safeguards are fundamental to promoting efficiency, cost-effectiveness, and accountability in the expenditure of public funds for contracted services. These safeguards include open, fair competition; sound, well-written contracts with sufficiently detailed scopes of services and reasonable compensation terms; and effective contract monitoring procedures.

Building committees often contract with outside consultants to provide the necessary oversight of a construction project. These consultant contracts require the same level of

monitoring and oversight as the building committee's contracts with the designer and the contractor. Thus, a building committee – like any other public entity – must possess the internal capability to monitor and oversee consultant contracts. Failure by any public entity, including a building committee, to institute basic contracting safeguards unnecessarily exposes taxpayers to waste, abuse, and even fraud. While the Office's review found no evidence of fraud or abuse in this case, the risks of fraud and abuse on any public project are heightened when these safeguards are inadequate or absent.

Finally, full documentation of the official decisions and actions of public bodies is essential. In addition to ensuring compliance with the requirements of the open meeting law, "transparency," or public disclosure, promotes public accountability and public confidence in government.

The following recommendations to the Town of Greenfield and other local jurisdictions that decide to delegate responsibility for construction projects to building committees represent strategies for promoting cost-effective contracts and reducing the jurisdiction's vulnerability to unnecessary risks.

1. **Clarify the building committee's role, authority, and reporting relationships.**
2. **Adopt designer selection procedures.**
3. **Appoint a project manager for each construction project.**
4. **Develop a project-specific oversight plan.**
5. **Provide appropriate legal and managerial training and guidance to building committee members and others with supervisory responsibilities.**
6. **Institute effective fiscal and administrative controls over consultant contracts.**

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Introduction

Background

In September 2000, Representative John Merrigan and Senator Stanley Rosenberg requested that the Office of the Inspector General assist the Town of Greenfield in its efforts to facilitate the completion of a troubled project to renovate the Greenfield Middle School, which was being overseen by a Town building committee. They were concerned that the project was over budget and behind schedule; that the Town's relationship with the contractor, Interstate Construction Corporation (ICC), had deteriorated to the point that the Town had fired ICC; and that the middle school students were being displaced for a third consecutive year. They emphasized the importance of moving the project forward as quickly as possible.

The Office took immediate steps to respond to this request. In September and October 2000, the Office met with the Town Administrator, the Town Counsel, the Town Council President, the Chairman of the Building Committee, a member of the Board of Selectmen serving on the Building Committee, and representatives of the Building Committee and the Town Council. Office staff toured the site of the unfinished school and obtained copies of major contracts and other selected project records.

On October 17, 2000, Representative Merrigan and Senator Rosenberg convened a meeting of state and local officials in downtown Greenfield for the purpose of assisting the Town in completing the Greenfield Middle School project. In addition to the legislators and Office staff, representatives of the Department of Education (DOE) and the Division of Capital Asset Management (DCAM) attended the meeting. Town officials attending the meeting included the Town Council President, a member of the Board of Selectmen, the Superintendent of Schools, and the Building Committee Chairman. Several days earlier, on October 13, DCAM had granted a request from the Building Committee for a limited emergency waiver of the advertising and bidding

provisions of M.G.L. c. 149[1] to enable the Building Committee to secure and mitigate damage to the school building. The Building Committee had entered into negotiations with the surety of the terminated contractor for completion of the project, but the outcome of those negotiations appeared uncertain.

At the October 17 meeting, DCAM's Associate General Counsel advised the Town representatives to initiate certain measures in the event that the Building Committee did not reach agreement with the surety and, thus, needed to request an emergency waiver from DCAM to complete the project. The measures recommended by DCAM's Associate General Counsel included the following:

- Preparation by the project designer of a biddable set of documents for the purpose of obtaining competitive quotations on an emergency basis,
- Hiring of a construction manager,
- Consultation with an attorney with construction expertise, and
- Filing with DCAM of an emergency waiver request when a biddable set of documents was available for the purpose of obtaining competitive quotations.

The Building Committee Chairman told those present that the Building Committee had engaged the services of a consultant, Baybutt Construction Corporation (Baybutt Construction), which was working with the project designer, Todd Lee-Clark-Rozas Associates, Inc. (TLCR), to rescope the project. He also stated that the Building Committee was holding discussions with Garrity and Knisely, a Boston-based law firm with construction law expertise.

After the October 17 meeting, the Office met with DCAM officials on several occasions regarding the emergency waiver requests submitted by the Building Committee. The Office supported DCAM's decision to grant the requested waivers and assisted DCAM in developing reasonable and realistic waiver conditions to be met by the Building Committee in completing the project.

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[1] An overview of the emergency design and construction contracting requirements, including the emergency waiver requirements, contained in the Massachusetts General Laws is provided in Appendix B of this report.

During the ensuing months, the Office requested project-related documents from the Building Committee but deferred interviews with project participants until the school building was substantially complete. After the project reached substantial completion[2] on August 10, 2001, the Office obtained additional project documents and conducted interviews with project participants.

Scope and Methodology

The Office's review focused primarily on the period from September 1, 2000, shortly after the Building Committee terminated ICC, through August 31, 2001, shortly after the Greenfield Middle School project reached substantial completion. The review did not focus on the previous contract between the Town and ICC, nor on the Town's negotiations with ICC's surety, because the Town was engaged in project-related litigation. However, this report does reference significant project-related contracts and events preceding and following the review period.

During the course of this review, the Office obtained documents from the Building Committee, the Town Accountant, the Town Treasurer, Baybutt Construction, PMA Consultants LLP (PMA), and DCAM. The Office conducted interviews with the Chairman and another member of the Building Committee; with representatives of TLCR, Baybutt Construction, PMA, Breezeway Farm Consulting (Breezeway Farm), and McManus & Rogers Builders LLC (McManus & Rogers); and with DOE. In March 2002, the Office met with the Superintendent of Schools and several other School Department officials regarding furniture and equipment that had been purchased with project funds and stored in a gymnasium at the Greenfield Middle School. The Office appreciates the cooperation and assistance provided by all of those listed above. The Office toured the project site in September 2000 and September 2001. On May 31, 2002, the Office submitted written questions to the Building Committee's legal counsel, Callahan, Curtiss, Carey, & Gates (Callahan Curtiss), which had requested that the

[2] "Substantial completion" refers to the point at which either the value of the remaining work to be done is less than one percent of the original contract price or the awarding authority takes possession of the building for occupancy, whichever comes first. [M.G.L. c. 30, §39K]

Office submit questions in writing rather than conducting an oral interview. In subsequent discussions with the Office, a Callahan Curtiss partner indicated that Callahan Curtiss intended to respond; however, the Office received no response.

The principal objectives of the Office's review were to determine whether the Building Committee complied with legal requirements,[3] including the conditions set forth in the emergency waivers granted by DCAM, during the completion phase of the project and to evaluate the adequacy of the Building Committee's oversight of the project during this period. This report does not address or take a position regarding reimbursement of project expenditures by the Department of Education. The Office's review was conducted in accordance with generally accepted government auditing standards.

On November 18, 2002, the Office provided a confidential draft of this report to the Building Committee and to the Board of Selectmen and requested their responses by December 6, 2002. On December 5, 2002, the Building Committee requested an extension to December 31, 2002, and the Inspector General granted the request. On December 19, 2002, the Building Committee requested an additional extension to January 31, 2003, and the Inspector General granted the request. The Office received the Building Committee's response to the confidential draft report on January 31, 2003. The Building Committee's response is provided in Appendix A of this report.

Brief Chronology of the Greenfield Middle School Project

According to a Middle School Feasibility Study prepared in November 1994 by the design team of TLCR and Juster/Pope/Frazier, the Greenfield Middle School was originally built as a high school in 1924. In 1967, a substantial renovation had reconfigured classrooms, science laboratories, and music rooms. As of November 1994, the interior of the building was in poor condition and parts of the building needed immediate repairs, according to the study. However, the study found that the building was structurally sound.

[3] The scope of the Office's review did not include the Building Committee's compliance with local by-laws, ordinances, or other local rules.

The study evaluated three options: a "face lift" with minimal renovations, comprehensive additions and renovation, and construction of a new facility. The study designers recommended the second option, which was estimated to cost slightly more than $10 million for construction only. Although the study found that the building roof and most of the building systems had outlived their useful lives, the study estimated that the recommended renovation option would cost 40 percent less than the cost of constructing a new middle school.

The Town Council had authorized its President to appoint a "School Building(s) Study Committee" in 1986, according to the minutes of a Special Town Council Meeting held on December 17, 1986 in joint session with the Greenfield School Committee and Board of Selectmen. From 1987 on, this Committee was known as the Building Committee, according to Town Council minutes of a meeting held on February 18, 1987. In February 1995, the Town Council President appointed eight new members to fill vacancies on the Building Committee, including the individual who served as Chairman of the Building Committee during the period covered by this review.

On November 14, 1995, the Town, through the Building Committee, contracted with TLCR to design additions and renovations to the Greenfield Middle School. Bids were solicited on the final design prepared by TLCR. On June 18, 1998, the Town, through the Building Committee, executed a $10,085,224 construction contract with ICC. The contract contained a substantial completion date of September 1, 1999.

Town records indicate that the Building Committee engaged the services of a local law firm, Callahan Curtiss, in 1998.[4] In November 1998, Callahan Curtiss authorized PMA to provide project-related services, although no contract was executed.[5]

During the course of the project, a serious moisture problem developed in the sub-flooring of the school building. Because of the water, the sub-flooring buckled, and

[4] Town records show that the Town's first payment to Callahan Curtiss was issued on November 20, 1998.

[5] The project-related services provided by Callahan Curtiss and PMA prior to September 2000 are beyond the scope of this report.

carpeting that had been installed began to rise up. The Building Committee also found evidence of microorganisms that, in the opinion of the Building Committee, had the potential to pose health problems.[6]

In a letter dated August 24, 2000, the Building Committee Chairman advised ICC's surety, Seaboard Surety, that the Town had declared ICC in default and formally terminated ICC's right to complete the contract.[7] On the same date, the Town filed a complaint against ICC in Franklin Superior Court alleging breach of contract and negligence on the part of ICC.

The Building Committee then entered into negotiations with Seaboard Surety for completion of the project. On September 1, 2000, the Building Committee contracted with Baybutt Construction for project-related consulting and construction services. The Building Committee subsequently contracted with a second construction firm for project-related construction services, Clayton Davenport Trucking (Davenport), on October 4, 2000. These contracts are discussed further in Finding 1 of this report.

On September 27, 2000, the Building Committee Chairman wrote to DCAM's Associate General Counsel requesting a limited waiver of the advertising and bidding requirements of M.G.L. c. 149 to allow the Building Committee to secure and mitigate damage to the school building. DCAM granted this request on October 13, 2000. The emergency waiver issued by DCAM waived advertising and bidding for work undertaken to make the heating, ventilation, and air conditioning (HVAC) system operational, to weatherproof the school roof, and to eliminate the sub-flooring moisture problem. To substitute for the formal advertising and bidding requirements that had been waived, the DCAM waiver outlined several options available to the Building Committee: contracting

[6] The information in this paragraph is drawn from a letter dated September 27, 2000 from the Building Committee Chairman to DCAM's Associate General Counsel.

[7] The Building Committee's relationship with ICC is not reviewed in this report.

with DCAM-certified[8] trade contractors after seeking competitive quotations for each scope of work; using existing subcontractors that had performed work under contract to ICC; or contracting with a DCAM-certified general contractor after seeking competitive quotations.

On October 30, 2000, the Building Committee executed an Emergency Work Agreement with Seaboard Surety for a series of tasks required to enclose the building.[9] Work under the Agreement was to start on November 6, 2000 and to be completed by December 31, 2000. As of November 14, 2000, the Building Committee estimated that the project would cost $6,108,968 to complete[10] and that $1,771,624 was available from unspent ICC contract funds.

On November 14, 2000, the Building Committee presented a request to the Greenfield Town Council for an additional $4.35 million to complete the Greenfield Middle School project. The Town Council approved the request on November 20, 2001. Table 1 summarizes the project completion cost estimate as of November 14, 2000.

[8] M.G.L. c. 149 requires general contractors bidding on public building construction contracts estimated to cost more than $25,000 to be certified by DCAM, which issues a Certificate of Eligibility to each certified contractor on an annual basis. The purpose of contractor certification is to identify those contractors that pose an unacceptable risk to awarding authorities and to disqualify such contractors from bidding on public building projects.

[9] The Emergency Work Agreement required the Building Committee to pay Seaboard Surety $206,959 for performance of the emergency work, plus the net amount of ICC's July 2000 requisition to the Building Committee, less the amounts paid directly by the Building Committee to ICC subcontractors, plus $23,223 for work performed in August 2000 by ICC subcontractors performing emergency work.

[10] This figure included a construction cost estimate of $5,608,968 prepared in October 2000 by Baybutt Construction plus an estimated $500,000 to cover administrative costs of the Building Committee, including architect, clerk of the works, and consultant fees.

Table 1.
Greenfield Middle School Project Completion Cost Estimate
(as of November 14, 2000)

Estimated project completion cost		
Estimated construction cost	$5,608,968	
Plus: estimated administrative cost	500,000	
Total		**$6,108,968**
Available ICC contract funds		
Original ICC contract amount	$10,085,224	
Plus: approved change orders	1,468,358	
ICC contract amount as of August 2000	11,553,582	
Less: payments and retainage	9,781,958	
Total		**(1,771,624)**
Total estimate of project completion funds required		**$4,337,344**

Source: Building Committee Appropriation Request to Town Council, November 14, 2000 and Baybutt Construction Final Analysis, October 30, 2000.

On November 10, 2000, the Building Committee requested a second emergency waiver from DCAM. In a letter to DCAM's Associate General Counsel, the Building Committee Chairman stated, in part:

> The surety has not yet decided if it will complete the remainder of the contract, including the floor remediation work. This indecision has compelled the Town to ask for a further waiver of the bid laws to complete the project since we must have an alternative method for completion of the work in place should the surety refuse to complete. Otherwise, the Town will be unable to open the school by September 2001.

The Chairman's letter noted that Baybutt Construction had estimated that work on the project would have to commence by December 4, 2000 in order to open the school for the next school year. His letter also stated that the Building Committee's attorney, Callahan Curtiss, had engaged PMA's services to analyze the construction project and schedule and that PMA generally supported Baybutt's estimated project schedule and cost.

DCAM granted this second, more comprehensive emergency waiver request. In a detailed, eight-page letter to the Building Committee Chairman dated November 22,

2000, DCAM's Associate General Counsel set forth the project background, DCAM's legal analysis, and a summary of the waiver conditions to be met by the Building Committee. The principal waiver conditions included:

- Competitive bidding on all subcontractor and supplier work other than work performed by ICC's filed subcontractors agreeing to complete their work at their filed subcontract prices.

- Preparation of bid documents containing complete scopes of work specified in plans and specifications required to be as detailed as possible.

- Selection of the lowest responsible and eligible bid for each contract.

- Active involvement of the project designer in providing construction administration services, including reviewing the completion work for compliance with the specifications.

- Hiring of a construction manager, selected and paid by following the required statutory process.[11] The letter noted that if Baybutt Construction were selected for this role, Baybutt Construction would be prohibited from performing any of the construction work.

- Appointment of a person "to maintain all records of bid solicitations, bid documents, contracts and other documents verifying compliance" with the conditions set forth in the letter.

DCAM's letter concluded:

> DCAM acknowledges that the Town is faced with the difficult task of completing the Middle School Project to alleviate some very difficult conditions for the students and school staff. The above waiver and conditions will enable the Town, if necessary, to forgo the more time consuming statutory bidding requirements while maintaining the integrity and intent of the bidding process which is to protect the public.

[11] As will be discussed in Finding 3, construction management is a design service that is subject to the requirements of M.G.L. c. 7, §§A½-O, the designer selection law.

According to Building Committee minutes,[12] the Building Committee voted on November 26, 2000 to adopt designer selection procedures, authorize an emergency construction management contract with Baybutt Construction, and appoint the principal of Breezeway Farm to maintain all project records pertaining to the work performed under the November 22, 2000 emergency waiver.

Project records show that Garrity and Knisely, a law firm retained by the Building Committee, was continuing to negotiate the terms of a takeover agreement with Seaboard Surety on behalf of the Building Committee. However, in a letter to Seaboard Surety's attorney dated December 8, 2000, a partner of Garrity and Knisely raised serious concerns regarding Seaboard Surety's performance under the October 30, 2000 Emergency Work Agreement:

> The lack of management of the Emergency Work by the surety's representative at the job site is seriously undermining our ability to portray the surety as being capable of managing the completion work. According to the Town's records, . . . [Seaboard Surety's designated construction manager] was on site five of the first twenty-five days of the emergency work. He was not on site one day this week. The boilers have been fired but there is no operational fire alarm system. The electrician who should be on site working on the fire alarm is not there. The fire chief is upset. The Town's site personnel are despondent because there is no one to address the many issues that are arising.

The letter instructed Seaboard Surety's attorney to immediately provide a meaningful staffing plan from the surety and to advise the surety to have its key on-site person attend the forthcoming meeting of the Building Committee to be held on December 11, 2000. The letter made clear that the purpose of the meeting was to decide on how the Building Committee should proceed to complete the project.

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[12] In August 2001, the Office requested copies of all Building Committee minutes for the period of September 1, 2000 through August 1, 2001. The regular meeting minutes provided to the Office, which appeared complete, showed that the Building Committee held at least ten executive sessions between September 2000 and September 2001. However, no executive session meeting minutes were provided to the Office, nor did the Building Committee provide an explanation for the missing executive session minutes.

According to the minutes of the Building Committee meeting held on December 11, 2000, Seaboard Surety did not send a representative to the meeting:

> The committee members, selectmen, and others expressed the belief that any further delays would jeopardize the completion of this project. The Surety Company was invited to attend this meeting and did not come. The project manager for the Surety Company has not met his time requirements.

The minutes show that the Building Committee decided to complete the project without the surety's involvement and voted to contract with Baybutt Construction for construction management services:

> The Executive Committee of the Greenfield Middle School Building Committee unanimously recommends that they enter into a Construction Management Contract with Baybutt Construction Company for $1,254,275 to complete the construction work at the Middle School. The Executive Committee believes that Baybutt will complete the work by the mandated completion deadline and have presented the committee with the only feasible and responsible proposal, including responsible and feasible cost estimates and an accountable management plan. . . . The motion to hire Baybutt Construction as construction manager was voted unanimously.

