

Important Information from the OIG

Angela Atchue Leaving the OIG

After three years with the Office of the Inspector General, Deputy General Counsel Angela Atchue will be assuming the position of General Counsel with the Public Facilities Department for the City of Boston. Angela has made an invaluable contribution to our 30B Team and our MCPPO training program. We wish her all the best in her new endeavor.

Public Procurement Charts

The Office of the Inspector General created charts for local officials to use as a quick reference guide on public procurement procedures that must be followed pursuant to the following Massachusetts General Laws: M.G.L. c.7, §§38A½-0; M.G.L. c.30, §39M; M.G.L. c.30B; and M.G.L. c.149.

The charts may accessed at <http://www.mass.gov/ig/mcppo/charts06.pdf>.

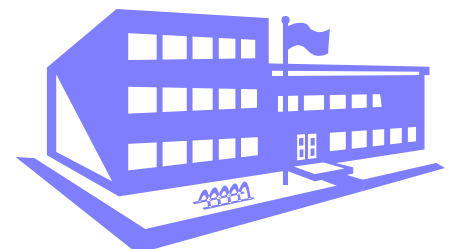
Congratulations!

As you may know, section 11 of Chapter 46 of the Acts of 1997 requires that the procurement officers of charter schools participate in the MCPPO program conducted by this office in order to earn a Massachusetts public purchasing official certificate. The following Commonwealth charter school employees have hereby satisfied the training requirement by recently attending and successfully completing the **Public Contracting Overview** seminar or the **Charter School Procurement** seminar:

- Steve Bissonette, Business Manager, SABIS International Charter School
- William Contois, Facilities Manager, North Central Charter Essential School
- Catherine Dalton, Bookkeeper, Champion Charter School of Brockton
- C. Sterling Davis II, Co-principal, Robert M. Hughes Academy Charter School
- Richard E. Dragon, Business Manager, The Match School
- Joan Mark-Bell, Business Manager, Upham’s Corner Charter School
- Michelle Pirelli McKenna, Business Manager, Francis Parker Charter School
- Thomas Paul, Director of Business and Technology, Atlantis Charter School
- Eileen Riley, Business Manager, Kipp Academy Lynn
- Barbara Severin, HR Manager, Foxborough Regional Charter School
- Rosalie Stone, Business Manager, Conservatory Lab Charter School
- Rick Velleux, Business Manager, Mystic Valley Regional Charter School
- Ann Yurek, Accountant, Lowell Commonwealth Charter Public School

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OIG Articles

EMPLOYMENT AGREEMENTS AND M.G.L. c.30B

Massachusetts General Laws, Chapter 30B applies to contracts for the procurement of supplies, services and real property and the disposal of supplies, and real property by a governmental body. Chapter 30B defines services as “the furnishing of labor, time, or effort by a contractor, not involving the furnishing of a specific end product other than reports.” M.G.L. c.30B, §2. Employment agreements, however, are not subject to the competitive bidding requirements of Chapter 30B. Chapter 30B defines an employment agreement as “any agreement between a governmental body and an individual pursuant to which (1) the governmental body withholds or is required to withhold taxes on the individuals wages pursuant to the Internal Revenue Code or chapter sixty-two B; or (2) the governmental body and the individual stand under common law rules in the legal relationship of employer and employee.” M.G.L. c.30B, §2

In Massachusetts, common law provides that one is considered an employee, and not an independent contractor, unless each of the following three elements is applicable:

1. the services are performed free from the control or direction of the employing enterprise;
2. the services are performed outside of the usual course of business; and
3. the services are performed as part of an independently established trade, occupation, profession, or business of the worker.

The following examples may assist you to interpret whether your set of facts constitutes an employer and employee relationship for the purposes of Chapter 30B:

Example 1: The town’s building committee is hiring an administrative assistant to file notices, respond to correspondence, and report the minutes of meetings. The administrative assistant’s immediate supervisor will require that he or she file notices and respond to correspondence according to previously established office policy.

