

Procurement Bulletin

Massachusetts Office of the Inspector General

Congratulations to New MCPPOs!

The Inspector General's office extends congratulations to the most recent recipients of MCPPO designations based on applications reviewed between June 30, 2001 and September 15, 2001.

MCPPO

Madeleine B. Boisvert, City of Lowell

Timothy R. Carroll, Town of Chilmark

Corinne A. Delaney, Tewksbury Housing Authority

Alice G. Santos, City of Lowell

John J. Story, Town of Danvers

Evelyn D. Wilson, Salem State College

Associate MCPPO

Marilyn L. Gallardo, Groton Dunstable RSD

Bobby Lam, Town of Brookline

Pamela Themelis, City of Lowell

MCPPO for Design and Construction Contracting

Eric A. Hart, Town of Halifax

MCSPPO for Design and Construction Contracting

Judith L. O'Kula, DEM—Resource Conservation

New Continuing Education Opportunities

The MCPPO program will be offering opportunities to earn continuing education credits by studying materials that will be available on our website and taking a written exam. The cost for these self-administered continuing education opportunities will be \$15 per credit.

Check our website at www.state.ma.us/ig for upcoming opportunities.

Notice to Procurement Bulletin subscribers:

In order to save printing and mailing costs, the Office will soon be distributing the *Procurement Bulletin* via e-mail. If you would like to be included on the distribution list, please fax your name, jurisdiction and e-mail address to 617-723-2334, Attn: Beth Hayward.

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Prevailing Wage Update

The Division of Occupational Safety (DOS) recently issued a notice to awarding authorities and contractors concerning drivers who haul bituminous concrete and ready-mix concrete.

Drivers who deliver bituminous concrete and ready-mix concrete to public construction projects, for which a prevailing wage schedule dated on or after August 22, 2001 has been issued, are covered by the Prevailing Wage law, M.G.L. c. 149, §§26-27D, only

while they are on-site at the public construction project. Those drivers are not covered by the prevailing wage law while off-site, including over-the-road driving and picking-up materials.

This applicability determination is codified in a decision of the Department of Labor and Workforce Development, Division of Occupational Safety (DOS) issued on August 21, 2001 pursuant to M.G.L. c. 149, §27A. That decision was issued in response to an

appeal brought by 88 contractor employees and the Construction Industries of Massachusetts who argued for the repeal of an administrative policy that required drivers delivering bituminous concrete to be paid prevailing wage rates for time spent traveling over-the-road. That policy also required ready mix drivers to be paid prevailing wage rates for time spent traveling over-the road.

The August 21, 2001 decision reasons that the

prevailing wage law expressly limits the extent of DOS's authority to set wage rates only to workers at a work site except where the law specifically states that drivers who haul gravel and fill must be paid prevailing wage rates for time spent traveling over-the-road. The Massachusetts Supreme Judicial Court (SJC), in *Construction Industries of Massachusetts v.*

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Natural Gas Notes

The procurement of natural gas contracts is a frequent topic of calls to our M.G.L. c. 30B Team. There are primarily two key questions asked:

1. Are natural gas contracts exempt under M. G.L. c. 30B, §1(33) (the 'energy' exemption) or are they subject to a sealed bid or proposal process?
2. May natural gas contracts be procured using the sole-source provisions of M.G.L. c. 30B, §7?

The answer to both ques-

tions is, *it depends!* (Keep reading, there will be an explanation!)

Please note that this article discusses only natural gas contracts, and does *not* apply to other fuel sources such as gasoline, fuel oil and propane, all of which are supply contracts and must be competitively procured.

Natural gas contracts are split between two entities, the **local distribution company** ("LDC") who delivers the gas, and the **supplier** who provides the gas to the LDC. The two different con-

by Helen Flaherty

tracts are treated differently under M.G.L. c. 30B.