On the same date, the Building Committee executed a contract with Baybutt Construction for construction management services at a fixed fee of $1,254,275. Also in December 2000, the Building Committee authorized PMA to serve as owner's representative on the Greenfield Middle School project.[13]

On January 30, 2001, the Building Committee requested a third emergency waiver from DCAM. In a letter to DCAM's Associate General Counsel, the Building Committee's Acting Chairman requested a limited waiver to enable the Building Committee to contract with four non-filed sub-bidders that had substantially completed, but not fully performed, under their contracts with ICC. The Acting Chairman's letter stated, in part:

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[13] Because the Building Committee did not execute a contract for PMA's services, the date on which PMA began to provide owner's representative services is unclear. The Building Committee's business relationship with PMA is discussed in Finding 9 of this report.

> [I]n view of the advanced stage of the material supplied and work performed, it would be impossible for the Town, through its construction manager, to obtain contractors and suppliers to bid on the limited work that needs to be completed, and warranties on the work partially installed will be lost using new suppliers or contractors. Additionally, the necessity of obtaining bids for the limited work that needs to be completed may impact upon the project completion schedule.

In a letter to the Acting Building Committee Chairman dated February 12, 2001, DCAM's Associate General Counsel granted the requested waiver on the condition that the Building Committee submit to DCAM a notarized, signed statement from each of the four non-filed subcontractors giving a detailed accounting of the status of its subcontract.

Between January and May 2001, the Building Committee executed 30 construction contracts with 29 contractors, of which 21 were original subcontractors under the ICC contract and eight were new contractors that had not previously worked as subcontractors to ICC. (These contracts are discussed in Findings 4, 5, and 6 of this report.)

On August 10, 2001, the Greenfield Middle School project reached substantial completion, and the school reopened for the 2001-2002 school year shortly thereafter. Records provided to the Office by the Town Accountant show that project expenditures from September 1, 2000 and August 31, 2001 were $6,786,960, bringing the total project expenditures as of August 31, 2001 to $18,061,152.

In March 2002, the Town Accountant provided the Office with an updated listing of project expenditures. According to these records, project expenditures as of March 22, 2002 totaled $19,602,702.[14]

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[14] On April 16, 2002, the Town of Greenfield voters approved a referendum to exempt from the provisions of Proposition 2½: "the amounts required to pay for the additional bonds issued in order to remodel, reconstruct or to make extraordinary repairs or to enlarge the Middle School and also for the purpose of improvement to existing mechanical systems in the Middle School and also for the purpose of providing architectural, engineering, legal and consulting services in relation thereto."

The following table shows the chronology of the Town's emergency waiver requests and other major project events between August 2000 and August 2001.

Table 2.
Chronology of Emergency Waiver Requests and Other Major Project Events
(August 2000-August 2001)

August 24, 2000	Building Committee terminates construction contract with ICC.
September 1, 2000	Building Committee contracts with Baybutt Construction for project-related construction and consulting services.
September 27, 2000	Building Committee requests first emergency waiver from DCAM to secure and mitigate damage to the school building.
October 4, 2000	Building Committee contracts with Davenport for project-related construction services.
October 13, 2000	DCAM grants first emergency waiver.
October 17, 2000	State legislators and officials meet with Town officials to discuss measures to expedite completion of the project.
November 10, 2000	Building Committee requests second emergency waiver from DCAM to complete the renovation project.
November 22, 2000	DCAM grants second emergency waiver.
December 11, 2000	Building Committee decides to complete project without the involvement of ICC's surety and contracts with Baybutt Construction for construction management services.
January 30, 2001	Building Committee requests third emergency waiver from DCAM to allow four non-filed sub-bidders from the previous ICC contract to complete their work.
February 12, 2001	DCAM grants third emergency waiver.
August 10, 2001	Project reaches substantial completion.

Consultants and Counsel to the Greenfield Middle School Building Committee

Between September 1, 2000 and August 31, 2001 – the period covered by this review – the Greenfield Middle School Building Committee was assisted by consultants[15] and legal counsel. The consultants and legal counsel discussed in this report are listed below:

Todd Lee-Clark-Rozas Associates, Inc. The Building Committee contracted with TLCR, the project designer, in November 1995 to provide architectural design and construction administration services on the Greenfield Middle School project. Town records show that the Town paid TLCR $300,389 during the review period, of which $72,485[16] consisted of payments to PMA processed by TLCR.

Baybutt Construction Corporation. The Building Committee contracted with Baybutt Construction in September 2000 to provide construction and consulting services; the Building Committee subsequently contracted with Baybutt Construction in December 2000 to provide construction management services during the completion phase of the Greenfield Middle School project. Town records show that the Town paid Baybutt Construction $1,451,984 during the review period.

PMA Consultants LLP. In January 2001, the Building Committee authorized PMA to serve as the owner's representative during the completion phase of the project and to bill TLCR for these services. Project records show that the Town paid TLCR $72,485 for PMA's services and paid an additional $30,910 directly to PMA during the review period.

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[15] The consultants hired by the Building Committee also included a clerk of the works with whom the Building Committee signed a contract in July 2000. In addition to assisting Baybutt Construction, this individual was responsible for handling an elevator modernization contract that was not part of the Building Committee's original contract with ICC. According to Town records, the clerk of the works was paid $54,000 during the review period.

[16] Dollar amounts cited in this report have been rounded to the nearest dollar.

Breezeway Farm Consulting. The Building Committee contracted with Breezeway Farm in October 24, 2000 to establish a centralized filing system, monitor the status of the project schedule, and develop public information materials, among other duties. In November 2000, the Building Committee appointed the principal of Breezeway Farm to maintain all records required by the November 2000 emergency waiver. Town records show that the Town paid Breezeway Farm $24,702 during the review period.

Callahan, Curtiss, Carey & Gates. The Building Committee engaged the services of Callahan Curtiss, a Greenfield law firm, to serve as legal counsel to the Building Committee beginning in 1998. Town records show that the Town paid Callahan Curtiss $241,166 during the review period.

Garrity and Knisely. Garrity and Knisely, a Boston law firm, provided legal assistance to Callahan Curtiss on the project. Town records show that the Town paid Garrity and Knisely $45,014 during the review period.

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Findings

Finding 1. Between September and December of 2000, the Greenfield Middle School Building Committee spent more than $213,000 on construction services procured under no-bid, time-and-materials contracts that lacked performance bonds and other statutorily required protections.

Finding 1a. The Building Committee contracted for building-related construction services without bidding, seeking an emergency waiver, or complying with other M.G.L. c. 149 requirements.

In September 2000, the Building Committee Chairman signed a contract with Baybutt Construction to provide consulting and construction services on a time-and-materials basis over a 45-day period to end on October 31, 2000. The contract scope included a mix of construction and administrative services to be performed by "forces and personnel" assigned by Baybutt Construction "to take immediate action to protect and secure the building and grounds," by "skilled construction supervisory personnel," by project estimators and schedulers, and by administrative and accounting personnel. The contract specified that the contract labor costs would include "wages of construction workers directly employed by the Contractor to perform the construction of the Work at the site, or with the Owner's agreement, at off-site workshops" as well as wages and salaries of supervisory and administrative personnel. The contract was dated September 1, 2000.

In addition to the contract document and related invoices, the contract-related records provided to the Office by the Building Committee included nine "work directives" specifying additional construction tasks to be performed by individual subcontractors to Baybutt Construction. Although the work directives provided to the Office were undated and unsigned, Baybutt Construction's invoices to the Building Committee under this contract included billings for labor, materials, and equipment corresponding to five of the work directives as well as to the base contract.

The minutes of a Building Committee meeting held on September 11, 2000 reported that the Building Committee Chairman:

> . . . clarified the Committee's hiring of Baybutt as consultants, and outlined their responsibilities:
>
> - mitigating building – checking roof and flashing for leaks. The Committee expects to have the roof buttoned up and heating system in place by 10/14/00.
> - reviewing state of heating/ventilating system
> - general clean-up
> - moving wood for gymnasium floor to safe storage
> - closing-up building securely to deny access to birds and people
> - studying moisture problem with our consultants and ICC's consultants if they wish to be present for testing
> - inventory of building
> - estimation of remaining work

These meeting minutes also noted:

> Site contractor will be hired to work on a time and materials basis only doing mitigating work such as seeding the front lawn to prevent erosion, checking the grade of the parking lot, repairing gas line to start up the heating system, possibly putting a binding coat on the Sanderson St. parking area to prevent mud problems.

As will be discussed in Finding 1b, the Building Committee subsequently hired a site contractor for this work.

The minutes of a Building Committee meeting held on September 18, 2000 contained the following discussion of and vote to approve the contract with Baybutt Construction:

> A contract has been drawn up between the Town and Baybutt through which the contractor is acting as a consultant to the Building Committee for 45 days, ending on October 31, 2000. The contract specifies Baybutt has been hired for these purposes:

- To provide forces and personnel to protect the building
- To provide administrative and accounting personnel to take action with subcontractors
- To provide skilled construction supervisory personnel who will aid in contracting with others to complete protective work
- To provide estimation services re: project costs
- To provide scheduling services

Motion . . . : To approve the contract between the Town of Greenfield and Baybutt Construction Company pending proper funding availability and approval of the Town Attorney. Passed, unanimously. [Emphasis in the original.]

This vote was taken two weeks after Baybutt Construction began work. Project records included an invoice from Baybutt Construction dated September 15, 2000, covering work performed between September 1, 2000 and September 15, 2000, in the amount of $36,700.

Invoices submitted by Baybutt Construction and approved by the Building Committee show that Baybutt Construction billed the Building Committee a total of $254,506 under the contract. The invoices included charges for work performed by Baybutt Construction's own personnel as well as by four subcontractors to Baybutt Construction. Town records show that the Town paid Baybutt Construction $254,506 for the period of August 28, 2000 through December 20, 2000.[17] The charges for the construction tasks specified in the work directives totaled $161,081,[18] or more than 60 percent of the total amount billed by Baybutt Construction under the September 2000 contract.

[17] The Building Committee minutes for November 14, 2000 recorded a vote by the Building Committee to extend Baybutt Construction's services through the end of December; however, project records provided to the Office contained no written amendment to the September 1, 2000 contract with Baybutt Construction.

[18] This figure, which was computed based on the contract invoices provided to the Office by the Building Committee, includes labor charges for field personnel, construction equipment rental charges, and charges for purchases of construction materials.

Public contracts estimated to exceed $25,000 for the construction, reconstruction, installation, demolition, maintenance, or repair of a building are subject to the provisions of M.G.L. c. 149.[19] Baybutt Construction had been certified by DCAM to bid on public building projects, as required by M.G.L. c. 149. However, although the contract entailed substantial public building construction work for which Baybutt Construction was paid at least $161,081, the Building Committee neither solicited bids nor requested an emergency waiver of the M.G.L. c. 149 advertising and bidding requirements from DCAM before the Building Committee Chairman signed the contract with Baybutt Construction. The contract did not require Baybutt Construction to furnish performance and payment bonds for the work,[20] did not contain a prevailing wage rate sheet,[21] and did not include statutorily required provisions for contracts subject to M.G.L. c.149, such as those governing change orders,[22] payment procedures,[23] and financial reporting.[24] The contract lacked a certification by the Town Accountant stating that appropriated

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[19] Detailed information on the requirements of the public construction laws in Massachusetts may be found in the Office's manual entitled *Designing and Constructing Public Facilities*, available at www.mass.gov/ig. The Office has published and widely distributed regular updates of this manual since 1984.

[20] A performance bond is a bond obtained by the contractor, from a surety, that is payable to the awarding authority in the event that the contractor fails to perform the contract. A payment bond is a bond obtained by the contractor, from a surety, that guarantees payment to materials suppliers and/or subcontractors in the event that the general contractor fails to pay the materials suppliers and/or subcontractors. Contracts subject to M.G.L. c. 149 require a performance bond and a payment bond, both of which must be in the amount of the full contract price.

[21] 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.

[22] 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.

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

[24] 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.

funds were available for the contract and that the officials signing the contract had been authorized to do so, as required by M.G.L. c. 44, §31C. The contract also lacked the tax compliance certification required by M.G.L. c. 62C, §49A for all public contracts in Massachusetts.[25]

The Office does not question the need for the services provided by Baybutt Construction; indeed, these services may well have been justifiable as emergency services under M.G.L. c. 149. Nevertheless, the Building Committee had an obligation to adhere to legal requirements for emergency construction contracting. Moreover, Massachusetts law prohibits payment by a governmental body for services rendered in violation of a public procurement law.[26]

In an interview with the Office, the Building Committee Chairman emphasized the importance of protecting the school building and activating the heating system during the period immediately following ICC's departure. He stated that the Building Committee had relied on the advice provided by its legal counsel, Callahan Curtiss, and that the Building Committee had authorized Callahan Curtiss to consult with Garrity and Knisely if Callahan Curtiss required information regarding the public construction laws.

Baybutt Construction officials advised the Office that they were not familiar with the legal requirements governing public building construction contracts in Massachusetts[27] and that the September 2000 contract had been developed by Baybutt Construction's attorney in consultation with the Building Committee's legal counsel.

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[25] 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.

[26] See *Majestic Radiator Co.* v. *Commissioners of Middlesex*, 397 Mass. 1002 (1986).

[27] The Office's review of Baybutt Construction's August 2000 application to DCAM for certification to bid on Massachusetts public building projects showed that the 20 most recent projects completed by Baybutt Construction prior to the application date included no public projects in Massachusetts. The listed projects included only one private Massachusetts project; all other public and private projects were completed in New Hampshire and Vermont.

Finding 1b. The Building Committee contracted for public works construction services without bidding, seeking an emergency waiver, or complying with other M.G.L. c. 30, §39M requirements.

The Building Committee executed a time-and-materials contract of indefinite duration with Davenport, a DCAM-certified contractor, to provide construction services at the school building site, including sidewalk work, grading, subgrading, and seeding. The contract was dated October 4, 2000. As noted in Finding 1a, Building Committee meeting minutes for September 11, 2000 had discussed a plan to hire a site contractor. However, meeting minutes for this period contained no references to or vote on the contract with Davenport. Invoices submitted by Davenport and approved by the Building Committee show that Davenport billed the Building Committee $51,922 for services that were provided between September 19, 2000 – 15 days before the date of the contract – and December 11, 2000. Town records show that the Town paid Davenport $51,922 for the period of November 3, 2000 through January 12, 2001.

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 requirements of M.G.L. c. 30, §39M. There is no evidence that the Building Committee advertised for bids or requested an emergency waiver from DCAM of the M.G.L. c. 30, §39M notice requirements[28] for the construction work performed by Davenport.[29]

The contract with Davenport contained the following vague reference to wage rates:

> We call your attention to your obligations regarding minimum wage rates and general standards on the job which, by law, must be strictly adhered to as a part of your performance hereunder.

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[28] An overview of the emergency design and construction contracting requirements, including the emergency waiver requirements, contained in the Massachusetts General Laws is provided in Appendix B of this report.

[29] When such work is undertaken as part of a larger building project, it is normally included in the scope of the awarding authority's M.G.L. c. 149 contract with the general contractor.

However, the contract did not contain the required prevailing wage rate sheet, the required payment bond,[30] or statutorily required contract provisions such as those governing change orders, payment procedures, and financial reporting. Like the contract with Baybutt Construction, the contract with Davenport lacked the Town Accountant's certification and the tax compliance certification required by Massachusetts law.

On September 27, 2000, less than two weeks before he signed the contract with Davenport, the Building Committee Chairman had written to DCAM requesting a limited waiver of the advertising and bidding provisions of M.G.L. c. 149 to enable the Building Committee to protect the school building. (This waiver is discussed in more detail in Finding 2.) However, the Building Committee Chairman's letter to DCAM did not request a waiver of the M.G.L. c. 30, §39M notice requirements for or otherwise reference the sidewalk work, grading, seeding, and other work that Davenport had begun. As previously noted, Massachusetts law prohibits payment by a governmental body for services rendered in violation of a public procurement law.

The Building Committee Chairman told the Office that the work performed by Davenport was necessary to avoid further damage to the school building by protecting it from moisture problems. He stated that he was unfamiliar with the legal requirements that applied to the contract with Davenport.

Finding 1c. Project records did not include weekly payroll reports from the contractors for the work they performed under these contracts.

Under the prevailing wage law, contractors performing public construction work are required to provide their awarding authorities with certified payroll reports on a weekly basis.[31] These records must be maintained by the awarding authority for three years following completion of the contract. The Office requested copies of all weekly payroll

[30] 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.

[31] M.G.L. c. 149, §27B.

reports obtained by the Building Committee for the period of September 1, 2000 through August 1, 2001. The records provided by the Building Committee did not include any weekly payroll reports for the construction work performed by either Baybutt Construction or Davenport under the contracts discussed in this finding.

Finding 2. The Building Committee's floor remediation contractor was paid $175,549 before the Building Committee executed a written contract or obtained a performance bond for the floor remediation work.

On September 27, 2000, the Building Committee Chairman wrote to DCAM to request a limited emergency waiver of the advertising and bidding requirements of M.G.L. c. 149. The Chairman's letter pointed to the immediate need to secure the school building from the weather; to complete the HVAC system; to complete the building roof; to address the moisture problem in the sub-flooring of the building; and to hire a general contractor to coordinate the work of the filed sub-bidders willing to complete their work under the terminated contract with ICC. The Chairman's request stated, in part:

> Most importantly, the building needs to be secured from the weather and in that connection, the heat, ventilation and air conditioning (HVAC) system needs to be completed. There is a filed sub-bidder at the site who may be willing to complete the work. Secondly, the roof needs to be completed to protect the building from the elements, which can likewise be done by a filed sub-bidder who may also return to the site. Thirdly, our Committee believes we need a contractor on the site to coordinate those filed sub-bidders and others who are willing to continue to work at the site and complete their bid work assignments. Fourth, a serious moisture problem has developed in the sub-flooring of the building and tests need to be performed in order to determine the source of the water and moisture problem. At the present time, most of the floors have been covered with carpeting, but because of the water, the carpeting has begun to rise up and the sub-flooring has buckled. There is also evidence of microorganisms, which may create a health concern. Fifth, the contractor, Baybutt Construction Corporation, has financial accounting services available to assist us in determining the amounts that have been paid to the various sub-bidders and what amounts may remain to be paid. . . . Finally, Baybutt Construction Corporation has also agreed to evaluate the work that has been done to date, provide us with an opinion as to what work remains to be done, the cost of such work, and what work may need to be corrected. This information is vitally necessary in order to continue in a timely fashion with the project.

In a letter dated October 13, 2000, DCAM's Associate General Counsel advised the Building Committee Chairman:

> [Y]our emergency waiver request is granted to the extent of making the HVAC system operational, the roof weatherproof, and to the extent of eliminating the sub-flooring moisture problem.

DCAM's letter set forth two alternative procedures for procuring this emergency work. First, the Building Committee could seek competitive quotations from DCAM-certified contractors in the respective trades (or supply DCAM with a detailed explanation of why an existing subcontractor should be used). Alternatively, the Building Committee could contract with a general contractor to complete the emergency work by seeking competitive quotations from DCAM-certified general contractors. Project records show that the Building Committee advertised for competitive quotations for "floor repair and remediation" work at the Greenfield Middle School, based on specifications prepared by TLCR, and received two quotations on December 8, 2000.[32] The lowest quotation of $706,525 was submitted by Baybutt Construction.