In this example, it appears that the administrative assistant would fall under the common law definition of employee in that he or she would not have the right to control the methods utilized to complete his or her work. Further, the administrative work to be done cannot be considered outside the normal course of the town’s business, nor is the person to be hired as part of an independently established trade. Because the administrative assistant will be considered an employee of the town, Chapter 30B would not apply to the hiring.

Example 2: The city’s board of health is hiring a stenographer to take the minutes of board meetings and submit those minutes to the board within 24 hours of each meeting. The board of health is not concerned with how the minutes are taken, as long as they are timely submitted.

In this example, the stenographer is free from the control of the board, the taking of the minutes is performed outside the usual course of business, and the stenographer performs his or her services as part of an independently established trade, occupation, or business. The stenographer is considered an independent contractor who is providing a service to the board that is subject to the competitive bidding requirements of M.G.L. c.30B. Whether the board will follow sound business practices, solicit quotes, or solicit bids or proposals will be determined by the estimated cost of the services for the full term of the contract.

Example 3: A high school needs to hire per diem substitute teachers. The school board decided to use a temporary agency through which to hire the substitutes. The temporary agency will pay the substitute teachers, and the school board will pay the temporary agency for the services of providing the substitute teachers.

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OIG Articles cont.

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In this example, although the school will most likely be directing the substitute teachers in their duties, the agreement is between the school board and the temporary agency and is therefore a service subject to M.G.L. c.30B. However, if the school board had decided to hire the substitute teachers directly, the transaction would be an employment agreement, excluded from the provisions of M.G.L. c.30B, as the contract would be between the school and the substitute teachers, and the school would have control over the substitute teachers.

Example 4: A city is hiring an individual to develop its website. The city has a specific set of tasks for the individual to perform as defined in the scope of services. The city may want to have the individual perform any other web services that may arise in the future. The city is unsure of whether they should hire the individual as an employee or as an independent contractor.

If the city wants the flexibility to assign additional tasks, it may be prudent to hire the individual as an employee rather than have to procure a new contract each time the city needs additional web services that were not part of the original scope of services.

The above examples are common situations. It is important to note that a governmental body has discretion to hire an individual as an employee or as an independent contractor, based upon the needs and budget of the jurisdiction. There may be situations, such as Example 4, where one governmental body may prefer to have an employee relationship, but may not have the financial capability to add another individual to its payroll.

If you have any further questions on employment agreements, please contact your legal counsel or contact our office's Chapter 30B hotline at 617.722.8838 to speak with an attorney.

Chapter 30B Questions and Answers

Q.1. My town is procuring actuarial services and we are interested in having a local certified public accountant provide those services. Are actuarial services exempt from Chapter 30B?

A.1. No. Actuarial services are subject to the competitive bidding requirements of Chapter 30B. This office interprets exemption 1(b)(15) to exempt only those services that can reasonably be restricted to the professions specified therein, which include services to be performed by a certified public accountant. A CPA may perform actuarial services, but because such services cannot reasonably be restricted to CPA's, it is this office's opinion that actuarial services are not exempt under M.G.L. c.30B, §1(b)(15).

Q.2. I am the business manager for a high school, and the town's CPO delegated purchasing authority to me for the high school. I am considering leasing photocopier machines for five years. Must the majority vote requirement for contracts exceeding three years in length be obtained by a vote at town meeting or by a vote of the school committee?

A.2. Chapter 30B, §12 requires that majority vote approval be obtained from your governing body, which in this case, is a town meeting vote. However, if your high school was part of a regional school district, an affirmative vote by two-thirds of the members of the school committee would need to be obtained. If you have questions regarding majority vote approval, please contact your CPO or legal counsel.

Q.3. My city received federal grant money to provide child-care assistance to low-income residents. The eligible residents choose their child-care provider from a city approved list of individuals or non-profit entities. After the city verifies the child's attendance, the city pays the child-care provider for services rendered. Is this transaction subject to the competitive bidding requirements of Chapter 30B?

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Chapter 30B Questions and Answers, cont.