The jurisdiction is required by the Department of Telecommunications and Energy, ("DTE") to contract only with the LDC whose territory includes the jurisdiction's geographical area (there is only one LDC per geographic area). These contracts fit squarely within the sole-source procurement provision of M.G.L. c. 30B, §7(c), because only one source exists for these services.

-continued on the next page-



Natural Gas Notes , *continued*

A natural gas **supply** or **commodity** contract is with a supplier of natural gas. The jurisdiction, as the end user, contracts directly with a supplier of natural gas for the supply of the commodity alone, without any delivery charges. LDCs are required to accept these contracts and must deliver gas supplied by an independent supplier to the customers in their geographical area. Natural gas customers within the geographical area of an LDC will also contract with the LDC for separate delivery charges. The supplier charges the customer the agreed-upon rate, and the LDC collects its delivery charge. Billing can be either together or separately.

The Electricity Restructuring Act of 1997 added two exemptions to the competitive procurement requirements of M.G.L. c. 30B. M.G.L. c. 30B, §1(32) exempts energy aggregation¹ contracts, and M.G.L. c. 30B, §1(33) exempts energy contracts. The problem in interpreting these two exemptions is that “energy” is not defined in any applicable statute, and most of the Electricity Restructuring Act applies to electricity.

A few years ago, after consulting with the Massachu-

setts Division of Energy Resources (DOER), our Office adopted a ‘wait-and-see’ position with respect to whether natural gas commodity contracts are considered “energy” for purposes of the exemption from M.G.L. c. 30B. Since that time, the gas industry has come to mirror electricity in its horizontal structure. Whereas we used to advise jurisdictions to be on the safe side and bid natural gas contracts, we now advise that natural gas commodity contracts appear to fit within the exemption for energy contracts under M.G.L. c. 30B, §1(33).

Of course, we always recommend obtaining the benefits of competition, especially in an industry like natural gas which lends itself so well to competitive pricing. Since natural gas contracts are exempt from the sealed competition requirements of M.G.L. c. 30B, jurisdictions can utilize tools such as online bidding.

If your jurisdiction chooses to issue an RFP for an exempt energy contract, we would advise you to consult the language in M.G.L. c. 30B §6(k) (an awarding authority may negotiate items in an energy contract post-proposal if such items are

identified as negotiable in the RFP solicitation).

While natural gas supply contracts are exempt, like electricity contracts, jurisdictions are required to send a copy of the contract and a report of your jurisdiction’s process which led to the contract award, to the DTE, DOER and OIG within 15 days of contract execution. See, M.G.L. c. 30B, §1(33).

Collaborative purchases of natural gas can be handled like any other collaborative purchase. That is, two or more jurisdictions may pool their natural gas requirements in order to purchase at a lower rate based upon volume discount. This arrangement is also exempt under M.G.L. c. 30B, §1(33). The reporting requirement of §1(33) also applies to collaborative natural gas contracts.

LDCs typically offer “free” gas line installation to building owners who are installing gas service, if they agree to be contractually bound to take gas for a set period of time (usually about 5 years, depending on the extent of construction necessary). This agreement obligates the building owner to continue *delivery* of natural gas; it does not obligate the owner to buy from the company who is

installing the line. (Actually, such is not possible as previously discussed since the supply and delivery functions of natural gas have been separated by industry deregulation.) The owner can still switch suppliers without impacting its agreement with the LDC, and the LDC must deliver from the designated supplier. All the owner is agreeing to do, essentially, is not to switch off the gas (by, for example, converting to oil).

If you have any questions about your energy procurement, please call Helen Flaherty at 617-727-9140. For technical or consumer-oriented questions, contact the DOER at 617-727-4237.

1. In an “aggregation” contract, a city or town enters into an energy supply contract on behalf of its residents.

Chapter 30B Frequently Asked Questions (FAQ)

Here is an update to some of this Office's most frequently asked questions. We hope the following are helpful.

May I increase the amount of supplies or services in a contract?