In the meantime, however, the Building Committee Chairman had requested from DCAM a second, more comprehensive emergency waiver allowing the Town to perform the necessary corrective work on and to complete the Greenfield Middle School project without following the advertising and bidding requirements of M.G.L. c. 149. The Building Committee Chairman had also notified DCAM of the Building Committee's interest in hiring Baybutt Construction to provide construction management services – i.e., supervision of the filed sub-bidders and other contractors – for the project completion phase. On November 22, 2000, DCAM had granted the more comprehensive emergency waiver, which stipulated that if Baybutt Construction were hired as construction manager, Baybutt Construction would be prohibited from performing any construction work.

[32] The advertisement did not reference the requirement that the floor remediation contractor be DCAM-certified.

On December 11, 2000, a Callahan Curtiss partner wrote to DCAM's Associate General Counsel on behalf of the Building Committee, asking whether Baybutt Construction could be selected to perform the floor remediation work under the first emergency waiver provided that Baybutt Construction would not perform any construction work under the second, more comprehensive emergency waiver. On the same date, the Building Committee Chairman executed a construction management contract with Baybutt Construction (discussed in the next finding).

On December 19, 2000, DCAM's Associate General Counsel wrote back to confirm an earlier telephone conversation in which he had advised the Callahan Curtiss partner that it would be inappropriate for Baybutt Construction to perform the floor remediation work, given the Building Committee's intention to hire Baybutt Construction as construction manager. The letter stated that the floor remediation work could be completed along with the other construction work covered by the second emergency waiver granted on November 22, 2000. The letter noted that Baybutt Construction would be employed in conflicting roles if it served as both construction manager and floor remediation contractor. The letter also cited Baybutt Construction's involvement in determining the scope and cost of the floor remediation work as an additional reason to preclude Baybutt Construction from performing the work.

In a letter to the Building Committee Chairman dated January 6, 2001, a senior manager of Baybutt Construction summarized Baybutt Construction's recommendation regarding the floor remediation contract. According to the letter, on December 11, 2000 Baybutt Construction contacted the other contractor submitting a quotation for the floor remediation work and asked whether that contractor would consider performing the work "at or near" Baybutt Construction's price of $706,525. The contractor, which had submitted a quotation of $1,215,593, reportedly declined to perform the work for less than $1,000,000. Baybutt Construction then contacted a New Hampshire contractor that had not submitted a quotation, McManus & Rogers.[33] According to the letter,

[33] Project records show that McManus & Rogers had worked as a subcontractor to Baybutt Construction under the September 2000 contract discussed in the previous Finding 1.

Baybutt Construction asked McManus & Rogers if the company would perform the work "at or near" $706,525, and McManus & Rogers agreed to do so. The letter went on to state:

> BCC [Baybutt Construction Corporation] has used RM [McManus & Rogers] to do carpentry work for several years. Neither BCC, nor its owners, nor any employees of BCC, has an interest in RM or will benefit directly or indirectly from this proposed contract.

Project records show that McManus & Rogers began to perform the floor remediation work without an executed contract and without having provided the performance and payment bonds required under M.G.L. c. 149.[34] The December 14, 2000 "Notice of Intent to Award/Notice to Proceed" sent by Baybutt Construction to McManus & Rogers stated: " A contract will be prepared by Baybutt Construction for this project and sent to you for review by Tuesday December 19." The January 6, 2001 letter from Baybutt Construction to the Building Committee noted that McManus & Rogers had begun work but that a contract for the work had not yet been executed:

> A Notice to Proceed was issued to Rogers and McManus on December 14, 2000. Under this NTP Rogers and McManus has completed about 26% of the Work to date. We recommend entering into a contract with RM.

The memorandum was marked "OK" and initialed by a principal of PMA, which was providing owner's representative services to the Building Committee,[35] on January 8, 2001.

Project records include a January 8, 2001 letter from McManus & Rogers's insurance company advising the Building Committee Chairman that the insurer was in the process of procuring performance and payment bonds for the Greenfield Middle School contract.

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[34] This contract was awarded under the second emergency waiver granted by DCAM, which stated: "To the extent possible, bids must be requested from DCAM certified contractors." McManus & Rogers was not DCAM-certified.

[35] The Building Committee's business relationship with PMA is discussed later in this report.

The letter cited an incorrect contract amount: "I anticipate that the Bonds for this $699,678.40 contract will be able to be issued within the next two weeks. . . . "

Town records show that the Town issued a check for $175,550 to McManus & Rogers on January 12, 2001, although the Building Committee's contract with McManus & Rogers had still not been executed. Finally, on January 19, 2001, the floor remediation contract was finalized in the agreed-upon amount of $706,525. The contract document provided to the Office did not include performance or payment bonds,[36] nor did it include the certificate of tax compliance required by M.G.L. c. 62, §49A.

Although only the Building Committee Chairman had signed the previous contracts with Baybutt Construction and Davenport, six members of the Building Committee signed the contract with McManus & Rogers. The contract was also signed by three other individuals: the Town Accountant certified the availability of funds for the contract, as required by M.G.L. c. 44, §31C; a Callahan Curtiss partner approved the contract "as to form only"; and the principal of Breezeway Farm approved the contract "as to appropriate procurement method."

The minutes of a project meeting held on January 23, 2001, and attended by representatives of Baybutt Construction, PMA, TLCR, and Breezeway Farm Consulting, among others, indicate that concerns were raised at that meeting about the missing bonds:

> It was noted that McManus & Rogers Builders, LLC received their first payment even though we have not yet received their payment and performance bonds.

While the Office's review yielded no indication of problems with the work performed by McManus & Rogers, the Building Committee's decision to allow a construction

[36] Although the project records included performance and payment bonds for McManus & Rogers (in the incorrect amount of $699,678), it is unclear when these bonds were issued. They were attached to a second contract with McManus & Rogers in the amount of $500,000 executed in May 2001; however, they referenced the earlier floor remediation contract. As will be discussed, the Building Committee did not obtain performance or payment bonds from McManus & Rogers for the May 2001 contract.

contractor to work on a public building without an executed contract and a performance bond protecting the Town's interests was risky. Given the high priority accorded to the floor remediation work by the Building Committee and the availability of legal counsel to assist the Building Committee, it is unclear why the Building Committee did not execute the contract with McManus & Rogers in a more timely fashion. Similarly, the Town's issuance of a $175,000 payment to the contractor without an executed contract indicates that financial controls over Town funds were inadequate.

Finding 3. The construction management contract executed by the Building Committee was inconsistent with the designer selection law and with the Building Committee's recently adopted designer selection procedures.

M.G.L. c. 7, §§38A½-O, the state's designer selection law, applies to the contracts for the following services in connection with a public building project estimated to cost more than $100,000: preparation of master plans, feasibility and other studies, surveys, soil tests, cost estimates and programs; preparation of drawings, plans, and specifications, including schematic drawings and preliminary plans and specifications; supervision or administration of a construction contract; and construction management and scheduling.[37] Thus, the services provided by TLCR, Baybutt Construction, and PMA were subject to the requirements of the designer selection law, which requires municipalities and other local jurisdictions to adopt written designer selection procedures that reflect the purposes and intent of the law.

In general, the designer selection law requires an advertised, qualifications-based competition and selection process.[38] The public jurisdiction is required to set the contract fee in advance or negotiate the fee up to a not-to-exceed fee limit. The

[37] M.G.L. c. 7, §38A½(b).

[38] The Office's manual on *Designing and Constructing Public Facilities* provides detailed information on the requirements of the designer selection law.

contract fee must be expressed as a fixed dollar amount; the designer selection law prohibits fees expressed as a percentage of construction cost.[39]

The designer selection law also requires every contract subject to the designer selection law to include specific certifications relating to non-collusion in the submission of applications and to financial reports that the designer or construction manager must file. For example, the design or construction management contract must include a "certification that the designer or construction manager has not given, offered or agreed to give any person, corporation or other entity any gift, contribution or offer of employment as an inducement for, or in connection with, the award of the contract for design services."[40]

Like the other public construction laws, the designer selection law permits an expedited selection process whenever the health or safety of any persons will be endangered because of the time required for the selection process under the normal designer selection procedures or when a deadline for action that is set by a court or federal agency cannot be met if the designer selection procedures are followed. The emergency selection process, which is typically established in the written procedures adopted by each public jurisdiction, does not require approval by or a waiver from DCAM; public jurisdictions have discretion to determine that an emergency exists, as defined by the law.

The Office's review found that the Building Committee lacked written designer selection procedures until November 2000. As discussed in the previous finding, the Building Committee Chairman had notified DCAM that the Building Committee was interested in hiring Baybutt Construction as construction manager for the completion phase of the project. The emergency waiver issued by DCAM on November 22, 2000 granted the waiver of advertising and bidding for the construction work subject to M.G.L. c. 149 and

[39] Percentage-based fees, which reward designers and construction managers when the construction cost of the project increases, can reduce incentives to identify construction cost savings and to promote cost-effective construction approaches.

[40] M.G.L. c. 7, §38H(i).

noted, with respect to the proposed contract with Baybutt Construction, that the Town could use an expedited process to hire a construction manager by invoking the emergency provisions of its own adopted designer selection procedures. The DCAM waiver stated, in part:

> The hiring of construction managers is governed by GL c. 7, section 38A½ to 38O. The procedure requires advertising for the services and receiving proposals. The procedure is essentially the same as that for hiring designers because construction management is considered a "design service" as defined in Chapter 7. . . . The Town should have a designer selection procedure in place that is consistent with the state's procedures as set out in sections 38A½ to 38O of Chapter 7 of the General Laws. The Town may adopt such a procedure immediately if one is not in place. The designer selection process has an emergency waiver provision that provides for an expedited selection process for designers and construction managers, and it also provides a process for the determination of fees (the fees may be predetermined or negotiated). The Town should consult with its attorneys regarding the adoption of a designer selection process and the provisions relating to emergency waivers and fees. A construction manager may only be selected and paid for by following the required process set forth in General Laws Chapter 7.

The Building Committee minutes for November 26, 2000 show that the Building Committee voted to adopt designer selection procedures and to authorize an emergency construction management contract with Baybutt Construction at that meeting.

In December 2000 and again in August 2001, the Office requested a copy of the designer selection procedures adopted by the Building Committee on November 26, 2000. On October 5, 2001, the Building Committee sent the Office a memorandum labeled "Designer Selection Guidelines – Cities and Towns" accompanied by a set of model guidelines for local designer selection procedures; both had been issued by the state Designer Selection Board 15 years earlier, in November 1985.[41] The model guidelines provided to the Office by the Building Committee had not been modified to

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[41] The documents provided to the Office indicated that the November 1985 memorandum and model guidelines from the Designer Selection Board had been faxed by Garrity and Knisely to the Building Committee on November 17, 2000.

reference the Town of Greenfield or otherwise adapted for use by the Building Committee. Although adoption of designer selection procedures generally requires formal action by the local jurisdiction, as determined by local ordinances or by-laws, the documents furnished by the Building Committee to the Office contained no indication that any Town official or body other than the Building Committee had voted on or approved the designer selection procedures.

On December 11, 2000, the Building Committee Chairman executed a contract for construction management services with Baybutt Construction. This contract was inconsistent with the requirements of either the designer selection law or the written procedures the Building Committee had adopted in anticipation of the contract with Baybutt Construction in two respects. First, although the contract appropriately specified a fixed fee of $1,254,275 to be paid in equal monthly installments, it also provided that Baybutt Construction would receive a fee of 15 percent for any approved construction change order.[42] As noted above, the fee for a contract subject to the designer selection law may not be expressed as a percentage of construction cost.[43]

In addition, although the procedures adopted by the Building Committee required the contract to include statutorily required provisions relating to non-collusion and financial reporting, the executed contract did not include these provisions.

The contract also lacked the tax compliance certification required by M.G.L. c. 62C, §49A for all public contracts in Massachusetts. Thus, although the Building Committee did take action to obtain and vote to adopt model designer selection procedures in response to the DCAM emergency waiver, it did not ensure that the contract executed with Baybutt Construction was consistent with these procedures and with Massachusetts law.

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[42] Town records indicate that the Town had paid Baybutt Construction $1,365,650 under the construction management contract as of March 31, 2002.

[43] Moreover, this type of compensation provision is inadvisable from a management perspective: it creates a financial incentive for the construction manager to recommend costly construction change orders.

Finding 4. Although the Building Committee appears to have complied with the informal bidding requirements specified in the DCAM emergency waiver, the bid documentation provided to DCAM was incomplete.

The November 2000 emergency waiver waived the advertising and bidding requirements of M.G.L. c. 149 for contracts executed by the Building Committee with filed subcontractors that had worked for ICC under the original contract and that agreed to complete their subcontract work at their original filed subcontract prices.[44] The November 2000 waiver also waived the advertising and bidding requirements of M.G.L. c. 149 for new subcontractors and suppliers performing work not performed by ICC's former filed subcontractors. To substitute for the formal advertising and bidding requirements that had been waived, the waiver specified the following informal bidding requirements for contracts with new subcontractors and suppliers:

> Competitive bids must be requested from a minimum of three qualified contractors for each contract awarded and the contracts awarded must be between the successful bidder and the Town. To the extent possible, bids should be requested from DCAM certified contractors. The Town must maintain detailed documentation of all bid solicitations, competitive bidding and contracts. . . .

The waiver defined "competitive bids" as follows:

> "Competitive bids" as that term is used in this waiver, requires accepting the lowest responsible and eligible bid, based on bid documents that contain complete scopes of work that are specified in plans and specifications that are as detailed as possible.

As previously noted, the Building Committee executed a total of 30 contracts with construction contractors during the waiver period. Of these, nine contracts, including the floor remediation contract with McManus & Rogers (discussed in the previous

[44] M.G.L. c. 149 requires that awarding authorities solicit sub-bids from eligible sub-bidders on certain categories of subtrade work estimated to cost more than $10,000. The Office's manual on *Designing and Constructing Public Facilities* provides detailed information on the filed sub-bid system required by M.G.L. c. 149.

finding) were executed with contractors that had not previously been filed subcontractors or non-filed subcontractors[45] to ICC.

Finding 4a. Project records indicated that the Building Committee's construction manager sought competitive prices on contracts with new contractors after December 11, 2000.

The Building Committee's December 11, 2000 contract with Baybutt Construction for construction management services required Baybutt Construction to solicit competitive bids from at least three contractors for each new contract (i.e., each contract with a new contractor that had not previously been a subcontractor to ICC). The floor remediation contract with McManus & Rogers had been advertised by the Building Committee in November 2000. Baybutt Construction was thus responsible for seeking competitive bids on eight contracts with new contractors executed after the Building Committee contracted with Baybutt Construction. Project records show that, for all but one of the eight contracts, Baybutt Construction prepared detailed summary sheets that included the following information:

- The number of contractors from which bids were solicited,
- The number and amounts of bids received;
- Baybutt Construction's recommendation for award of the contract; and
- A brief description of the recommended contractor's experience and DCAM certification, if any.

[45] On January 30, 2001, the Acting Chairman of the Building Committee wrote to DCAM requesting a supplemental emergency waiver to enable the Building Committee to contract with four non-filed sub-contractors that had substantially completed, but not fully performed, the work specified in their contracts with ICC. In a letter dated February 12, 2001, DCAM's Associate General Counsel granted the supplemental waiver provided that the Building Committee provide DCAM with a notarized, signed statement from each of the four subcontractors giving a detailed accounting of the status of the respective subcontracts. Project records show that these documents were provided to DCAM.

The exception was a $500,000 “unassigned labor” contract executed with McManus & Rogers, the floor remediation contractor, on May 7, 2001. For this contract, project records include a memorandum from Baybutt Construction’s Project Superintendent stating that labor rates were solicited through advertisements in the local newspaper on six dates in January and that the labor rates charged by McManus & Rogers proved to be the lowest among the labor rates offered. Project records include copies of six advertisements requesting “labor and material quotations.”

No specifications were prepared for this contract. Moreover, the Project Superintendent’s memorandum noted that Baybutt Construction had not kept records of all bids received in response to the advertisements:

> During the months of January and February bids were received regarding those rates. Although not all bids were recorded, a mental note was taken. Throughout the process McManus & Rogers L.L.C. remained the lowest bidder.
>
> To the best of my knowledge and professional experience McManus & Rogers L.L.C. has produced the lowest rates.

In an interview with the Office, Baybutt Construction officials explained that the completion phase of the Greenfield Middle School project entailed a series of tasks that were not within the scope of the work performed by the filed and non-filed subcontractors under their original contracts with ICC. According to Baybutt Construction officials, the unpredictability of these unassigned tasks meant that it was infeasible to prepare specifications for the tasks, which would normally be performed by the general contractor on a project. In this case, however, there was no general contractor, and the November 2000 emergency waiver prohibited Baybutt Construction from performing construction work. Accordingly, these necessary but unassigned tasks were assigned to McManus & Rogers through change orders executed to its floor remediation contract. Subsequently, in May 2001, Baybutt Construction prepared the $500,000 contract for “unassigned labor” and a credit change order to the floor remediation contract. The credit change order had the effect of transferring the unassigned labor tasks from the floor remediation contract to the new unassigned labor contract.

According to the TLCR principal serving as project designer, there was no reasonable way to prepare plans and specifications for the unassigned labor tasks completed by McManus & Rogers. He stated that these tasks consisted of odd jobs that arose each day, and he confirmed that these tasks would normally be the responsibility of the general contractor.

The unassigned labor contract appears to have been a necessary, if unanticipated, consequence of the Building Committee's decision to complete the Greenfield Middle School project without a general contractor. However, Baybutt Construction should have maintained detailed records of all bids, whether written or oral, received in response to the advertisements for labor rates, as required by the November 2000 emergency waiver.

Finding 4b. Bid documentation provided to DCAM and the Office was incomplete for four of the nine construction contracts with new contractors.

The November 2000 emergency waiver required the Building Committee to appoint a person to maintain records of bid solicitations, bid documents, contracts, and other documents verifying compliance with the waiver conditions and to provide DCAM with copies of such documents as soon as possible after their preparation and/or execution. On November 26, 2000, the Building Committee appointed the principal of Breezeway Farm to maintain all records required by the November 2000 emergency waiver.

The Office's review of the documents provided to DCAM by the Building Committee disclosed that these documents did not include copies of the bids obtained by Baybutt Construction for eight of the nine contracts executed with new contractors during the review period.[46] In April 2002, the Office requested copies of the missing documents from Breezeway Farm, which forwarded bid documents to the Office on behalf of the

[46] Bid documents provided to DCAM did include those pertaining to the floor remediation contract with McManus & Rogers (discussed in the previous Finding 2).