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A.3. No. This contract is a grant agreement, which is specifically excluded from the definition of services found in section 2 of Chapter 30B. A grant agreement is defined as an agreement between a governmental body and an individual or non-profit entity, the purposes of which is to carry out a public purpose of support or stimulation instead of procuring supplies or services for the benefit of the governmental body. Although there is a contract between the child-care provider and the city, the agreement is to provide child-care services to residents, not city employees. This office recommends that all municipalities who participate in such child-care agreements work with their legal counsel and the appropriate state and federal agencies to ensure compliance with all state and federal laws that govern these arrangements and the licensing and reporting requirements of child-care providers.

Q.4. I am the CPO of a water district that has received federal grant money for purchasing emergency equipment. Is the use of the federal grant money subject to the competitive bidding requirements of Chapter 30B?

A.4. Yes. Chapter 30B applies to every contract for the procurement of supplies and services by a governmental body, the source of the funds is irrelevant. However, where you are using federal assistance or contract funds, and a provision of Chapter 30B would prevent compliance with mandatory provisions of federal law and regulations, section 1(d) allows you to waive that specific Chapter 30B provision. If you are unsure whether a specific provision of Chapter 30B would prevent compliance with federal law or regulations, please contact your legal counsel.

Q.5. I am the purchasing agent for a regional school district. I recently solicited quotes for fuel oil. I would like to enter into a contract with the lowest, responsive, and responsible vendor, but the cost of the contract will exceed \$100,000. May I enter into a contract with this vendor?

A.5. No. Chapter 30B requires that you solicit sealed bids or proposals for any contract in the amount of \$25,000 or more. In addition, any contract for supplies or services in the amount of \$100,000 or more must be advertised in the *Goods and Services Bulletin*. Any contract entered into in violation of the requirements of Chapter 30B is invalid and no payment can be made. You may not enter into this contract because you did not conduct an advertised bid or proposal process in compliance with the provisions of Chapter 30B.

Q.6. I am the CPO of a town. My town wants to enter into an agreement with a bank that allows residents to pay their municipal tax bills online. There would be an agreement between the town and the bank, but the town is not paying for the services, rather the bank receives payment by charging a fee to residents who pay their municipal tax bills by credit card. No fee is charged to residents who pay their municipal tax bills via an electronic check. Must this online bill payment service be procured using Chapter 30B?

A.6. Yes. Chapter 30B applies when there is a contract between a governmental body, such as your town, and a vendor to provide service. It makes no difference that the residents are making payment to the bank as opposed to the town, as the applicability of Chapter 30B is not contingent on a governmental body making payment for services. To determine the applicable provisions of Chapter 30B, you need to estimate the amount of credit card fees the bank will collect from residents for the length of the contract. If the total fees are estimated to be less than \$5,000 over the contract term, you will use sound business practices to procure the online bill payment service. If the amount is \$5,000 or more, but less than \$25,000, you must solicit three price quotes. If the amount is \$25,000 or more, you must conduct either an IFB or RFP process.

RECENT PUBLICATIONS

Letter to Dana Keenan, Town Administrator of the Town of Webster, regarding a public works design contract, June 2006

This office received a complaint regarding a public works design contract entered into in 1994 between the town of Webster and the design firm, Camp Dresser & McKee (CDM). CDM was reimbursed for labor and overhead costs as determined by CDM, and was paid a profit markup. The contract did not include an end date. Although there is no specific law that applies to the procurement of design services for non-building public works projects, this office is of the opinion that the town is required to ensure that it is receiving a competitive price. This office advised the town to expeditiously advertise a new contract for design services wherein the contract clearly states the contractor's responsibilities, the maximum contract value, an estimate of required work hours, and a fee structure.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/websterl.pdf>.

Letter to Daniel Mylott, Mayor of the City of Fitchburg, regarding the removal of city-owned fill material from the city's gravel pit, August 2006.