Once you have awarded a contract, Chapter 30B allows you to increase the amount of supplies or services to be provided under a contract by 25% of the total contract price. However, the unit price of the supply or service must remain the same.

When may I negotiate with a bidder in order to save money?

If you invited bids, you and the low bidder only may negotiate the price of a contract downward, without any change in the quantity or scope of services. This would not be prejudicial to fair competition because the low bidder will be awarded the contract anyway.

If you obtained oral or written quotations for a contract that is less than \$25,000, you may negotiate the price downward with all of the vendors that gave you a quote. You should treat all of the vendors equally.

Does M.G.L. c. 30B require majority vote approval for real property

leases having a duration longer than three years, as it does for supplies and services?

No. Chapter 30B does not limit the duration of real property contracts. However, other laws may place a limit on the duration of such contracts. Your town counsel or city solicitor can provide further advice on this area of the law.

May I use specifications provided by a vendor and if I do, must the vendor supplying the specifications be prohibited from submitting a bid/proposal for the contract?

The use of vendor-supplied specifications is not prohibited, but a word of caution is in order. When you solicit specifications from the vendor community, you should consult similar specifications from several vendors and consider them as "starting points" for the development of specifications that will meet your particular needs. You should also recognize that some vendor-supplied specifications may be proprietary in nature. Under Chapter 30B, awarding authorities may only use proprietary specifications when no other manner of description suffices.

A vendor who supplies

specifications to an awarding authority is not prohibited from submitting a bid or proposal for the contract, so long as there is open and fair competition.

We recently solicited proposals for a management contract. One proposer failed to submit a certificate of good faith form as required by M.G.L. c. 30B and in conformance with the request for proposal (RFP) requirements. Must we reject this proposal?

Yes. Massachusetts courts have held that an awarding authority must reject a bid that fails to meet a substantive statutory requirement. Since M.G.L. c. 30B requires that bidders and proposers include a certificate of good faith with their bids or proposals, it is our opinion that you may not waive the proposer's omission as a minor informality and you must reject that proposal.

What Massachusetts laws apply to construction contracts costing less than \$10,000?

M.G.L. c.149, §29 requires you to obtain a payment bond from the contractor in the amount of one-half of the cost of the contract for all construction contracts costing more than \$2,000.

You must also comply with the prevailing wage law for all construction contracts, regardless of the cost. To obtain prevailing wage rates for different types of construction labor, contact the Division of Occupational Safety at (617) 727-3492.

Are engineering services exempt from Chapter 30B?

Not necessarily. Engineering services may fall under the exemption for contracts with designers in M.G.L. c. 30B, §1 (b) (15), but only if those services are in connection with a construction project. The definition of a designer is found in M.G.L. c. 30B, §2.

A designer is a person performing any of the following in connection with the construction, reconstruction, alteration, repair, development, installation, maintenance, or demolition of any road, bridge, or other physical property: preparation of master plans, studies, surveys, soil tests, cost estimates or programs; preparation of drawings, plans or specifications; supervision or administration of a construction contract; or construction management or scheduling.

Chapter 30B Frequently Asked Questions (FAQ) , cont.

Design contracts which are exempt from competitive procurement include:

Preparation of plans and specifications for public works construction projects such as road construction or sewer line installation.

Hiring a licensed site professional to assess hazardous waste contamination in connection with a remediation project.

If you are hiring a designer in connection with a building project estimated to cost more than \$100,000, you must follow procedures in accor-

dance with M.G.L. c.7, §§ 38A½-0.

May I use the price quotation process in M.G.L. c. 30B to procure construction contracts estimated to cost more than \$10,000, but not more than \$25,000?

No. M.G.L. c. 30, §39M(d) only permits the use of the *bid* process under M.G.L. c. 30B(5) for construction projects estimated to cost more than \$10,000 but not more than \$25,000. Remember, you have the option of using the M.G.L. c. 30B bid process or the M.G.L. c. 30, §39M process for construction projects

within this price range. Regardless of which you choose, you need to require prevailing wages and a 50% payment bond, but only M.G.L. c. 30, §39M requires an advertisement in the *Central Register* and a 5% bid deposit. See *Designing and Constructing Public Facilities* at www.state.ma.us/ig/igpubl.htm for further information about construction procurement procedures.