Building Committee. The bid documents forwarded to the Office were incomplete for four contracts:

- No bid documents were provided for a $56,100 contract with Davenport for installation of a concrete gym floor, although Baybutt Construction had reported receiving two bids. The contract was authorized at a Building Committee meeting on April 2, 2001. The meeting minutes stated: "The documentation for this work is in order and [has] been reviewed by the project management – Baybutt Construction, PMA, and [Breezeway Farm Consulting]. . . . "

- Two bid documents were provided for a $23,900 contract with Smith Hill Woodcraft Company for finish mill work, although Baybutt Construction had reported receiving three bids. The contract was authorized at a Building Committee meeting on April 2, 2001, "contingent upon the signatures of the contractor, town accountant, legal counsel, and the receipt and completion of the necessary documentation," according to the meeting minutes.

- No bid documents were provided for a $186,904 contract with Warner Brothers, Inc. for finish site work, although Baybutt Construction had reported receiving three bids. The contract was approved at a Building Committee meeting on May 7, 2001.

- As previously discussed, Baybutt Construction acknowledged that it had not recorded all bids received in response to advertisements for "labor and material quotations" in connection with a series of unassigned labor tasks. These tasks were ultimately included in the $500,000 contract with McManus & Rogers for unassigned labor tasks. The contract was approved at a Building Committee meeting on May 7, 2001. The meeting minutes stated: "This work was bid and McManus was lowest bidder; [Baybutt Construction] also stated this work is not related to floor remediation – it is for labor used in various locations and doing different tasks. Board members asked that the amount be amended to read "NOT TO EXCEED $500,000.00." After discussion motion passed."

Finding 5. Three of the nine construction contracts with new contractors lacked performance and payment bonds required under M.G.L. c. 149.

Although six of the nine contracts with new contractors executed by the Building Committee included performance and payment bonds in the full amount of the contracts, as required by M.G.L. c. 149, the other three contracts did not include either performance or payment bonds. The three contracts that did not include the statutorily required bonds were:

- The $500,000 contract with McManus & Rogers for unassigned labor tasks (discussed above);[47]

- An $80,000 contract with A. Dion and Sons to furnish and install wood gym flooring;

- A $23,900 contract with Smith Hill Woodcraft Company to furnish and install finish millwork.

Project records show that Building Committee members were aware that A. Dion and Sons and Smith Hill Woodcraft were unable to obtain the required performance and payment bonds. The minutes of an "Executive Committee" meeting[48] held on April 24, 2001 noted:

> These sub contractors do not have payment or performance bonds[.] . . . . Discussion about what to do in order to comply with state regulations and it was decided to rewrite their contracts so they will be subs under either Mowry & Schmidt or McManus & Rogers.

The motion to rewrite the contracts was passed unanimously.

The bonding issue was discussed again at a project meeting held on May 1, 2001. The project meeting minutes, which did not list those in attendance, noted, with regard to the bonding issue:

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[47] The bonds attached to the copy of the unassigned labor contract provided to the Office did not pertain to that contract. In an interview with the Office, a principal of McManus & Rogers confirmed that McManus & Rogers had not obtained the required performance and payment bonds for the unassigned labor contract.

[48] The Executive Committee was a three-member subcommittee of the 11-member Building Committee. Meeting minutes of the Building Committee show that the Building Committee voted on December 13, 1999 to establish the Executive Committee, which was to "work together with the project manager, architect, and contractor to expedite problems in the future." During the period covered by this review, the Executive Committee consisted of the Building Committee Chairman, a Building Committee member who was also a member of the Board of Selectmen and who served as Chairman of the Executive Committee, and a third Building Committee member. The minutes of the Executive Committee held on April 24, indicated that the meeting was attended by two Building Committee members, a Town Council member, a PMA representative, and several other consultants.

> **Smith Hill and A. Dion & Son** bonding issue: have considered putting them under Smith McManus & Rogers but McManus wants 15% administration fee and . . . [Baybutt Construction] is refusing to allow that. Alternatives could include having McManus charge the Subs for the amount of the bond increase or only allowing limited pay requisitions until work is complete. Baybutt is also willing to carry their bonds – [PMA's Senior Engineer] . . . will call [a Callahan Curtiss partner] . . . about this matter. [Emphasis in the original.]

In an interview with the Office, PMA's Senior Engineer stated that he could not recall whether or not he received advice on this issue from the Callahan Curtiss partner.

The minutes of a subsequent project meeting held two weeks later, on May 15, 2001, indicate that the decision was made to allow the two contracts to proceed without the required bonds. According to the minutes, the project meeting was attended by representatives of Baybutt Construction, PMA, and TLCR, as well as the Clerk to the Building Committee; no Building Committee members were present. The minutes stated:

> *Dion and Son* bond issue – will pay 50% and hold the rest as retainage until work is complete and we are satisfied with the results before remainder is paid; they have agreed to 50% according to [Baybutt Construction] . . . .
>
> *Smith Hill* – bond issue will handle same as Dion and Son, above
>
> [Italics in the original.]

In an interview, PMA's Senior Engineer told the Office that he made the determination that performance bonds were not necessary for these contracts. He said that the decision to withhold 50 percent retainage from these two contracts in lieu of requiring bonds was driven by the need to finish the project while minimizing the Town's financial exposure.

This arrangement did provide financial protection to the Town. However, PMA's determination was incorrect: neither awarding authorities nor their consultants have discretion to waive the performance bond requirement contained in M.G.L. c. 149.

Finding 6. None of the nine construction contracts with new contractors included statutorily required provisions governing payment of prevailing wages, change orders, payment procedures, financial reporting, or interpretation of specifications.

None of the nine Building Committee contracts with new contractors that had not previously been subcontractors to ICC contained the specific contract language required by the following longstanding provisions of the public construction laws in Massachusetts:

- M.G.L. c. 149, §§26-37: These provisions relate to wages and employment conditions including, but not limited to, the payment of prevailing wage rates; hiring preferences for veterans and residents of Massachusetts; and workers' compensation coverage.

- M.G.L. c. 30, §§39N-39O: These provisions govern suspension, delay, interruption, or failure to act on the part of the awarding authority; submission of written claims; and equitable adjustments in the contract price for differing subsurface or latent physical conditions.

- M.G.L. c. 30, §39F, 39G, 39K: These provisions govern payment procedures on public construction contracts.

- M.G.L. c. 30, §39R: This provision relates to the contractor's duty to keep certain financial records, make them available for inspection by certain state agencies, and file periodic financial reports.

- M.G.L. c. 30, §39P: This provision requires prompt decisions by the awarding authority on interpretations of the specifications and other approvals.

Finding 7. Although the Building Committee required its legal counsel and its records manager to sign each construction contract, neither appears to have reviewed the contracts for compliance with applicable laws.

Beginning with the floor remediation contract with McManus & Rogers executed in January 2001, the Building Committee instituted a contract approval procedure whereby each contract was to be signed by the Building Committee's legal counsel (a Callahan Curtiss partner) and by the consultant hired as records manager (the principal of Breezeway Farm). Of the 30 construction contracts signed between December 20,

2000 and May 7, 2001, the Callahan Curtiss partner signed 28 contracts, and the Breezeway Farm principal signed 29 contracts.[49]

As previously discussed, nine of the 30 construction contracts were executed with new contractors that had not previously been subcontractors to ICC. Each of the nine contracts was signed by both Callahan Curtiss and Breezeway Farm. The Callahan Curtiss partner's signature on each contract was accompanied by the notation: "Approval of Contract as to Form Only." The Breezeway Farm principal's signature on each contract was accompanied by the notation: "Approval of Contract as to Appropriate Procurement Method."

As noted in the introduction to this report, Callahan Curtiss did not respond to the Office's written questions, which included a question regarding the significance of the notation, "Approval of Contract as to Form Only." However, in a June 2002 telephone conversation with the Office, a Callahan Curtiss partner stated that this phrase signified that the Building Committee had the authority to enter into the contract.

In an interview with the Office, the Breezeway Farm principal stated that he did not review the manner in which the contracts that he signed had been procured, nor did he conduct legal reviews of the contracts. He noted that the contracts had been prepared by PMA and Baybutt Construction before they reached him.

In an interview with the Office, the Building Committee Chairman expressed the view that Callahan Curtiss, PMA, and Baybutt Construction were all responsible for ensuring that the Building Committee's contracts complied with applicable legal requirements. He stated that he could not recall why the Breezeway Farm principal was assigned responsibility for signing the contracts or why the notation "Approval of Contract as to

[49] Records provided to the Office show that the Callahan Curtiss partner did not sign a $41,583 contract executed on March 12, 2001 with Conn Acoustics and that neither the Callahan Curtiss partner nor the Breezeway Farm principal signed a $30,098 contract executed on February 14, 2001 with Allied Fire Protection. Both Conn Acoustics and Allied Fire Protection were former filed subcontractors under the ICC contract.

Appropriate Procurement Method" appeared on the contracts next to the signature of the Breezeway Farm principal.

There is no evidence that either PMA or Baybutt Construction reviewed these contracts for compliance with the public construction laws. Although the Building Committee Chairman believed that PMA and Baybutt Construction were responsible for ensuring that the contracts met legal requirements, neither firm was contractually obligated to do so: PMA did not have a written contract with the Building Committee, and Baybutt Construction's contract with the Building Committee did not require Baybutt Construction to provide legal services.

The Building Committee's establishment of a formal contract approval process was appropriate. However, it appears that the Building Committee and its consultants were operating under differing assumptions about the nature of the contract reviews conducted by the Callahan Curtiss partner and the Breezeway Farm principal, both of whom were required to sign contracts. This procedural failure illustrates the importance of defining and documenting the specific responsibilities of every consultant with an oversight role on a construction project, including legal counsel. An unambiguously written scope of services or set of instructions is an essential management tool for ensuring that a consultant can be held accountable. In this case, the Building Committee apparently did not prepare a written agreement or other document clarifying the Building Committee's expectations with respect to the contract approvals provided by its legal counsel and records manager. Consequently, the contract approval procedures established by the Building Committee did not achieve their intended objective of ensuring that the contracts complied with applicable legal requirements.

Finding 8. Project records did not include weekly payroll reports for five contractors.

As discussed in the previous Finding 1c, the prevailing wage law requires that contractors performing public construction work submit certified payroll reports to their

awarding authorities on a weekly basis.[50] These records must be maintained by the awarding authority for three years following completion of the contract. The Office requested copies of the all weekly payroll reports obtained by the Building Committee for the period of September 1, 2000 through August 1, 2001. The records provided by the Building Committee did not include weekly payroll reports for five of the 30 construction contracts executed by the Building Committee during the review period. The five contractors for which the required payroll reports were missing from project records are listed in Table 3.

Table 3.
Missing Contractor Payroll Reports

Contractor	Type of Work	Contract Amount (including change orders)
Corbin-Hufcor, Inc.	Operable walls	$ 3,074
Highland Seating, Inc.	Auditorium seating	$27,804
Penco Products, Inc.	Locker manufacture and installation	$42,206
Porter Athletic Equipment	Athletic equipment installation	$16,090
Walker Specialties	Stage curtain manufacture and installation	$ 7,250

Source: Building Committee records.

Finding 9. The Building Committee's business relationship with its owner's representative lacked basic contracting safeguards.

After contracting with Baybutt Construction in December 2000 to serve as construction manager for the completion of the project, the Building Committee authorized PMA to serve as the owner's representative.[51] After DCAM granted the Building Committee's

[50] M.G.L. c. 149, §27B.

[51] Project records showed that PMA had provided services on the Greenfield Middle School project for almost two years, beginning in January 1999. PMA's services on the project prior to December 2000 included litigation consulting services billed to Callahan Curtiss and construction management services billed directly to the Building Committee.

request to waive the advertising and bidding requirements of M.G.L. c. 149 for the completion phase of the project, the Building Committee accepted a proposal from PMA to provide owner's representative services. Project records include a letter dated December 4, 2000 from PMA's Managing Principal to a partner of Callahan Curtiss, proposing that PMA provide owner's representative services on the next phase of the project. PMA's letter, which indicated that Callahan Curtiss had solicited the proposal, offered to provide full-time coverage at the building site for the balance of the project. The letter proposed billing rates of $140 per hour and $102 per hour for the two PMA staff to be assigned to provide the owner's representative services and estimated that the "proposed monthly budget" would total approximately $21,000 plus expenses for full-time coverage.[52] PMA's letter did not list specific tasks to be performed or responsibilities to be assumed by the two PMA staff.

In an interview with the Office, the Building Committee Chairman stated that PMA's role during the project completion phase was to represent the Building Committee, to ensure that legal requirements were adhered to, and to provide checks and balances on the project. He stated that PMA served as "project manager," monitoring Baybutt Construction's performance on behalf of the Building Committee, and that both PMA and Baybutt Construction reported directly to the Building Committee. He stated that the Building Committee felt that both a construction manager and a project manager were needed to complete the project and that it was his understanding that the November 2000 emergency waiver required the Building Committee to hire both.[53]

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[52] The Office's analysis of invoices submitted by PMA over the following six months indicated that actual billings were consistent with this estimated budget.

[53] The November 2000 emergency waiver required the Building Committee to hire a construction manager. The waiver also required the continued, active involvement of TLCR, the project designer, in performing construction administration services, and it required the appointment of a person responsible for record-keeping. However, the waiver did not require the Building Committee to hire a project manager or owner's representative.

Finding 9a. The Building Committee did not execute a written contract with the owner's representative.

Project records show that, during the period covered by this review, the Building Committee authorized payments to PMA of $103,395 without an essential public protection: a written contract specifying the services PMA was obligated to provide and the major terms and conditions of the Building Committee's business arrangement with PMA. Moreover, the Office's review indicates that the Building Committee's assumptions regarding PMA's role on the project were inaccurate in several respects. When asked by the Office to describe PMA's specific responsibilities as owner's representative, the Building Committee Chairman expressed the view that PMA was responsible for ensuring that the project adhered to legal requirements, state regulations, and the DCAM waivers. He also stated that PMA was also hired to "watch" Baybutt Construction, thereby providing checks and balances on the project.

In an interview with the Office, PMA's Senior Engineer concurred that PMA was responsible for monitoring Baybutt Construction's performance as construction manager and for making sure that the requirements of the November 2000 emergency waiver were met. However, he did not concur that PMA bore responsibility for ensuring project compliance with other legal requirements, such as the applicable provisions of M.G. L. c. 149 and M.G.L. c. 30. The conflict between the view of PMA's role expressed by the Building Committee Chairman and that expressed by PMA's Senior Engineer points up the pitfalls of conducting a business relationship with a consultant without a clear, documented agreement spelling out the consultant's role and responsibilities.

Finding 9b. The Building Committee's decision to pay the owner's representative through the Building Committee's design contract cost the project more than $14,000 in unnecessary administrative expenses.

On January 8, 2001, the Building Committee Chairman wrote a letter to TLCR, the project architect, stating:

> I hereby grant you the approval, pursuant to Article VI, Paragraph I, to utilize the services of PMA, pursuant to their proposal letter of December 14, 2000, to be the Owner's Representative on-site to coordinate pursuant to the terms of said proposal letter.[54]

Article VI, Paragraph I, of TLCR's 1995 design contract authorized TLCR to be reimbursed by the Town for the actual cost to TLCR of special consultants whose services were not included in the basic design fee, plus a 10 percent coordination fee, provided that the compensation rates were approved in writing by the Building Committee Chairman.

In an interview, TLCR's project designer advised the Office that TLCR did not supervise PMA's work, verify the timesheets or other documentation of the hours billed by PMA, or review PMA's billings for reimbursable expenses. Thus, notwithstanding the billing arrangement established by the Building Committee, PMA did not work as a subconsultant to TLCR. Rather, TLCR – at the Building Committee's request – merely served as a conduit for billings from PMA to the Town and payments to PMA from the Town.

The minutes of a Building Committee meeting held on February 12, 2001 indicate that the billing arrangement described above was instituted in order to avoid having to conduct a competitive selection process for the project management services provided by PMA.

> A question arose about why PMA was billing through TLCR and it was clarified. **If they weren't consultants brought in through the architect there would be a need for the Committee to go out to bid the work.** A motion was made previously and [a Callahan Curtiss partner] said he believes a letter had gone out to accept the arrangement. [Emphasis added.]

It is unclear from this brief interchange recorded in the meeting minutes whether the Building Committee was aware that its recently adopted designer selection procedures

[54] According to PMA's Managing Principal, PMA's proposal letter of December 4, 2000 was the only proposal letter submitted by PMA for the completion phase of the Greenfield Middle School project; thus, the above reference to a December 14, 2000 letter may be a typographical error.

would have governed the award of a contract for owner's representative services. As discussed earlier, the designer selection process is a competitive qualifications-based selection process that gives public jurisdictions broad discretion to select the designer or construction manager deemed to be the most qualified for a particular contract.

Moreover, since the Building Committee had invoked the emergency provisions of its designer selection procedures for the purpose of expediting the contract with Baybutt Construction, it is unclear why the Building Committee did not invoke the same emergency provisions in order to expedite the contract with PMA. Had the Building Committee done so, the Building Committee would not have been required to conduct an advertised competition. However, the Building Committee would have been required to execute a written contract with PMA spelling out PMA's responsibilities and basis of compensation.[55]

TLCR's invoices for PMA's services confirmed that TLCR charged the Building Committee a markup of 10 percent for processing PMA's invoices. According to the Town records, these processing charges totaled $14,746 as of August 31, 2001.[56]

Finding 9c. The Building Committee approved, and the Town Accountant issued, a $30,910 illegal payment to the owner's representative during the review period.

Project records show that the Building Committee approved a direct payment to PMA of $30,910 for owner's representative services provided between May 27, 2001 and June

[55] See *Gaffney Architects, Inc.* v. *Town of Brewster*, __ Mass. App. Div. __ (2002).

[56] This amount includes processing charges of $4,407 that were not paid by the Town until after August 31, 2001, the end of the period covered by this review.

30, 2001.[57] Project records also show that the Town Accountant approved the payment and that the funds were issued to PMA on August 10, 2001.[58]

The Building Committee had authorized PMA to bill and receive payment from TLCR for owner's representative services on the project without conducting an advertised competition for the services or executing a written contract with PMA. As previously discussed in Finding 1, Massachusetts law prohibits payment by a governmental body for services rendered in violation of a public procurement law. In the absence of a legally procured contract between the Building Committee and PMA, the $30,910 payment should not have been approved by the Building Committee or issued by the Town Accountant.

Finding 9d. The Building Committee did not monitor the cost of the services provided by the owner's representative.