This office received a complaint regarding the removal of fill material by a local business from the city's gravel pit. The city had entered into an agreement with Ron Bouchard's Auto Sales, Inc. (Bouchard) whereby Bouchard would receive fill material and receive favorable tax treatment from the city and, in return, Bouchard would refurbish a blighted area that included the demolition of a motel. The town estimated the value of the fill material to be between \$10,000 and \$13,500, which fell below the \$25,000 dollar threshold of M.G.L. c.30B, §16; however, there was no documentation to support the estimate. In order to remove the fill material, a trucking firm was granted unfettered access to the city-owned property for two weeks, which this office deemed imprudent. This office recommended that any similar future agreements be in writing and include proper safeguards.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/fitchbrg.pdf>.

Letter to the Board of Selectmen, Town of West Brookfield, regarding payroll and operations of the West Brookfield Water Department's Ware Point Road

Greensand Plant, August 2006.

This office identified irregularities regarding the payroll and operations of the West Brookfield Water Department's Ware Point Road Greensand Plant (plant). A review of water department payroll records and filings with the Massachusetts Department of Environmental Protection found that there were apparent violations of a town meeting annual article that permitted the water commissioners to work at the plant during emergencies; unlicensed individuals were working at the plant in the absence of the plant superintendent; the water commissioners signed off on their own time sheets; and there were apparent conflicts of interest in that the water commissioners were responsible for the hiring, firing, and overseeing of the superintendent but were working under the superintendent's direction while working at the plant. This office recommended that the town contract with an independent auditor to review the water department's payroll and expense records. This office referred information in regard to the possible conflict of interest to the State Ethics Commission.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/wbrookfi.pdf>.

Letter to the Chairmen of the Joint Committee on Transportation, regarding the partial collapse of the Interstate 90 ceiling, October 2006.

At the request of the Chairmen of the Joint Committee on Transportation, this office reviewed the obligations of certain entities of the Commonwealth to inspect, maintain, and certify the safety of the I-90 connector tunnels to the federal government, bond holders, and the general public. This letter represents an interim report. This office found that there were repeated and inexcusable lapses by the Massachusetts Highway Department and the Massachusetts Turnpike Authority in their fiduciary and legal duties related to the safety and proper maintenance of the I-90 connector. The letter lists the questions reviewed, and the answers and recommendations provided.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/bigdigcollapse.pdf>.

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Recent Publications, cont.

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Letter to Joseph Martin, Deputy Executive Director of the Public Employee Retirement Administration Commission, regarding written testimony on the investment and recordkeeping practices of retirement boards, October 2006.

This letter provides written testimony regarding the investment and record keeping practices of retirement boards, as well as the actions of board members. This testimony is based on the investigation, with the Public Employee Retirement Administration Commission (PERAC), of a \$37 million dollar loss by the Middlesex Retirement System. The letter lists certain actions and failures to act by Middlesex board members that may represent breaches of fiduciary duty. These breaches include failing to adequately monitor the Cambridge Financial Management account, using inflated market values in monthly reports, failure to comply with PERAC rules, and failure to act when anomalies occurred. This office recommended that PERAC refer the fiduciary breaches to the PERAC commissioners.

The complete letter may be accessed at http://www.mass.gov/ig/publ/perac_testimony.pdf.

Letter to Joseph Connarton, Executive Director of the Public Employee Retirement Administration Commission, regarding the referral of matters that may be appropriate for administrative action, October 2006.

Pursuant to this office's regulations, matters that may be appropriate for administrative action were referred to PERAC. At PERAC's request, this office reviewed a Powers and Sullivan audit of the Middlesex Retirement System, which called attention to more than \$8,000 in questionable reimbursements to Middlesex Retirement Board member Lawrence P. Driscoll. This office found that Mr. Driscoll submitted expense reports for conferences that he did not attend, sought reimbursement for lease payments for his personal vehicle by categorizing the expenses as car rentals, submitted a meal receipt from China that he claimed was from a conference in San Diego, and billed approximately \$60,000 in expenses over a five-year period to both the Middlesex Retirement Board and his private employer. This office is of the opinion that the facts clearly show that Mr. Driscoll

has violated his fiduciary duty to the beneficiaries of the Middlesex Retirement System and should be penalized pursuant to PERAC's regulations.