Who do I call for advice on a design contract under M.G.L. c. 7 and construction contracts procured under M.G.L. c. 30, §39M and M.G.L. c. 149?

You should contact the Attorney General's Fair Labor and Business Practices Division at 617-727-3476. They are charged with enforcing the construction bid laws and the designer selection law.



Prevailing Wage Update, Cont.

Commissioner of Labor and Industries, 406 Mass. 162. 546 N.E. 2d 367 (1989), affirmed that bituminous drivers are more than just materialmen and must be paid prevailing wage rates while on-site, although it did not render an opinion on whether those drivers should be paid prevailing wage rates for time spent traveling over-the-road. Where a case remains silent, it is the

responsibility of the administrative agency to provide guidance. The decision makes clear that the prior administrative policy, requiring prevailing wage rates be paid to drivers delivering bituminous concrete over-the road, was an improper expansion of the law.

DOS is encouraging awarding authorities to notify all contractors who may be engaged in

projects involving the delivery of bituminous concrete and ready-mix concrete. Contractors are encouraged to notify workers that the payment of prevailing wage rates for this category of drivers is required only while on-site at a public construction project. As a reminder, certified weekly payroll reports must be submitted to awarding authorities for all applicable workers.

Copies of the decision are available from DOS. If you have questions concerning this matter, contact DOS at (617) 727-3492.



**Massachusetts Certified Public Purchasing Official Program
Massachusetts Office of the Inspector General**

State House Station
P.O. Box 270
Boston, MA 02133
(617) 727-9140
(617) 523-1205

For an in-depth description of courses offered, please visit our website at www.state.ma.us/ig and download a course catalog, or you may call 617-523-1205 to request a catalog, or fax a request to 617-723-2334.

Courses available in your own city or town:

Bidding Basics and Contract Administration

This brief four-hour seminar is packed with the basics you need to begin understanding public purchasing for local governmental bodies in Massachusetts. You may earn .4 CEUs and 4 CPEs for completion of this course. This course does not contain an examination and may not be applied toward MCPPO certification or recertification. You will receive a certificate of completion. This seminar can be offered at a location in your jurisdiction with a minimum of 35 attendees.

Bidding For Better Results

Participants in this six-hour seminar will practice writing and critiquing specifications to maximize best value for supplies and services. Participants will also learn the best way to handle late bids and how to avoid the appearance of bid splitting. There is no written examination. This seminar qualifies for 6 continuing education credits that may be applied toward MCPPO and MCSPO recertification.

Local Government Real Property Transactions Under M.G.L. c. 30B

This 5-hour seminar covers the M.G.L. c. 30B request for proposals process for the acquisition and disposition of land and buildings by local governmental bodies. This seminar qualifies for 5 continuing education credits that may be applied toward MCPPO recertification.

Spotlight on Schools: Procurement Issues, Challenges and Trends

This 6-hour seminar focuses on the specialized issues and challenges confronting school business officials and staff members. Participants will apply the principles of public procurement under M.G.L. c. 30B to traditional and emerging areas of school buying. This seminar qualifies for 6 continuing education credits that may be applied toward MCPPO recertification.

Call Mike Callahan to schedule a seminar in your area at 617-523-1205.

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The Office of the Inspector General does not discriminate on the basis of race, color, national origin, ancestry, religion, sex, age, disability, sexual orientation, political affiliation, or Vietnam-era or disabled veteran status in its employment, admission policies, or in the administration or operation of, or access to its programs and policies. The Office of the Inspector General does not discriminate on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973. Inquiries pertaining to the Office's non-discrimination policy for MCPPO programs may be addressed to Mike Callahan, Program Director, at 617-523-1205.