In an interview, the Building Committee Chairman told the Office that Callahan Curtiss had prepared a spreadsheet showing all direct payments to PMA as well as all payments to TLCR for PMA's services. On March 20, 2002, the Office requested that the Building Committee provide the most recent available cost analyses, spreadsheets, or other records showing total payments to PMA for work on the Greenfield Middle School project billed to the Town, Callahan Curtiss,[59] and TLCR. However, the Building Committee did not provide the requested information. In a written response dated April 25, 2002, the Building Committee Chairman told the Office that the Building Committee

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[57] Town records show that the Town had made direct payments to PMA of $101,019 for construction management services provided between May 1999 and July 2000 without a written contract with PMA for those services. After the period covered by this review, the Town continued to make direct payments to PMA: between September 1, 2001 and March 1, 2002, the Town made direct payments to PMA of $100,850, according to Town records.

[58] Town records show that TLCR was paid a 10 percent processing fee, or $3,091, in connection with this payment.

[59] Prior to the period covered by this review, the Building Committee authorized PMA to bill Callahan Curtiss for litigation support services and approved payments of these billings through the Building Committee's agreement with Callahan Curtiss.

did not maintain a cost analysis or spreadsheet tracking the payments to PMA and advised the Office that it would be necessary to conduct a detailed review of every project invoice submitted by PMA, Callahan Curtiss, and TLCR in order to calculate the amounts paid to PMA. His letter stated, in part:

> **By way of explanation, the Building Committee does not maintain a cost analysis or spreadsheet as requested.** Nor does the Town Accountant maintain a spreadsheet in the form requested. Included in Exhibit 2, however, are four tables prepared by the Town Accountant outlining: (1) total payments made to PMA directly through April 12, 2002; (2) total payments made to TLCR through December 21, 2001; (3) total payments made to Callahan, Curtiss, Carey & Gates through April 12, 2002; and (4) a combined table of total payments made to the three entities through April 12, 2002. Included in the payments to TLCR and Callahan, Curtiss, Carey & Gates are substantial payments that have been made to PMA. **In order to obtain that breakdown, it would be necessary to review each invoice that supports the checks listed in each table.** The Building Committee believes that you have previously obtained copies of those invoices. Please advise the Building Committee, whether it will be necessary that the Committee provide you with copies of those invoices at this time or if you wish to directly review the invoices. [Emphasis added.]

The above explanation indicates that the Building Committee did not monitor the amount paid for PMA's services. It also suggests that the Building Committee did not maintain reliable records of the amounts paid for services provided by TLCR and Callahan Curtiss.

Contract monitoring is an essential element of public contracting. The Building Committee's decision to hire PMA shows that the Building Committee recognized the importance of monitoring the Building Committee's contract with Baybutt Construction. However, the Building Committee conducted its business relationship with PMA without instituting basic contracting safeguards or financial monitoring procedures. It is important to recognize that a public jurisdiction that contracts out major project oversight functions must retain the capacity to oversee and monitor the consultant(s) providing oversight.

Finding 10. The Building Committee purchased excess school furniture and equipment.

Project records show that the Building Committee decided to retain responsibility for selecting and procuring fixtures, furnishings, and equipment (FF&E) for the renovated Greenfield Middle School rather than delegating this task to TLCR, the project designer. The FF&E budget for the project was $850,000, according to Building Committee meeting minutes from June 4, 2001.

Project records include a letter agreement dated October 29, 1999[60] that was prepared by Alison Smith Design Consultants and signed by the principal of Alison Smith Design Consultants and by the Building Committee Chairman. The letter agreement outlined a number of tasks to be performed by the consultant, including interviewing staff, recommending educational furnishings and equipment, preparing presentation boards, preparing a "room list" listing the furniture requirements for each room in the building, preparing a budget for the equipment and furniture covered by the contract, preparing bid documents, evaluating bids, preparing purchase orders, preparing delivery and installation schedules, inspecting and approving furnishings and equipment, and recommending partial and final payments to vendors.[61] The letter agreement specified a lump-sum fee of $29,750 to be paid to Alison Smith Design Consultants in four installments corresponding to each phase of work.

In March 2002, the Office received a complaint alleging that excess FF&E items had been purchased with FF&E budget funds and were being stored or distributed to other Greenfield schools. Shortly thereafter, the Office interviewed the Building Committee Chairman and a member of the Building Committee's FF&E Subcommittee regarding the complaint received by the Office. Those interviewed stated that the FF&E Subcommittee was responsible for soliciting requests – or "wish lists" – from individual teachers at the school, setting priorities, and deciding on the items to be purchased with

[60] The letter agreement indicated that it had been revised on December 3, 1999.

[61] The agreement stated that the furniture would be bid through the Hampshire County Cooperative Purchasing Agency and that the equipment would be bid through the Franklin Regional Council of Governments.

FF&E budget funds. They confirmed that Alison Smith Design Consultants was hired to assist the FF&E Subcommittee. They also told the Office that the Greenfield Middle School Principal was made aware of the wish lists and the purchases, although he had no formal approval role, and that the Superintendent of Schools was not involved in the FF&E decision-making process. Those interviewed stated that they did not know why furniture and equipment purchased for the project were being stored in the "special gymnasium" of the Greenfield Middle School; however, they expressed confidence that the school would eventually use the stored items.

On the same day, Office staff visited the school, met with School Department officials, and conducted a visual inspection of the items stored in the "special gymnasium" of the school. Based on the Office's visual inspection and count, the Office estimated that the stored furniture included 78 classroom chairs, 126 lab tables, and 130 computer desks.[62] School Department officials advised the Office that the 78 chairs had been purchased for the school before the renovation project was undertaken and that the chairs had then been replaced by new chairs ordered by the Building Committee. They stated that the laboratory tables delivered to the school were of such shoddy quality that they could not support the weight of a microscope and that school officials had had to brace those tables currently in use. School Department officials also told the Office that the Building Committee had ordered four tables for each classroom but had lacked sufficient funds to purchase four computers for each classroom, as originally planned. They stated that because the number of computer tables was not reduced accordingly, the school had computer tables that it did not need and that approximately 30 to 40 computer tables had already been moved to Greenfield elementary schools.

The Office viewed other items stored in the special gymnasium, including other classroom furniture; gymnastic equipment, including military free weights, incline

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[62] Because of the large number of items stacked in the special gymnasium, it was not possible for the Office to identify every item through a visual inspection. In response to the Office's subsequent request for a complete listing of all items stored in the special gymnasium, the Building Committee provided a listing of 134 computer desks and 45 pieces of gym equipment. The listing included no chairs or lab tables.

benches, barbells, and a very large piece of Nautilus-style exercise equipment; and other physical education equipment, including badminton standards and exercise bicycles. School Department officials advised the Office that they regarded the free weights and barbells as potentially dangerous to middle school students and that these items would be moved to the high school after being inventoried. They stated that the Nautilus-style equipment, which was being stored in a hallway because of insufficient space in the special gymnasium, was not needed, but that the badminton standards and exercise bicycles would be used by the students and were not surplus to the school's needs.

In an effort to evaluate the process used by the Building Committee and the FF&E Subcommittee to plan, prioritize, and decide on purchases of furniture and equipment for the school, the Office requested on March 20, 2002 that the Building Committee provide the Office with all relevant documents relating to the FF&E planning process, including, but not limited to:

- All planning-related documents pertaining to the expenditure of funds for fixtures, furnishings, and equipment (FF&E) at the Greenfield Middle School, including but not limited to educational programs; minutes of FF&E subcommittee meetings; internal memoranda, analyses, and notes of FF&E-related requests, discussions, and decisions; listings of FF&E priorities; and all other documents reflecting planning activities pertaining to FF&E;

- All work products provided by Alison Smith Design Consultants pertaining to the Greenfield Middle School project, including but not limited to reports; memoranda; documentation of School Department programs, priorities, and requests for FF&E; and recommendations;[63] and

- All correspondence pertaining to FF&E, including but not limited to correspondence with TLCR; the Greenfield School Committee; the Greenfield School Department, including administrators, teachers, and other staff; PMA Consultants, LLC; Baybutt Construction Corporation; and Alison Smith Design Consultants.

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[63] The Office subsequently advised the Building Committee Chairman that the Office did not require the Building Committee to provide vendor product information, FF&E bid specifications, or other documentation of the bid process itself in response to the Office's request.

On April 25, 2002, the Building Committee provided the following documents pertaining to the FF&E planning process:

- The 1999 letter of agreement with Alison Smith Design Consultants.
- A listing of the Greenfield Middle School teachers and their room numbers.
- Handwritten and typed lists of furniture and equipment requested by teachers.
- Memoranda and e-mail prepared by school personnel regarding equipment needs.
- An undated floor plan of the school showing placement of desks and other furniture for each room.
- Memoranda prepared by the principal of Alison Smith Design Consultants regarding scheduled meetings with school personnel, Building Committee votes on furniture bids, scheduled inspections of furniture samples, furniture delivery dates, and the FF&E budget.
- Shipping schedules showing vendor names, item descriptions, purchase order totals, and delivery dates.
- Two letters dated April 9, 2002 regarding the Building Committee's FF&E purchases.

The documents provided to the Office showed that Alison Smith Design Consultants consulted with the Greenfield Middle School teachers regarding their FF&E needs and coordinated with the Principal regarding scheduled meetings with teachers, viewings of furniture samples, and deliveries of purchased items. However, these documents contained little information regarding the planning and decision-making process by which the Building Committee and/or the FF&E Subcommittee selected the FF&E items that were purchased for the renovated school.[64] For example, the documents included no educational programs, no meeting minutes of the FF&E Subcommittee, no lists or

[64] The minutes of an Executive Committee meeting held on August 28, 2001 included the following comments provided by the principal of Alison Smith Design Consultants: "In response to a question posed regarding the amount of furniture ordered – teachers send wish lists to the FF&E Sub Committee and this committee would okay or deny these requests. The G.M.S.B.C. [Greenfield Middle School Building Committee] was given these lists and signed off on them for the furniture."

other written records of the priorities set by the FF&E Subcommittee, and no documentation of the FF&E Subcommittee's final decisions or votes regarding the FF&E budget.

As noted above, the Building Committee provided the Office with two letters dated April 9, 2002 regarding the Building Committee's FF&E purchases. The first letter, written to the Principal of the Greenfield Middle School by the Building Committee Chairman, stated, in part:

> This letter is to confirm the discussion that was held yesterday in your office regarding the inventory of computer desks, gym equipment, desks and chairs, and lab top tables currently being stored in the "small gym" on the first floor. **The building committee has determined that the materials that were ordered correspond to the furniture, fixture, and equipment plan that was approved by the school department, FF&E subcommittee where the school staff and school committee were represented, and the building committee.** The FF&E consultant has documented the requests and decisions that were made regarding these items.
>
> It was agreed that beginning next week you would move all of the equipment currently being stored in the gym and elsewhere into the classrooms in order to qualify them for state reimbursement. . . . [Emphasis added.]

As noted above, the documents provided to the Office contained no final FF&E plan nor any records documenting approvals of a final FF&E plan by the School Department, the FF&E Subcommittee, or the Building Committee.

The second letter was written by the principal of Alison Smith Design Consultants to the Building Committee Chairman and members. The letter provided the following clarification regarding the excess FF&E items:

> *Computer Tables*. The committee's decision was to provide four (4) student computer tables and one (1) teacher computer table per classroom. The original plan was to have computers for all the tables. The tables were not installed because in the end there was not enough

> money to purchase computers.[65] These tables are versatile and of good quality, and can be used in rooms for other activities. Also, they need to be in rooms in order to receive reimbursement.
>
> *Student Chairs*: Existing student chairs were brought to the Middle school from the High School but were not needed, (there are 55 of these chairs with chrome frames – we ordered painted frames) also, chairs were taken out of rooms that would have gone with the computer tables. As a result chairs had to be stored.
>
> *The P.E. Equipment*: The equipment for the P.E. department was purchased from the handwritten list and cut sheets provided by the department. The larger pieces were to go into the little gym.

The letter also noted the difficulties confronted by the Building Committee and the FF&E Subcommittee because of the delayed completion date.

Finding 11. The Building Committee's subcommittees did not fully document their official actions, as required by the open meeting law.

Like other governmental bodies, school building committees are subject to the requirements of the open meeting law. The open meeting law applicable to municipal government, M.G L. c. 39, §23A, applies when a quorum of a governmental body[66] – in this case, the Greenfield Middle School Building Committee – meets to deliberate on any public business or policy within its jurisdiction. The *Open Meeting Law Guidelines* published by the Office of the Attorney General set forth the broad purpose and intent of the open meeting law:

> The purpose of the Open Meeting Law is to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based. It accomplishes this purpose by requiring open discussion of governmental action at public meetings. The requirements of the Open

[65] The Office was unable to determine, from the documents provided by the Building Committee, when the decision was made to reduce the number of computers purchased or why the number of computer tables was not correspondingly reduced.

[66] M.G.L. c. 39, §23A defines "governmental body" as "every board, commission, committee or subcommittee of any district, city, region, or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting."

> Meeting Law grow out of the idea that the democratic process depends on the public having knowledge about the considerations underlying governmental action, for without that knowledge people are not able to judge the merits of action taken by their representatives. The overriding intent of the Open Meeting Law is therefore to foster and indeed require open discussion of governmental action at public meetings. Yet the Law does recognize that public officials might be "unduly hampered" if all discussions by public officials were required to be open. As a result, it specifies certain types of issues that may be discussed and decided in a closed session. These exceptions, however, are limited in number and narrow in scope.

With respect to documentation, the open meeting law requires that accurate minutes of all public meetings, including executive sessions, be maintained and made available to the public within a reasonable period of time following each meeting. The minutes of each meeting must set forth the date, time, place, members present or absent, and actions taken, a requirement that has been interpreted to include discussion or consideration of issues for which no vote is taken or final determination made as well as votes and formal decisions.[67]

Finding 11a. The Building Committee's Executive Committee did not prepare minutes of its meetings until December 2000.

The open meeting law applies to meetings of a governmental body subcommittee if a quorum of the subcommittee is present.[68] As previously discussed, the Executive Committee was a three-member subcommittee established by the Building Committee in 1999. In an October 2000 discussion with the Office, the Executive Committee Chairman stated that the Executive Committee's meetings took place during the time periods between the scheduled Building Committee meetings and that the Building Committee had authorized the Executive Committee to approve construction change directives with a value up to $30,000.

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[67] Office of the Attorney General, *Open Meeting Law Guidelines*, page 7.

[68] Office of the Attorney General, *Open Meeting Law Guidelines*, page 4.

When asked by the Office whether the Executive Committee kept minutes documenting its actions, the Executive Committee Chairman stated that minutes had not routinely been prepared. The minutes provided by the Building Committee in response to the Office's August 1, 2001 request included no Executive Committee meeting minutes prior to December 26, 2000. Thus, although the Executive Committee had been delegated managerial and financial responsibility by the Building Committee, it appears that the Executive Committee's votes and spending decisions prior to December 2000 were undocumented.

The open meeting law clearly applies to subcommittees such as the Executive Committee. The fact that the Executive Committee was delegated authority for spending project funds underscores the importance of documenting these spending decisions. However, the open meeting law applied even when the Executive Committee's function was limited to making recommendations to the Building Committee. According to the Attorney General's *Open Meeting Law Guidelines*:

> The fact that the jurisdiction of the subcommittee or special purpose committee extends only to making recommendations to the parent governmental body does not render the Law inapplicable.[69]

Finding 11b. The Building Committee's FF&E Subcommittee did not prepare minutes of its meetings.

As discussed in the previous Finding 10, the Building Committee's FF&E Subcommittee was given responsibility for setting priorities for and deciding on the items to be purchased with the FF&E budget. Accordingly, the FF&E Subcommittee was required under the open meeting law to keep accurate minutes of its meetings, documenting the FF&E Subcommittee's discussions, recommendations, and decisions pertaining to the FF&E budget. However, although the Office requested that the Building Committee provide the Office with all meeting minutes of the FF&E Subcommittee, the Building Committee provided no FF&E Subcommittee meeting minutes.

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[69] Office of the Attorney General, *Open Meeting Law Guidelines*, page 2.

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Conclusion and Recommendations

The task of completing the troubled Greenfield Middle School renovation project after the Building Committee terminated the project contractor, Interstate Construction Company (ICC), in August 2000 posed a substantial challenge. Recognizing that the Building Committee needed the Commonwealth's assistance in developing a workable completion plan, Representative Merrigan and Senator Rosenberg brought state officials to Greenfield in October 2000. At that meeting, officials of the Division of Capital Asset Management (DCAM) and the Department of Education expressed their commitment to supporting the Town's efforts to complete the project. Subsequently, DCAM granted all three requests submitted by the Building Committee for waivers of the advertising and bidding requirements of M.G.L. c. 149, the bid law for public building contracts. Although the Office of the Inspector General requested documents during the completion period, the Office deferred all requests for interviews of project participants until the Greenfield Middle School renovations were substantially complete. The Greenfield Middle School ultimately reopened for the 2001-2002 school year, an accomplishment for which the Building Committee deserves credit, along with the state legislators, other state officials, and other Town officials who provided assistance and guidance to the project.

There is no state law that requires the creation of a building committee for the purpose of overseeing a local construction project. Nevertheless, like many other Massachusetts cities and towns, the Town of Greenfield decided to create a building committee to contract for and oversee the renovation of the Greenfield Middle School. The Building Committee, like other local building committees, was comprised of citizens and Town officials, many of whom had other jobs and obligations, volunteering their time in order to serve their community. The Office does not question the dedication or integrity of these public servants. It would be understandable if many or most Committee members were unfamiliar with the statutory requirements detailed in this report and were unable to devote the necessary time to administering the Building Committee's consultant contracts.

Nevertheless, by delegating full responsibility and spending authority for the project to the Building Committee, the Town conferred on the Building Committee the obligation to conduct its business in accordance with applicable laws, to provide effective fiscal and managerial oversight, and to ensure public accountability and transparency in the expenditure of public funds. The findings summarized in this report show that the Building Committee did not fully meet these obligations during the period covered by this review.

Specifically, the Office's review showed that the Building Committee executed numerous contracts that did not comply with legal requirements. After DCAM granted the first two waivers, the Building Committee instituted a formal contract approval process that required the Building Committee's legal counsel and records manager to sign each contract. However, the Office found that this contract approval process did not function as an effective legal safeguard: the approved contracts did not contain statutorily required provisions and, in some cases, did not include statutorily required performance bonds.

The Office's review also showed that the Building Committee did not employ sound business practices in obtaining the services of its owner's representative. While the Building Committee's decision to engage the services of an owner's representative was justifiable, the Building Committee's expenditure of more than $100,000 in project funds for these services during the period covered by this review[70] without a written contract specifying the owner's representative's responsibilities and fees was not. In addition to incurring unnecessary processing fees in order to pay the owner's representative through the project architect, the Building Committee violated state law by authorizing a payment to the owner's representative without executing a legally procured contract.