The complete letter may be accessed at http://www.mass.gov/ig/publ/perac_expenses.pdf.

Training for School Project Designers and Owner's Project Managers

Do you hope to build or renovate a school in the near future? If so, you should know that the Massachusetts School Building Authority's (MSBA) new regulations require your owner's project manager and project designer to be certified in the Massachusetts Certified Public Purchasing Official (MCPPO) program. To meet this requirement, the MCPPO program has added a new course: Certification for School Project Designers and Owner's Project Managers. In addition, the MSBA regulations also require that the municipal employee in charge of procurement for a school building project be designated as an MCPPO or an MCPPO for Design and Construction Contracting. For more information on course offerings and registration, please visit the Inspector General's website at www.mass.gov/ig or email us at MCPPO@maoig.net.



**MASSACHUSETTS CERTIFIED PUBLIC PURCHASING OFFICIAL PROGRAM
REGISTRATION FORM January—June 2007**

Office of the Inspector General

Gregory W. Sullivan, Inspector General

REGISTRATION INFORMATION:
All seminars will be confirmed based on a minimum of 20 participants.

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).

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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. **NO-SHOWS WILL BE INVOICED A \$100.00 SERVICE CHARGE.**

For more information regarding administrative policies, such as complaint and refund resolution, please contact Joyce McEntee Emmett, Director of the MCPPO Program at (617) 727-9140 x28835 or go to our website at www.mass.gov/ig.

PUBLIC CONTRACTING OVERVIEW 3-day seminar **Tuition:** \$450 for government/non-profit employees
No Prerequisite \$700 for all others
 January 17, 18, 19—2007 **BOSTON**
 March 6, 7, 8—2007 **BOSTON**
 May 22, 23, 24—2007 **BOSTON**
 June 12, 13, 14—2007 **BOSTON**

SUPPLIES & SERVICES CONTRACTING 3-day seminar **Tuition:** \$450 for government/non-profit employees
Prerequisite: Public Contracting Overview or Charter School Procurement \$700 for all others
 January 23, 24, 25—2007 **BOSTON**
 March 27, 28, 29—2007 **BOSTON**
 May 8, 9, 10—2007 **BOSTON**

DESIGN & CONSTRUCTION CONTRACTING 3-day seminar **Tuition:** \$650 for government/non-profit employees
Prerequisite: Public Contracting Overview or Charter School Procurement \$900 for all others
 February 13, 14, 15—2007 **BOSTON**
 April 11, 12, 13—2007 **BOSTON**
 June 5, 6, 7—2007 **BOSTON**
 June 20, 21, 22—2007 **BOSTON**

ADVANCED TOPICS UPDATE 2-day seminar **Tuition:** \$350 for government/non-profit employees
\$600 for all others
 May 3 & 4—2007 **BOSTON**

CERTIFICATION for School Project Designers & Owner's Project Managers 4-Day Training **Tuition:** \$1200
NEW January 30, 31, Feb. 1, 2—2007 **BOSTON**
 March 20, 21, 22, 23—2007 **BOSTON**

CONSTRUCTION MANAGEMENT AT RISK Under M.G.L. c. 149A: Legal Requirements & Practical Issues 1-day seminar **Tuition:** \$275 for government/non-profit employees
\$600 for all others
*Introductory material geared to procurement officials who are not construction experts
 April 24—2007 **BOSTON**

CHARTER SCHOOL PROCUREMENT 2-day seminar **Tuition:** \$400 for government/non-profit employees
No Prerequisite \$600 for all others
 May 31 & June 1—2007 **BOSTON**

Drafting A Model IFB Self-paced **Tuition:** \$75 ea. for gov./non-profit employees
Disk program requiring Microsoft Word 7.0 or higher \$200 for all others
*Registration for this course must be accompanied by a check

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The Commonwealth of Massachusetts Office of the Inspector General is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE sponsors. State Boards of Accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be addressed to the National Registry of CPE Sponsors, 150 Fourth Avenue North, Suite 700, Nashville, TN 37219-2417, www.nasba.org.

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Procurement Bulletin **Subscription Information**

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