The Massachusetts Office of the Inspector General has been reviewed and approved as an Authorized Provider of continuing education and training programs by the International Association for Continuing Education and Training. Authorized Provider #101811.



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The Massachusetts Office of the Inspector General is registered with the Department of Education to award professional development points (PDP).



MASSACHUSETTS CERTIFIED PUBLIC PURCHASING OFFICIAL PROGRAM REGISTRATION

Office of the Inspector General
(617) 727-9140 or (617) 523-1205 Fax: (617) 723-2334

REGISTRATION INFORMATION:

Registration and payment must be received 10 days prior to course date in order to process a confirmation.

OFF-SITE REGISTRATION AND PAYMENT MUST BE RECEIVED 30 DAYS PRIOR TO SEMINAR DATE IN ORDER FOR THIS OFFICE TO CONFIRM SEMINAR. Off-site seminars will be confirmed based on a minimum of 50 registrants. In the event of cancellation of an OFF-SITE location, an alternate date will be offered. Confirmation letters, with directions, will be mailed 10 days prior to seminar.

GOVERNMENT/NON-PROFIT COURSE PRICE:

Government employees shall include all employees of the commonwealth, employees of the commonwealth's political subdivisions, employees of other state governments, employees of the federal government and employees of any other municipality, county, or local district. Non-Profit employees include any employee of a 501(c)(3) corporation. Proof of non-profit status must be provided with registration.

RESERVE SEATING:

To reserve seating, fax registration and purchase order to (617-723-2334).

MAIL ORIGINAL TO:

Commonwealth of Massachusetts
Office of the Inspector General
P.O. Box 270- State House Station
Boston, MA 02133
ATTN: MCPPO

MAKE CHECK PAYABLE TO: OIG

SUBSTITUTIONS/CANCELLATIONS:

Each seminar is limited and filled on a space available basis. No refunds for cancellations. Registration transfer to someone in your organization is possible with prior notice. The OIG reserves the right to cancel/reschedule any seminar and is not responsible for any costs incurred by registrants. Terms and conditions may change without notice. Alternate course dates may be substituted in the event of an emergency, upon notification. Change in seminar date and/or cancellations received (BY FAX) less than 2 business days prior to the seminar date are subject to a \$25 transfer fee - NO-SHOWS WILL BE INVOICED A \$50 SERVICE CHARGE.

FOR MORE INFORMATION:

Please contact the Program Director Mike Callahan at (617) 523-1205.

THIS FORM MAY BE DUPLICATED

PAYMENT:

- CHECK/M.O. PURCHASE ORDER #
 I/E/IV

PUBLIC CONTRACTING OVERVIEW	3-day seminar	Tuition:	\$300 for government/non-profit employees \$500 for all others
<input type="checkbox"/> JANUARY 8-10, 2002		METHUEN	
<input type="checkbox"/> JANUARY 29-31, 2002		BOSTON	
<input type="checkbox"/> MARCH 19-21, 2002		TAUNTON	
<input type="checkbox"/> MAY 8-10, 2002		TEWKSBURY	
SUPPLIES & SERVICES CONTRACTING	3-day seminar	Tuition:	\$300 for government/non-profit employees \$500 for all others
Prerequisite: Public Contracting Overview			
<input type="checkbox"/> FEBRUARY 27- MARCH 1, 2002		BOSTON	
<input type="checkbox"/> APRIL 2-4, 2002		GREENFIELD	
<input type="checkbox"/> APRIL 10-12, 2002		TAUNTON	
<input type="checkbox"/> MAY 21-23, 2002		AMHERST	
<input type="checkbox"/> JUNE 4-6, 2002		BOSTON	
DESIGN & CONSTRUCTION CONTRACTING	3-day seminar	Tuition:	\$400 for government/non-profit employees \$600 for all others
Prerequisite: Public or State Contracting Overview			
<input type="checkbox"/> MARCH 5-7, 2002		BOSTON	
<input type="checkbox"/> APRIL 23-25, 2002		TAUNTON	
<input type="checkbox"/> MAY 15-17, 2002		MARLBORO	
LOCAL GOVERNMENT REAL PROPERTY TRANSACTIONS UNDER M.G.L. c. 30B	1-day seminar	Tuition:	\$75 for government/non-profit employees \$125 for all others
<input type="checkbox"/> JANUARY 14, 2002		BOSTON	
<input type="checkbox"/> MARCH 15, 2002		BOSTON	
BIDDING FOR BETTER RESULTS	1-day seminar	Tuition:	\$90 for government/non-profit employees \$150 for all others
<input type="checkbox"/> MARCH 11, 2002		BOSTON	
<input type="checkbox"/> MAY 13, 2002		BOSTON	
DRAFTING A MODEL IFB	Self Paced BY MAIL Program	Tuition:	\$60 for government/non-profit employees \$100 for all others
<input type="checkbox"/> Disk Program requiring Microsoft Word 7.0 or higher Registration for this course must be accompanied by a check			
SPOTLIGHT ON SCHOOLS: PROCUREMENT ISSUES, CHALLENGES, AND TRENDS	1-day seminar	Tuition:	\$90 for government/non-profit employees \$150 for all others
<input type="checkbox"/> JANUARY 25, 2002		BOSTON	
<input type="checkbox"/> MARCH 25, 2002		BOSTON	
<input type="checkbox"/> MAY 3, 2002		CHICOPEE	
DRAFTING SPECIFICATIONS FOR PUBLIC SAFETY VEHICLES	1-day seminar	Tuition:	\$75 for government/non-profit employees \$125 for all others
<input type="checkbox"/> FEBRUARY 5, 2002		BOSTON	
<input type="checkbox"/> APRIL 8, 2002		STOW	
<input type="checkbox"/> JUNE 11, 2002		BARNSTABLE	

NAME: _____	PHONE: _____
SIGNATURE OF APPLICANT: _____	E-MAIL: _____
ORGANIZATION/JURISDICTION: _____	
TITLE: _____	FAX: _____
ADDRESS: _____	
CITY: _____	STATE: _____ ZIP CODE: _____
HOW LONG HAVE YOU BEEN EMPLOYED AS A PURCHASING OFFICIAL? _____	
Do you need special accommodations? _____	
American Institute of Architects (AIA) members must provide a membership number for LU credit. _____	

New Continuing Education Course: *Drafting Specifications for Public Safety Vehicles*

Drafting an invitation for bids (IFB) for large public safety equipment such as fire trucks, ambulances, and police cruisers can be a daunting challenge. Some seeming “shortcuts” such as using manufacturer’s specifications may in fact be traps for the unwary: the IFB could unintentionally result in proprietary specifications.

Proprietary specifications are only permitted under M.G.L. c. 30B when the awarding authority makes a written determination that no other manner

of description suffices. Proprietary specifications are a common source of bid protests and typically result in greater costs to the awarding authority. However, a fire or police department can draft specifications, or modify existing specifications, to avoid limiting competition.

Help in drafting and modifying specifications for public safety vehicles is on the way. The Inspector General’s Office is developing an MCPPO continuing education offering: **Drafting Speci-**

fications for Public Safety Vehicles.

This one-day course will consist of a limited lecture segment on the various types of specifications, interspersed with an intensive hands-on workshop in which participants evaluate and convert actual manufacturer’s specifications into non-proprietary, performance-based specifications.

Questions will be answered and participants may bring to class any IFBs for public safety vehicles cur-

rently in progress for workshop use and commentary. Anyone responsible for purchasing large capital equipment can benefit from this workshop. There is no prerequisite to attend.

The course provides 5 continuing education credits and costs \$75 for government or non-profit employees and \$125 for all others.

For more information and course schedule, please call Mike Callahan, MCPPO Program Director, at 617-523-1205.

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