The Office reviewed the available documentation for the Building Committee's purchase of excess furniture and equipment for the school. However, the records provided to the Office did not contain meeting minutes reflecting the work of the subcommittee

[70] This review focused primarily on the period from September 1, 2000 through August 31, 2001.

responsible for the purchases, documentation of the Building Committee's priorities, approved plans and equipment lists, or any other records showing how and why the Building Committee decided to purchase the furniture and equipment that proved unnecessary.

The report findings underscore the importance of ensuring that building committees, like other public entities, are provided with the necessary training and information on the legal requirements with which they are required to comply, the sound business practices that they are expected to implement, and the importance of maintaining complete, accurate meeting minutes and other project records. Legal violations expose jurisdictions to the costs and delays of legal disputes. In addition, Massachusetts law prohibits payment by a governmental body of services rendered in violation of a public procurement law.[71] Thus, a building committee that selects consultants and contractors without regard for the competitive requirements of M.G.L. c. 7, §§38A½-O; M.G.L. c. 149; M.G.L. c. 30, §39M; and M.G.L. c. 30B could find itself in the position of having to seek special legislative authorization in order to pay a consultant or contractor for services rendered.

Moreover, certain basic public contracting safeguards are fundamental to promoting efficiency, cost-effectiveness, and accountability in the expenditure of public funds for contracted services. These safeguards include open, fair competition; sound, well-written contracts with sufficiently detailed scopes of services and reasonable compensation terms; and effective contract monitoring procedures.

Building committees often contract with outside consultants to provide the necessary oversight of a construction project. These consultant contracts require the same level of monitoring and oversight as the building committee's contracts with the designer and the contractor. Thus, a building committee – like any other public entity – must possess the internal capability to monitor and oversee consultant contracts. Failure by any public entity, including a building committee, to institute basic contracting safeguards unnecessarily exposes taxpayers to waste, abuse, and even fraud. While the Office's

[71] See *Majestic Radiator Co.* v. *Commissioners of Middlesex*, 397 Mass. 1002 (1986).

review found no evidence of fraud or abuse in this case, the risks of fraud and abuse on any public project are heightened when these safeguards are inadequate or absent.

Finally, full documentation of the official decisions and actions of public bodies is essential. In addition to ensuring compliance with the requirements of the open meeting law, "transparency," or public disclosure, promotes public accountability and public confidence in government.

The following recommendations to the Town of Greenfield and other local jurisdictions that decide to delegate responsibility for construction projects to building committees represent strategies for promoting cost-effective contracts and reducing the jurisdiction's vulnerability to unnecessary risks.

1. Clarify the building committee's role, authority, and reporting relationships.

Local jurisdictions that choose to create building committees are free to design their own organizational arrangements for such committees. These arrangements should be fully documented and approved by the jurisdiction in order to promote efficiency and accountability and to avoid confusion and disputes. Several issues that should be addressed are:

- How and by whom building committee members are appointed;
- Whether and how the appointing authority will oversee the building committee;
- The extent of and limitations to the building committee's authority to execute contracts, make design decisions and changes, approve change orders and other contract changes, and otherwise expend public funds on behalf of the jurisdiction;
- The specific building committee actions that require formal approval by another entity within the jurisdiction, such as the School Committee or the Board of Selectmen; and
- The building committee's formal reporting obligations to other entities within the jurisdiction.

2. Adopt designer selection procedures.

Before beginning the planning phase of a public construction project, the jurisdiction must formally adopt designer selection procedures, as required by the designer selection law. These procedures will govern the procurement of design services – including, but not limited to, contracts with consultants to provide master plans, studies, final designs, and construction management services – for all building projects undertaken by the jurisdiction. The appropriate action for formally adopting designer selection procedures may be dictated by local ordinances or by-laws. The Office of the Inspector General has developed *Model Designer Selection Procedures for Municipalities* to assist cities and towns in developing their own procedures. The *Model Procedures* may be downloaded from the Office's website at www.mass.gov/ig.

3. Appoint a project manager for each construction project.

This individual, who should serve as the locus of project responsibility and accountability for the public jurisdiction, should be responsible for coordinating the work of the project participants, monitoring the project budget and schedule, and maintaining the central file of project records. The scope of the project manager's duties and authority will vary, depending upon the needs of the jurisdiction and the complexity of the project: for example, the project manager could be given responsibility for administering the contracts executed by a building committee and/or supervising the clerk of the works and other on-site personnel.

4. Develop a project-specific oversight plan.

For each construction project, the jurisdiction should develop an oversight plan that defines the roles and responsibilities of all individuals and entities with supervisory duties, including in-house staff such as the project manager, the building committee or other board or committee with supervisory responsibilities, and consultants such as the designer, the construction manager, the owner's representative, and/or the clerk of the works.

5. Provide appropriate legal and managerial training and guidance to building committee members and others with supervisory responsibilities.

If a building committee will bear full responsibility for all project-related procurements and contracts, the jurisdiction has an obligation to ensure that the committee members receive comparable training to that provided to its in-house procurement and contracting staff. Members of boards and committees should be fully apprised of the requirements of the open meeting law.

6. Institute effective fiscal and administrative controls over consultant contracts.

All agreements with consultants that are expected to cost $5,000 or more should be formalized in written contracts, whether or not the services are subject to a competitive procurement law. Each contract should contain a detailed scope of services and should specify the fees or basis of compensation. Contract amendments should be executed for approved changes in the contract scope, cost, or schedule. No payments to consultants for project-related services should be made unless specifically authorized under a legally procured, executed purchase order, contract, or contract amendment.

Appendix A: Greenfield Middle School Building Committee Response

The Office's report shows that the Building Committee devoted insufficient attention to ensuring that its actions conformed to legal requirements and sound business practices. The recommendations provided at the conclusion of the report are aimed at assisting the Town of Greenfield and other jurisdictions in their efforts to promote cost-effective contracting and reduce their vulnerability to risk on local construction projects.

The Building Committee's response to the confidential draft report contains numerous factual errors, which are discussed below. More broadly, the response does not recognize that that the Building Committee's business practices were deficient or that its contracting safeguards were inadequate. In the Office's view, the response underscores the importance of adopting the recommendations outlined in this report. The public interest will be best served by ensuring that major public construction projects are overseen in accordance with legal requirements, sound business practices, and principles of public accountability.

Detailed Discussion of the Building Committee's Response

Findings 1a and 1b. The report found that the Building Committee's September 1, 2000 contract with Baybutt Construction did not comply with the requirements of M.G.L. c. 149. The Building Committee's response takes the position that the work was performed on an emergency basis and that the Building Committee was unable to seek the required emergency waiver from DCAM prior to September 27, 2000, when the Building Committee requested a limited emergency waiver from DCAM. However, the response offers no explanation for the Building Committee's inability to contact DCAM in the days and weeks immediately preceding and following September 1, 2000. The response acknowledges that the Building Committee did not seek an emergency waiver from DCAM either before or after executing the noncompetitive contract with Clayton Davenport on October 4, 2000.

The footnote on page 7 of the response states that Baybutt Construction provided performance and payment bonds under the September 1, 2000 contract. However, no such bonds were included in the contract or provided to the Office during the review, nor did the documentation accompanying the response include the missing bonds.

Finally, the response states that the Building Committee's September 1, 2000 contract with Baybutt Construction incorporated by reference the statutorily required provisions contained in the Building Committee's previous contract with ICC. In fact, Article 1 of the September 1, 2000 contract did not reference these provisions; Article 1 referenced only the drawings, specifications, and addenda from the ICC contract.

Finding Ic. The report found that project records did not include weekly payroll reports from Baybutt Construction and Davenport for the work they performed under the illegal contracts, neither of which included the statutorily required wage rate sheets issued by the Department of Occupational Safety, discussed in Finding 1. The Building Committee's response states that the Building Committee believes that weekly payroll reports from Baybutt Construction and Davenport "may exist" for the period of September 1, 2000 through August 1, 2001. Although the Building Committee did provide the Office with weekly payroll reports filed by Baybutt Construction and Davenport in connection with later contracts executed in December 2000 and March 2001, the Building Committee did not provide the Office with weekly payroll reports relating to the contracts discussed in Finding 1c.

Finding 2. The Building Committee's response does not dispute the facts reported in Finding 2.

Finding 3. The Building Committee's response does not dispute the facts reported in Finding 3.

Finding 4. The report found that bid documentation provided to DCAM and the Office was incomplete for four of the nine construction contracts with new contractors executed by the Building Committee. (The Finding 4b heading has been corrected to state that the bid documentation for four, rather than three, contracts was incomplete.)

The Building Committee's response notes that two of the Building Committee's consultants were responsible for reviewing the bid documentation provided to DCAM. However, the response did not include the missing documents identified in Finding 4b of the report.

Finding 5. The report found that three of the nine construction contracts with new contractors lacked performance and payment bonds required under M.G.L. c. 149. The Building Committee's response inaccurately states that the Building Committee's contract with Smith-Hill Woodcraft was for $23,900 and, thus, did not require a performance bond. In fact, the signed contract with Smith-Hill Woodcraft provided to the Office listed the contract price as $29,300, a price that exceeds the M.G.L. c. 149 threshold requiring a performance bond. Project records show that the Building Committee ultimately approved payments to Smith-Hill Woodcraft totaling $84,334 under this contract.

The Building Committee's response does not dispute the other facts stated in the finding but offers the following observation: "[W]hile bond compliance is certainly required under G.L. c. 149, and is desirable, the legislature has provided no penalty or other sanction for failure of a public authority to do so." The suggestion that statutory requirements need not be regarded as mandatory unless they specify a penalty for noncompliance is disturbing.

The report found that the Building Committee did not obtain a performance bond from McManus & Rogers for its $500,000 unassigned labor contract. The Building Committee response states that it was "the Town's understanding" that the $699,687 bond posted by McManus & Rogers for the $706,525 floor remediation contract also covered the $500,000 unassigned labor contract. However, the performance bond in question clearly referenced the floor remediation contract; it did not obligate the surety to perform any work other than the floor remediation contract work.

Finding 6. The Building Committee's response does not dispute the facts reported in this finding.

Finding 7. The Building Committee's response does not dispute the facts reported in this finding.

Finding 8. The report found that the project records did not include weekly payroll reports for five contractors: Corbin-Hufcor, Inc.; Highland Seating, Inc.; Penco Products; Porter Athletics; and Walker Specialties. The Building Committee's response states that none of these contracts were subject to prevailing wage law requirements because they entailed no labor. However, in a May 2002 interview with the Office, PMA's Senior Engineer advised the Office that all five contracts entailed installation work as well as materials. Moreover, the Building Committee's response included memoranda showing that all five contracts entailed installation work. The following are excerpts from these memoranda:

- Corbin-Hufcor, Inc.: "The remaining scope of their work is to plumb the panels, install the lever closure piece, and provide operation instructions to the owner."

- Highland Seating: "The remaining work under the contract, including the supplying of bleachers and the installation of the auditorium seats and bleachers, totals $20,258, which is the amount left in the Contractor's ICC agreement."

- Penco Products, Inc.: "The incentive for the Contractor to return is to deliver the materials and make profit on his sale and installation. . . . Warranties on work partially installed will be lost with a new supplier or contractor."

- Porter Athletic Equipment: "Both the backstop and the gymnasium curtain have been manufactured by Porter Athletic Equipment and all that is left is the installation of both of these items. There is $6,710.00 left in the Contractor's ICC Agreement, which covers the installation."

- Walker Specialties: "The remaining scope of their work is to perform the installation of the custom made curtains and supply the associated equipment that goes along with the installation work. The cost to perform this installation is $7,250."

Finding 9a. The Building Committee's response does not dispute the facts reported in this finding but expresses disagreement with the Office's position that a written contract

is an essential public protection that should have been in place before the Building Committee authorized more than $100,000 in payments for services provided by PMA.

Finding 9b. The report found that the $14,000 paid to TLCR to process PMA's invoices and payments represented an unnecessary administrative expense, given that PMA did not work as a subconsultant to TLCR. The Building Committee's response argues that "the fees the architect could have reasonably charged the Town under its original contract would have been reasonably equivalent to" the $14,000 paid to TLCR for processing PMA's invoices and payments. It is unclear why the Building Committee believes that it would have paid an additional $14,000 to TLCR for design services absent the arrangement with PMA.

Finding 9c. The report found that the Building Committee approved, and the Town Accountant issued, a $30,910 illegal payment to the owner's representative. The Building Committee's response acknowledges that a direct payment of $30,910 to PMA was approved by the Building Committee and issued by the Town Accountant but contends that this payment was not illegal because "it was payment for services performed and a fee the Committee was under a contractual obligation to pay." However, as discussed in Finding 9a, the Building Committee had no contract with PMA and, thus, no legal or contractual basis for issuing a direct payment to PMA.

Finding 9d. The report found that the Building Committee did not monitor the cost of the services provided by PMA. The response acknowledges that the Building Committee did not maintain cost analyses or spreadsheets showing the cost of the services provided by PMA but disputes the report finding, noting that the Building Committee's attorneys "have compiled a spreadsheet outlining the payments to PMA." As explained in the report, on March 20, 2002, the Office sent a written request to the Building Committee for the most recent available cost analyses, spreadsheets, or other records showing total payments to PMA for work on the project billed to the Town, to Callahan Curtiss, and to TLCR. In a written response dated April 25, 2002, the Building Committee advised the Office that it would not be possible to obtain a breakdown of the cost of PMA's services without reviewing each invoice to generate the requested

information. The Building Committee's response indicates that Callahan Curtiss has compiled some information for use in project litigation but provides no evidence that the Building Committee monitored the cost of PMA's services during the project.

Finding 10. The report found that the Building Committee purchased excess school furniture and equipment. The Building Committee's response disputes this conclusion. However, the response acknowledges that the Building Committee unsuccessfully attempted to return some equipment to vendors when the school opened in September 2001.

The response states that an audit accounting for "all equipment purchased by the Committee" was obtained by the Building Committee and provided to the Office. However, the audit referenced in the response did not produce – and was not intended to produce – a full accounting of the project furniture, fixtures, and equipment (FF&E). According to the audit report provided to the Office by the Building Committee in April 2002, the auditors tested a sample of 75 "haphazardly selected" project expenditures, including 25 FF&E expenditures.

The response disputes the report statement that equipment purchased for the project had been distributed to other schools. However, the computer desk inventory listing, provided to the Office by the Building Committee in April 2002 showed that numerous computer desks were placed in other schools.

Finding 11. The Building Committee's response does not dispute the facts reported in this finding.

GREENFIELD MIDDLE SCHOOL BUILDING COMMITTEE

VIA UPS OVERNIGHT MAIL

RECEIVED

JAN 3 1 2003

OFFICE OF THE INSPECTOR GENERAL

Gregory Sullivan, Inspector General
Office of the Inspector General
John W. McCormack State
Office Building - Room 1311
Boston, MA 02133

RE: Greenfield Middle School Building Committee

Dear Mr. Sullivan:

Please find enclosed the response of the Greenfield Middle School Building Committee to the Draft Report of your office dated November 15, 2002. Please feel free to contact us if you require any further clarification or information.

Thank you for your kind attention and cooperation.

Respectfully submitted,

GREENFIELD MIDDLE SCHOOL BUILDING COMMITTEE

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INTRODUCTION.

On November 15, 2002, the Office of the Inspector General ("IG") submitted its Confidential Draft Report and Review of the Completion Phase at the Greenfield Middle School Renovation Project. The IG's Office was kind enough to grant the Greenfield Middle School Building Committee (the "Committee") an extension until January 31, 2003 to respond. The Committee has reviewed that Report with its consultants and others who may have participated in the Project in order to assist it in making this response.

The Report contains eleven (11) Findings and sub-findings, some of which the Committee is in agreement with, and others that the Committee opposes, or believes requires further explanation. The overall difficulty that the Committee has with the Background and Findings in the IG's Report is that it operates somewhat in a vacuum: while it considers only the conduct of the Committee's compliance with a variety of bidding and other statutory requirements in response to an unquestionable emergency, it fails to adequately assess the conduct of either the general contractor on the Project, Interstate Construction Co., Inc. ("ICC"), and the surety on the performance bond, St. Paul Insurance Company ("Surety"), and the difficult position that their failure to properly perform their contractual obligations created for the Committee and the Town of Greenfield. The IG's function, as it correctly points out in the Report, was not to investigate the conduct of ICC (and certainly not the Surety). Its statutory function is to investigate fraud, abuse and waste in the awarding and implementation of the bidding laws of the Commonwealth of Massachusetts. However, the Committee, in performing its function, had no such luxury; there were two elephants in the tent that the Committee could not ignore - ICC and the Surety. In order to understand and adequately assess the Committee's performance in taking over and completing the Project, as well as the Findings of the IG, the

conduct of ICC and the Surety and the impact such conduct had upon the Committee's responsibilities must be weighed in any critique of the Committee's performance. This response will further consider what the Committee deems as the relevant background in order to adequately assess its response to the IG's criticisms.

I. BACKGROUND.

On August 24, 2000, the Committee terminated its construction contract with ICC and initiated Court action to have ICC evicted and removed from the Project Site at the Greenfield Middle School. That termination was the result of a number of failures on the part of ICC that left the Renovation Project in a dreadful state. The bid was awarded and the construction contract signed in June, 1998. The contract between the Town and ICC required that construction begin in September 1998 and that it be completed by September 1, 1999. Time was made the essence of the contract. In order to accomplish the renovation, all of the Middle School students and classes had to be moved to the High School or Elementary School classrooms. Certain delays in the Project resulting from the discovery of asbestos and other hazardous substances at the Project Site pushed the Project beyond its September 1, 1999 deadline, and it was clear that the students would have to remain at the High School or Elementary Schools for another year. In January, 2000, significant delays began occurring during which ICC, its employees and subcontractors, were absent from the Site. It became apparent that the Project was in significant trouble. To compound matters, the failure of ICC to have sufficient personnel at the site to oversee and manage the project resulted in significant water damage inside the building and to the new floors that had been installed. As late as August, 2000, ICC unabashedly assured the Committee that the building would be complete and ready for student occupation by the start of the next school year, September 1, 2000. At that time, the Committee knew, through its own

observations and reports from its consultant, that the Project was in jeopardy and drastic steps needed to be taken to put the Project back on track. The continued placement of the Middle School students off-site was having a significant and detrimental effect on the education process.

Concurrent with the eviction of ICC by Court order on August 24, 2000, the Committee provided notice to the Surety of ICC's default and requested under the performance bond that the Surety come in and complete the Project. Prior to that date, the Committee had provided other notices to the Surety and met with the Surety's representatives on at least two prior occasions in the year to acquaint the Surety with the Project's problems. The Committee also provided the Surety with construction updates and data compiled by its consultants that clearly showed a disparity between ICC's rosy prediction of a September completion date and the actual status of the work at the Site. Upon termination and notice to the Surety, the Surety's initial response was a demand for voluminous documentation from the Committee to justify its action in declaring ICC in default, and a reservation of rights to contest and avoid liability on its surety bond. In anticipation of such reaction and indifferent response from the Surety, the Committee had begun steps to retain the services of another construction firm, Baybutt Construction Corp. ("Baybutt"), to assist the Committee in determining what work needed to be done to finish the Project, what the cost of that completion would be and most significantly, the time it would take to complete the Project. By Committee vote of September 18, 2000, the Committee voted to approve a limited contract with Baybutt and the Town dated September 1, 2000 to accomplish this purpose, as well as to perform work at the site that clearly needed to be done to protect the building. At the time of ICC's termination, the building was open to the elements, substantial water was entering the structure, and the interior was in an unsafe condition.

On September 1, 2000, it was the Committee's hope that the Surety would eventually agree to take over and complete the Project, but in the event the Surety did not do so, the Committee had to prepare itself to take over and complete the Project itself. The Committee was forced to proceed along this parallel approach path, especially as it became increasingly clear that if work on the Project was not resumed soon, the school might not be open for another school year beginning in September, 2001. On September 27, 2000, the Committee made its first application to the Division of Capital Asset Management ("DCAM"), under the provisions of G. L. c. 149, §44A(4), for a limited waiver from the state bidding laws to perform emergency work to secure and protect the building from the weather. (Attached to this response as Exhibits 1 through 13 are copies of the six requests the Committee made to DCAM and its responses.) On October 13, 2000, DCAM granted the limited waiver insofar as it permitted the Committee to make the HVAC system operational, make the roof weather-proof, and to the extent necessary of eliminating the sub-flooring moisture problem.

On October 30, 2000, Baybutt submitted its FINAL REPORT ON THE SCHEDULE AND COST TO COMPLETE, which estimated it would cost Five Million Six Hundred Eight Thousand Nine Hundred Sixty-Eight Dollars ($5,608,968.00) to complete the original contract and fix the water damage. More significantly, Baybutt advised the Committee that work needed to begin in the very beginning of December if the Project was to be completed by August, 2001 in time for student occupation. The schedule of work to complete the Project, the cost, and the date the work needed to commence on the Project were confirmed and corroborated by the Town's consultant. On October 10, 2000, with that information in hand, the Committee made its second request for a waiver from the bidding laws to DCAM to complete the Project. (Exhibit 3) On November 20, 2000, the Greenfield Town Council approved a request for an additional $4.30

Million to complete the Project to building occupancy. On November 22, 2000, DCAM issued a response approving the second request for a waiver subject to conditions. (Exhibit 4) During the period September 1, 2000 through December 12, 2000, the Committee continued to attempt to negotiate with the Surety in hopes that the Surety would take over the Project. The Committee notified the Surety that a Committee Meeting would be held on December 11, 2000 to decide who would complete the Project. The Town requested that the Surety have its representatives at that meeting to discuss completion. No one appeared for the Surety at the meeting of December 11, 2000, and at that time, the Committee elected to contract with Baybutt to complete the Project.

II. FINDINGS.

IG FINDING 1. **Between September and December of 2000, the Greenfield Middle School Building Committee spent more than $213,000 on construction services procured under no-bid, time-and-materials contracts that lacked performance bonds and other statutorily required protections.**

IG FINDING 1a. **The Building Committee contracted for building-related construction services without bidding, seeking an emergency waiver, or complying with other M.G.L. c. 149 requirements.**[1]

The IG has concluded that the Building Committee neither solicited bids nor requested an emergency waiver of the M.G.L. c. 149 advertising and bidding requirements from DCAM before the Building Committee Chairman signed the contract with Baybutt, that such contract did not require Baybutt to furnish a performance bond for the work, and that it did not contain certain mandatory provisions required under statute. (IG Report, p.p. 20-21) The Committee believes that in hiring Baybutt, it did not commit any violation of the emergency provisions of M.G.L. c. 149, §44A(4). Under the second paragraph of that section, where the "nature of the

[1] The contract was dated September 1, 2000, the Committee approved the contract by vote on September 18, 2000, all before the Committee's first request for a waiver on September 27, 2000.

emergency prevents the awarding authority from obtaining the prior approval of the commissioner, the awarding authority may contract for the necessary work without said prior approval." In such an instance, approval must be sought at the earliest possible time and if the commissioner at that time fails to approve the emergency determination, the awarding authority shall promptly cease all work for which the emergency determination was denied.[2] The obvious intent of this provision is to allow the awarding authority or owner to deal immediately with an emergency where delay would cause harm before a waiver might be obtained.

As the IG recognized, the services provided by Baybutt may very well have been justified as emergency services under G. L. c. 149. (IG Report, p. 21) On September 1, 2000, as outlined above, the Committee was faced with an immediate need to protect and secure the building for the reasons set out in the Committee's first request for a waiver and in addition, needed professional assistance to determine what exactly needed to be done.[3] In its request for a limited waiver on September 27, 2000, the Committee specifically asked DCAM if a waiver was needed for approval of the contract with Baybutt and enclosed a copy of that contract. While DCAM's response of October 13, 2000 specifically authorized some activities, it never indicated that the hiring of Baybutt was a violation of the bidding laws or not in compliance with the provisions of the second paragraph of Section 44A(4). In other words, under the statutory language, DCAM had not specifically "fail[ed] to approve" the Committee's "emergency determination." The

[2] That paragraph provides as follows:

> Where the nature of the emergency prevents the awarding authority from obtaining the prior approval of the commissioner, the awarding authority may contract for the necessary work without said prior approval; provided, however, that the approval of the commissioner shall still be sought at the earliest possible time; and provided, further, that if the commissioner at that time fails to approve the emergency determination the awarding authority shall promptly cease all work for which the emergency determination was denied. In such cases, the contractor shall be entitled to payment for the fair value of the labor and materials furnished prior to cessation of the work.

[3] In this respect, it should be pointed out that during the contract period in which ICC was involved in the building, ICC had complete control of the site and not the Town.

Committee believed under the emergency circumstances it found itself in view of the conduct of ICC, that it did have the authority to continue to retain Baybutt's services. Furthermore, as pointed out above in Section 1, consideration of the extent of ICC's deficient performance and the deplorable condition in which the building was left when the contract was terminated with ICC, are salient factors in considering whether there existed such an extreme emergency that justified immediate action without prior approval from DCAM.

The IG is also critical of the Committee for its failure to insert in its contract with Baybutt Construction certain statutorily required provisions.[4] To this the Committee first says that the Committee sought, through incorporation and reference, to include within its provisions the General Contract and conditions set forth in the Committee's agreement with ICC. (See Exhibit 1, Article 1, "The Contract Documents.") The General Contract between the Town and ICC specifically included and required compliance with the statutory provisions for Massachusetts Public Construction Contracts cited by the IG in Footnote 4. Rather than reproduce the thousands of pages of the contract documents for the initial bid, the Committee believed the incorporation by reference was both practical and legally sufficient. While one of the purposes of such incorporation was to guide and define the scope of the investigation and analysis Baybutt was to perform for the Town in assessing the work that needed to be done on the building, the reference to the General Conditions in ICC's contract with the Town also carried with it all of the

[4] The IG says the contract did not require Baybutt to furnish performance and payment bonds for the work required under G. L. c. 149, did not contain a prevailing wage rate sheet, G. L. c. 149, §§26 and 27, and did not include statutorily required provisions for contracts subject to G. L. c. 149, such as those governing change orders, G. L. c. 30, §§39N-39O, payment procedures, G. L. c. 30, §§39F, 39G and 39K, and financial reporting, G. L. c. 30, §39R. The IG also says the contract lacked a certification by the Town Accountant stating that appropriated funds were available for the contract and that the officials signing the contract were authorized to do so, as required under G. L. c. 44, §31C. The IG finally states that the contract lacked the tax compliance certification required by G. L. c. 62C, §49A for all public contracts in Massachusetts. There is no question, however, that Baybutt did furnish a payment and performance bond, did in fact pay the prevailing wage, and did comply with other statutory mandates.

statutorily required disclosures set out in the IG's report, which Baybutt thus assumed when it signed its contract with the Town on September 1, 2000.

More significantly, however, in the IG report is the conclusion, implicit or otherwise, that the Town's failure, if there was such a failure, may invalidate Baybutt's contract with the Town. (IG Report, p. 21, "Moreover, Massachusetts law prohibits the payment by a governmental body for services rendered in violation of a public procurement law," citing ***Majestic Radiator Co. v. Commissioners of Middlesex, 397 Mass. 1002 (1986)***. While that is a correct statement of the law, the Committee does not believe that legal principle applies. ***Majestic*** stands for the proposition that a contractor may be barred from recovering on a contract with a public authority if he has failed to follow the appropriate statutory steps for contract approval. However, as to cities and towns, our Courts have recognized that technical violations of the Designer Selection laws and other bidding law provisions do not invalidate public construction contracts ***LeClaire v. Town of Norwell, 430 Mass. 328 (1999)***.[5] Even though the bidding statutes mandate inclusion of certain terms in public contracts, there is no legislative intent that any particular consequence follow from such omission, and thus the inference is that such statutory provisions, although speaking in mandatory terms, are considered directory and are not prohibitory of the contract. ***LeClaire*** (Designer Selection statute does not mandate a specific remedy for a town's failure to comply with one of its provisions, and such a violation does not require a court to void a public contract). Thus, even if the Committee inadvertently failed to properly incorporate certain

[5] In ***LeClaire***, a ten-taxpayer suit against the town, the Supreme Judicial Court refused to invalidate a contract even though the Town had failed to publicly advertise a designer services project. Certainly, such a violation is a more egregious violation of the bidding laws than the failure to include statutorily mandated provisions in a public construction contract.

mandatory statutory provisions in its contract with Baybutt, such omissions do not invalidate the contract.[6]

IG FINDING 1b. **The Building Committee contracted for public works construction services without bidding, seeking an emergency waiver, or complying with other M.G.L. c. 30, §39M requirements. (Davenport)**

In this Finding, the IG criticizes the Committee for its failure to follow the bidding procedures. While the contract between Davenport and the Committee was signed on October 4, 2000, his services were necessary on September 19, 2000 because of water that was pouring into the north side of the building and causing extensive damage. The immediate site area had to be contoured in order to move the water flow away from the building. Again, as pointed out above, in case of such emergencies, prior approval is not required from DCAM since such a delay would exacerbate and increase the damage. Davenport's work was vital to the protection of the building and had to commence before a formal contract could be signed.

Also, while it is accurate that the limited waiver request of September 27th did not specifically mention site work, it did acquaint DCAM with the fact that moisture problems did exist in the building. Site work was necessary to prevent further aggravation of the problem.

IG FINDING 1c. **Project records did not include weekly payroll reports from the contractors for the work they performed under these contracts.**

The Committee believes that the weekly payroll reports from Baybutt and Davenport for the period September 1, 2000 through August 1, 2001 may exist. The Committee did receive payroll reports from the twenty-seven (27) or twenty-eight (28) other contractors, which were

[6] Questions have been raised on this issue as to the effect, if any, this Finding may have on the Town's right to reimbursement under G. L. c. 70B. The Committee recognizes that the IG's Report takes no position on that issue and indeed, is beyond its statutory responsibility.

contained in four (4) cabinets and made available to the IG. Also, G. L. c. 149, §27B pertains to laborers, and at least during Baybutt's work during his second contract as Construction Manager in completing the Project, the DCAM waiver of November 22, 2000 prohibited Baybutt from performing any construction work. (Exhibit 5) Thus, Baybutt may not have had any laborers.

IG FINDING 2. The Building Committee's floor remediation contractor was paid $175,549 before the Building Committee executed a written contract or obtained a performance bond for the floor remediation work.

In Finding 2, the IG questions why the Committee allowed McManus & Rogers to commence floor remediation work without having a contract in place or a performance bond. The IG is also critical of the Committee's failure to more timely execute a contract with McManus & Rogers and observes that the payment of One Hundred Seventy-Five Thousand Five Hundred Fifty Dollars ($175,550.00) to that firm made before the contract was executed indicates that financial controls over Town funds were inadequate. (IG Report, p. 29)[7]

The Committee has no dispute with the facts as reported by the IG. However, there are additional facts of which the IG may not have been aware. As outlined above, until December 11, 2000, the Committee did not know whether it or the Surety would take over the Project. In anticipation if the Committee had to do so, the Chairman sought a limited waiver of the bidding laws from DCAM in order, in part, to perform emergency work on the floor. That work required demolition and removal of the flooring that had been severely damaged by water entering the building from the roof and windows and from demolition work during the time the General Contractor had been on site. Furthermore, that work needed to be done first before any other major renovation work could commence. The Committee could not hire Baybutt to do that work

[7] McManus & Rogers were given notice to commence the floor remediation work on December 4, 2000; the payment of One Hundred Seventy-Five Thousand Five Hundred Fifty Dollars ($175,550.00) was made on January 12, 2001; and the contract executed on January 19, 2001.

because DCAM advised the Committee that it would raise possible ethical and conflict of interest issues if Baybutt were permitted to do that work. (Exhibit 5, p. 5) If Baybutt was to be the General Construction Manager in completing the Project, it was prohibited from providing or using any of its own labor forces. Under the DCAM conditions to its limited waiver, the Committee was left with seeking quotes from three (3) contractors. These contractors not only had to be capable of doing the floor work, but also had to be willing to begin immediately. McManus & Rogers were retained and began the actual work at the site on December 14th, three (3) days after the Committee voted to take over and complete the Project itself. As was true with some of the other Contractors hired by the Committee, but especially with McManus & Rogers, the actual start of work had to precede the formation of the contract between the Committee and the contractor if the Committee was to have any hope of having the building ready for student occupation by September 1st of the next year.

The contract with McManus & Rogers was drafted on December 20, 2000. However, it was not signed at that time because McManus & Rogers did not have a performance bond on January 8, 2001. McManus & Rogers' insurance carrier informed the Committee by letter that such a bond would be in place in two (2) weeks. The Town made its first payment to McManus & Rogers on January 12, 2001 in reliance on that information. Furthermore, the Committee did have in place a system of financial protection and accountability to deal with the McManus & Rogers contract and payment for work. First, no payment could be made to McManus & Rogers until the architect on the project, TLCR Associates, certified that the work for which payment was sought was complete. Also, further oversight and review was provided by our own representative on-site, PMA Consultants LLC. Finally, since the initial phase of floor work involved demolition and removal and not the advancement of any funds to provide materials for

completion of a new floor, the initial payment to McManus & Rogers did not place the Town at any financial risk or jeopardy. The Committee believes it did set in place a system for oversight and financial accountability of all of its contractors, including Baybutt, and at no time was the Town at financial risk. Indeed, as the IG's report acknowledges, there was no question of the necessity or quality of the work performed by McManus & Rogers or that payment to them was in anyway inappropriate. Finally, McManus & Rogers did eventually provide an appropriate bond, which covered the demolition work under its first contract.

IG FINDING 3. The construction management contract executed by the Building Committee was inconsistent with the designer selection law and with the Building Committee's recently adopted designer selection procedures.

In Finding 3, the IG claims that the Committee, in executing its contract with Baybutt as Construction Manager, failed to include sections required under the Designer Selection law and otherwise failed to follow the procedure provided for under that law. As the IG's Report indicates, the Committee was advised by DCAM in its second waiver grant that the Committee should adopt the Designer Selection law, G. L. c. 7, §§38A½ to 38O, and use that process in appointing a construction manager. DCAM also pointed out that the Designer Selection law has an emergency provision, G. L. c. 7, §38J, which allowed for an expedited procedure to appoint a construction manager. The Committee, in accordance with that advice, sought to adopt the provisions of the Designer Selection Law. On November 26, 2000, the Committee voted to adopt those procedures.[8] The Town also voted and approved a MOTION TO DECLARE

[8] The Motion voted on by the Committee provided as follows:

> It is hereby moved that the Greenfield Middle School Building Committee, as the appointed authority to award bids and oversee the renovation project at the Greenfield Middle School, vote to accept the Guidelines For Local Designer Selection Procedures described and established under the provisions of G. L. c. 7, §§38A ½ to 38O insofar as those statutory sections and any regulations adopted thereunder have been made applicable to cities and towns.

EMERGENCY AND APPOINT CONSTRUCTION MANAGER. That Motion provided as follows:

> It is hereby moved that the Greenfield Middle School Building Committee vote to declare that an emergency situation exists as described under G. L. c. 7, §38J and that as a consequence, this Committee adopt the following expedited procedure to select a Construction Manager for completion of the renovation work at the Greenfield Middle School:
>
> > The Committee shall forthwith determine if there exists a list of Construction Managers maintained by the Designer Selection Board who may be available to perform emergency construction management services on the Greenfield Middle School commencing on or about December 4, 2000, and in the absence of such a list, the Committee hereby selects and authorizes a contract with Baybutt Construction Corporation as the Construction Manager for the Project with the proviso that Baybutt Construction Corporation is hereby prohibited from performing any of the actual construction work on the Project. If a contract is entered into with Baybutt Construction Corporation, a file memorandum shall be prepared explaining the basis for the selection of Baybutt Construction Corporation under the circumstances existing at the Project.[9]

By these two (2) Motions, the Committee believed that it was in compliance with the DCAM directives and conditions set forth in its letter of November 22, 2000.

As discussed earlier, the omission of some statutorily required language does not invalidate a contract between a contractor and a public authority. The contract with Baybutt was in substantial, if not complete, compliance with the DCAM directives in permitting the Committee to take emergency action, and any failure of the Committee to correctly implement all of the Designer Selection requirements had little, if any, impact on the public interest to ensure that the fair bidding laws had not been violated. As for the inclusion of an additional Fifteen Percent (15%) for all change orders, G. L. c. 7, §38G(c) requires that all fees be in a total dollar amount. That Section also permits contracts to provide for equitable adjustments in the event

[9] After that vote was taken, it was learned that the Designer Selection Board has no list of certified construction managers.

of changes in the scope or services. The Committee believes that at the time of the execution of the second Baybutt contract, the possibility of such changes had been minimized by the Baybutt analysis of the scope of the work to be done, the review by our own consultant and representative on-site, PMA Consultants, LLC, and the fact that work previously done on the building enabled the Committee to more clearly define the remaining scope of the work.

IG FINDING 4. **Although the Building Committee appears to have complied with the informal bidding requirements specified in the DCAM emergency waiver, the bid documentation provided to DCAM was incomplete.**

IG FINDING 4a. **Project records indicated that the Building Committee's construction manager sought competitive prices on contracts with new contractors after December 11, 2000.**

In performing work under the second DCAM waiver to complete the Project, the IG is critical of Baybutt's failure to maintain appropriate records in relation to an "unassigned labor contract" with McManus & Rogers for Five Hundred Thousand Dollars ($500,000.00). The IG does not question the necessity of that work, nor that the payment received was in any way improper or constituted waste. The IG does, however, characterize the work as "unanticipated."" That work, in the Committee's opinion, was not unanticipated. Baybutt, in its financial estimates provided to the Town, did include a contingency factor for unanticipated work. As the IG recognizes, Baybutt could not perform those labor tasks because the DCAM waiver prohibited him from doing so. Under the ordinary public construction project, a construction manager may perform those labor tasks.

IG FINDING 4b. **Bid documentation provided to DCAM and the Office was incomplete for three of the nine construction contracts with new contractors.**

The IG complains that the bid documentation provided to DCAM and the IG's Office was incomplete for three (3) of the nine (9) written construction contracts with new contractors. Under the DCAM waiver, the Committee, through its Construction Manager, Baybutt, was required to solicit at least three (3) bids for all work to be performed by new subcontractors, i.e. subcontractors who had not previously been employed on the Project as either filed or non-filed subcontractors. It was also required that the Committee hire a person to maintain all records of bid solicitations, bid contracts, and other documents verifying compliance with DCAM conditions. The Committee thereafter appointed Breezeway Farm Consulting as Procurement Officer to perform those functions. The Committee believes it put in place a procurement and oversight policy to comply with the DCAM conditions. Baybutt, under its contract with the Town, had the responsibility of seeking the three (3) bids and obtaining contracts with contractors. The bid solicitation documentation and contracts were submitted to Breezeway Farm Consulting, who was responsible for ensuring that the documentation complied with the conditions of the DCAM waivers, and that all required documentation was submitted to DCAM. PMA's responsibility was to provide a second review of the documentation, make any recommendation to the Committee, and obtain the authorization and signatures from the Committee. No one questions that documentation was filed with DCAM, and at no time did DCAM raise any issue about any failure to file or incompleteness of those documents provided to DCAM. As for the four (4) of the nine (9) contracts that the IG does find fault, the Committee maintains that bids were solicited in all of those cases, sometimes from three (3) contractors and sometimes from four (4).

At all times, the Committee believed that it complied fully with the DCAM waivers and conditions.

IG FINDING 5. Three of the nine construction contracts with new contractors lacked performance and payment bonds required under M.G.L. c. 149.

The IG's comments concerning three (3) of the nine (9) contracts and the failure to provide performance or payment bonds concern three (3) contractors: Dion & Sons, Smith-Hill Woodcraft and McManus & Rogers. As far as Smith-Hill is concerned, that was a contract for Twenty-Three Thousand Nine Hundred Dollars ($23,900.00), and it appears that under the provisions of G. L. c. 30B, §5, no performance bond was required. A payment bond was required for Fifty Percent (50%) of that contract price, which was not provided by the contractor. However, in lieu of the bond, Smith-Hill agreed that Fifty Percent (50%) of the contract price would be withheld until after completion and acceptance of their work by the Committee's architect and consultants. The contract with Dion and Sons was for over Eighty Thousand Dollars ($80,000.00) and, thus, did require a bond in the full amount of that contract. The work that Dion and Sons was to perform was on the gym floor and was critical. To keep the Project on track for a completion date of September 1, 2001, and at the same time to avoid financial risk to the Town, the Committee, through its consultants and Baybutt, like with Smith-Hill, imposed a Fifty Percent (50%) holdback on the Dion and Sons contract in lieu of requiring a bond. This was in addition to the ten percent (10%) retainage the Town held from all payments. The IG acknowledges that the action of the Committee was driven by these considerations and more importantly, that such arrangements did provide financial protection to the Town. (IG Report, p. 40) Because of the emergency, the Committee was left with little choice since delaying performance until a bond or bonds could be obtained would place the completion date for the

Project in serious jeopardy. Again, while bond compliance is certainly required under G. L. c. 149, and is desirable, the legislature has provided no penalty or other sanction for failure of a public authority to do so. Finally, in reviewing the issue of the McManus & Rogers bond with McManus & Rogers and the Town's consultants, it is the Town's understanding that the bond provided in the amount of Six Hundred Ninety-Nine Thousand Six Hundred Seventy-Eight Dollars ($699,678.00) covered both the floor remediation work and the unassigned labor contracts with McManus & Rogers.

IG FINDING 6. None of the nine construction contracts with new contractors included statutorily required provisions governing payment of prevailing wages, change orders, payment procedures, financial reporting, or interpretation of specifications.

As also discussed previously under the IG's Finding 1 in relation to the Committee's first contract with Baybutt of September 11, 2000, the Committee with each of the nine (9) new contractors sought to incorporate into each contract the original contract documents, specifications and general conditions. Under the second Baybutt contract, Baybutt was responsible for the procurement of the labor and materials, and in that regard, was to do that in compliance with all of the original construction documents. In turn, Baybutt incorporated the same clause in all contracts he arranged between the Town and contractors:

> It is agreed and understood that you will perform the work described here in strict accordance with the plans, specifications, general conditions, addenda and alternates applicable to this project and be bound by the same in your performance except as modified in writing by separate Change Order.

Thus, the Committee believes it met its legal obligation of including those mandatory statutory provisions in each of those nine (9) contracts. Also, as pointed out above, the omission of those provisions does not invalidate those nine (9) contracts since despite the appearance of a statutory

mandate, the public interest does not require that contracts be declared invalid for failure to include them in public construction contracts.

IG FINDING 7. Although the Building Committee required its legal counsel and its records manager to sign each construction contract, neither appears to have reviewed the contracts for compliance with applicable laws.

In this Finding, the IG claims that the attorneys and the Procurement Officer for the Committee failed to review the nine (9) new contracts. Inferentially, that conclusion is drawn from the failure in each of the contracts to include the statutorily mandated language and other requirements, and the IG's opinion that endorsements on those contracts included assurance of compliance with all applicable laws. The Committee believes that conclusion and opinion misstates the legal and practical effect of those endorsements, especially within the context of the DCAM waivers. As the attorneys advised the IG, the words, "Approval of Contract As To Form Only" is a certification that the signatories appear to have authority to execute the document. It does not serve as a guarantee that all of the necessary requirements of law have been met and included within that contract.[10] As to the Procurement Officer, the words, "Approval of Contract As To Appropriate Procurement Methods" is a certification that, to the best of his knowledge, procurement documents, those documents required for the DCAM waiver and public construction projects were filed. The policy and method of reviewing each of the contracts was described in the previous response to Finding 4(b). By the time each contract reached the Committee, PMA had obtained three (3) certifications and signatures: the Town Accountant certified as to the availability of funds, the Procurement Officer certified DCAM waiver and public construction conditions had been met, and the attorneys would have signed "Approved As

[10] This does not mean that legal counsel was unfamiliar with those contracts. From time-to-time, legal advice had to be provided concerning the interpretation, sufficiency and application of terms in those contracts as well as to compliance with the DCAM waiver conditions.

To Form." Under the circumstances in which the Committee found itself, the Committee not only set up an appropriate contract approval process, but it was a process that was functionally effective in adjusting to the exigencies of a difficult public project.

IG FINDING 8. Project records did not include weekly payroll reports for five contractors.

The contractors listed in Table 3 are all contractors who were under contract with ICC. The Committee accepted assignment of those contracts under a provision in the original Contract Documents that, at the option of the Committee, it could assume upon termination of ICC. Upon review of the records of the five (5) contractors listed in Table 3, it was discovered that those contractors provided no labor, but materials only. Corbin-Hufor provided operable partitions, Highland Seating provided the bleachers and auditorium seating, Penco Products provided lockers, Porter Athletics the athletic equipment, and Walker Specialties provided the stage curtain. Thus, no weekly payroll needed to be filed.[11]

IG FINDING 9. The Building Committee's business relationship with its owner's representative lacked basic contracting safeguard.

IG FINDING 9a. The Building Committee did not execute a written contract with the owner's representative.

The Committee does not agree with the conclusions set forth in the above Finding. On the Committee's part, there was no misunderstanding as to PMA's role as the Committee's representative. After termination, PMA was hired by the Committee to protect its interest in ensuring that Baybutt and the other contractors complied with terms of the original construction contract and the conditions of the DCAM waivers. While the waiver did not require the Committee to hire an owner's representative, DCAM recommends that such managers be hired

[11] Walker Specialties did provide minimal labor for a period of one (1) day, for which certified payrolls were obtained and received by the Town's consultants.

for public construction contracts. As pointed out above, Baybutt was responsible for putting in place the contracts with the contractors and required paperwork, which were then submitted to the Procurement Officer, who would check to ascertain that those documents met the requirements of the DCAM waivers and the documents necessary for public construction projects. PMA would then double check those documents and make a recommendation for signature and approval to the Committee. If problems arose from the documentation and submissions, PMA's responsibility was to work those problems out. In view of the fact that this was a troubled project, the Committee wanted a daily presence on-site to assist in the speedy resolution of problems. PMA's role was analogous to that of a project manager, a role that PMA in its proposal letter agreed to. Also, PMA's original monitoring of ICC's performance and oversight of the completion phase of the Project as the Owner's Representative was necessary for the litigation that the Committee knew would follow from ICC's termination. Of necessity, PMA's multiple roles required flexibility. While there may have been no written contract more specifically defining PMA's precise roles, the Committee and PMA, through their workings and relationship with each other, knew what PMA's duties and functions were.

IG FINDING 9b. **The Building Committee's decision to pay the owner's representative through the Building Committee's design contract cost the project more than $14,000 in unnecessary administrative costs.**

The Committee does not agree with the IG Finding that the payment of Fourteen Thousand Dollars ($14,000.00) was an unnecessary administrative expense. The DCAM waiver required that the architectural services of TLCR be retained on the Project. TLCR was already providing services under its original contract with the Town and, thus, no new contract was necessary. Under that original contract, upon default of the General Contractor, ICC, the

architect became entitled to additional fees. (See Architect's Contract, Article V,1.(d).) Also under that original contract, it was entirely appropriate for the Architect to hire special consultants. Upon advice of counsel, the Committee chose to invoke that provision to hire PMA, rather than using the Designer Selection law. The Committee and its counsel believe that this approach was entirely permissible. Also, the Committee was aware of the Ten Percent (10%) that was paid to TLCR, but was of the opinion that the fees the architect could have reasonably charged the Town under its original contract would have been reasonably equivalent to the Fourteen Thousand Dollars ($14,000.00) actually paid to TLCR for hiring a Special Consultant. In other words, either through the provisions of the Architect's contract, or through the Ten Percent (10%) payment to the Architect for a Special Consultant, the Town would have been paying the Fourteen Thousand Dollars ($14,000.00) to the Architect. Thus, the Committee believes this expense was not an unnecessary administrative expense.

IG FINDING 9c. **The Building Committee approved and the Town Accountant issued, a $30,910 illegal payment to the owner's representative during the review period.**

The Committee believes that the Thirty Thousand Nine Hundred Ten Dollars ($30,910.00) payment directly to PMA was not illegal. As pointed out above, payments for PMA's services were made through TLCR. Checks were made payable to TLCR, and then TLCR would process those checks, deducting its Ten Percent (10%) fee and sending the balance on to PMA. At one point, PMA made a complaint that it was not receiving payment on some of the checks for its services on a timely basis. In order to resolve the problem, the above check was made directly payable to PMA and a separate check to TLCR for its Ten Percent (10%) fee. While the Committee did approve and sign the check, it did not believe the payment illegal for it

was payment for services performed and a fee the Committee was under a contractual obligation to pay.

FINDING 9d. **The Building Committee did not monitor the cost of the services provided by the owner's representative.**

The Committee respectfully disagrees with the IG conclusion that it did not monitor costs. Neither the Building Committee nor the Town Accountant maintained any cost or analysis or spreadsheets. However, our attorneys, Callahan, Curtiss, Carey & Gates, have compiled a spreadsheet outlining the payments made to PMA. These records have been shared with the Committee, the Selectboard, and the Town Council in executive sessions. These records have been kept by our attorneys and have not been made public because of our attorneys' opinion that the release of such information may compromise the litigation that has been engendered by this troubled Project. During the Project, Baybutt also provided monthly cost reports that categorized each item, and PMA and the Procurement Officer maintained detailed records of payments to TLCR and the attorneys. The Committee is willing to provide this information at the conclusion of the litigation.

IG FINDING 10. **The Building Committee purchased excess school furniture and equipment.**

The Committee does not believe it purchased excess school furniture and equipment. The Committee appointed a subcommittee to determine the amount and type of equipment, purchase the actual equipment and oversee its installation. This also included technology - computers, security systems, phones, and language and speech labs. Originally, the Committee believed that the appropriate way to decide what furniture and equipment should be ordered for the school should be done in consultation with the teachers and school administration, including the

principal and superintendent. All decisions of the subcommittee were approved for execution by the full Building Committee, usually with the School staff in full attendance. That equipment and furnishings were ordered in 1999 and delivered to the building in September, 2000, the date ICC claimed the middle school would be ready for student occupation. When the items arrived, there was no place to put them. The Committee decided to store them in trailers, which required the Committee to provide insurance. The equipment was inventoried during the move to storage trailers. During the final phase of construction, it was again moved to a warehouse and when returned to the building upon completion of construction, it was inventoried again. When the school opened in September, 2001, some of the teachers' needs had changed from 1999 when the items were ordered. Vendors were contacted and no vendor would accept the furniture's return. In order to reduce the cost and to inventory the equipment that came from the trailer, the items were placed in the building's gym and inventoried. The school department agreed to disburse the furniture to the middle school classrooms after the inventory was completed. The Building Committee, at the request of the Town Council, requested that a full accounting of large purchases by the Committee be completed, including a full accounting for furniture, fixtures and equipment. The audit accounted for all equipment purchased by the Committee. The results of this audit were reported to the IG, but not mentioned in the Report. The IG's office visited the building to inspect the furniture prior to its disbursement throughout the middle school, not throughout the school system as identified in the Report. Over time, all of the furniture and equipment has been distributed to the middle school classrooms. The Committee appointed a Furniture, Furnishings and Equipment Subcommittee (FF&E) and a design consultant was retained to assist in deciding what were the school's furniture and equipment needs. The time delay between the date of ordering until the date of placement has required the Committee and

FF&E Subcommittee to make adjustments in the allocation of that equipment and furnishings. Again, the Committee does not believe, under the circumstances, that it purchased excess items of furnishings and equipment.

NOTE: The purchase of the computer desks is per the plans prepared by TLCR and approved in consultation with the School Department officials. The plan is in accordance with the school construction standards of the Department of Education, which allows for three (3) computer drops per classroom. The initial funding for school construction projects is born by the Town, and the Greenfield Town Council did not vote approval of any technology purchases until the Project was near completion, so that desks were purchased prior to the Council's approval of computer purchases. Ultimately, the school department requested, and the Town Council funded, the installation of a single computer per classroom.

IG FINDING 11. **The Building Committee's subcommittees did not fully document their official actions, as required by the open meeting law.**

IG FINDING 11a. **The Building Committee's Executive Committee did not prepare minutes of its meetings until December 2000.**

IG FINDING 11b. **The Building Committee's FF&E Subcommittee did not prepare minutes of its meetings.**

The IG is correct in that the Building Committee's FF&E Subcommittee did not prepare minutes of its meetings, nor does it appear that the Building Committee's Executive Committee did until December, 2000. However, those subcommittee discussions and recommendations subsequently came before the Building Committee, either in open or executive sessions, and records and minutes were made of those full committee meetings. Also, since the Committee and Town are engaged in litigation, from time-to-time the Committee has had to go into execu-

tive session. Minutes of those meetings are not to be released "as long as publication may defeat the lawful purposes of the executive session." G. L. c. 39, §23B. With the exception of the executive sessions, all discussions, recommendations and decisions of the FF&E Subcommittee and the Building Committee's Executive Committee, have been made public and subject to discussion in the meetings of the full committee. Building Committee meetings were held in the main offices of the school department, and meetings were frequently attended by school department staff, including the superintendent of schools and his staff, the principal, building maintenance staff, representatives of the media.

III. CONCLUSION.

While the Committee and IG may disagree over whether certain actions taken by the Committee were in full compliance with the statutory mandates under the bidding laws of the Commonwealth, it believes firmly, in the main, that it appropriately sought and followed the directives of DCAM in its emergency waivers, and certainly did not violate the intent and purpose of those bidding laws. As the IG Report indicates, there was no fraud or abuse in the way the Middle School Project was brought to completion. The primary directive to the Committee from the Town Council, Board of Selectmen and the School Committee was to complete the project on time for student occupation by September 1, 2001. This the Committee did, with the assistance and cooperation of DCAM, under very difficult circumstances. The audit by the Department of Education for project reimbursement is some four (4) to six (6) years away. The Committee is well satisfied that it fulfilled its obligation to the Town of Greenfield and has no doubt that full reimbursement will be forthcoming. Also, in addition to reimbursement, the litigation seeks payment as damages for the cost of the construction management, consultants, and floor damage.

Appendix B: Overview of Emergency Design and Construction Contracting Requirements

M.G.L. c. 149, the public building construction law,[72] permits public awarding authorities to dispense with required advertising and bidding procedures in cases of "extreme emergency" for work needed to preserve the health or safety of people or property. DCAM's prior approval is required unless the urgency of the situation makes it impossible to contact DCAM in advance.[73] If DCAM determines that an emergency waiver is warranted, DCAM may waive public notice and public bidding requirements for the work. The waiver must be obtained in writing.

M.G.L. c. 30, §39M, the public works construction law,[74] permits public awarding authorities to dispense with required advertising and bidding procedures in cases of "extreme emergency caused by enemy attack, sabotage, other such hostile actions or resulting from explosion, fire, flood, earthquake, hurricane, tornado or other such catastrophe." Only work necessary for "temporary repair and restoration to service of any and all public work in order to preserve health and safety of persons and property" may be performed under an emergency contract. A waiver of M.G.L. c. 30, §39M advertising requirements must be obtained in writing from DCAM.

M.G.L. c. 7, §§38A½-O, the designer selection law, permits expedited selection of a designer whenever the health or safety of people would be endangered, or when a deadline for action set by a court or federal agency cannot be met, because of the time required by the designer selection procedures. Local jurisdictions are required to adopt written designer selection procedures. These procedures should specify the

[72] M.G.L. c. 149 applies to public building contracts estimated to cost more than $25,000.

[73] In such a case, the awarding authority may start the emergency work but must contact DCAM as soon as possible to request approval. If DCAM subsequently disapproves the emergency request, work must be stopped immediately, although the contractor is still entitled to payment for work done prior to the stop work order.

[74] M.G.L. c. 30, §39M also governs public building contracts estimated to cost between $10,000 and $25,000.

procedures to be used in an emergency, which person or entity within the jurisdiction has the power to invoke them, and which requirements may be waived.

The Office's manual on *Designing and Constructing Public Facilities*, which can be accessed at www.mass.gov/ig, provides more detailed information on these and other requirements for public construction projects.