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Via Email

The Honorable Marc R. Pacheco, Chair
Joint Committee on State Administration and Regulatory Oversight
State House, Room 312-B
Boston, MA 02133
Marc.Pacheco@masenate.gov

The Honorable Antonio F.D. Cabral, Chair
Joint Committee on State Administration and Regulatory Oversight
State House, Room 22
Boston, MA 02133
Antonio.Cabral@mahouse.gov

Re: House 7, An Act Updating Chapter 30B

Dear Chair Pacheco and Chair Cabral:

Thank you for your consideration of House 7, *An Act Updating Chapter 30B*. Chapter 30B of the Massachusetts General Laws (Chapter 30B), the Uniform Procurement Act, governs procurement methods cities and towns (local jurisdictions) must use to procure and dispose of supplies, services and real property. Chapter 30B ensures local jurisdictions use open and competitive processes to receive the best price. The Office of the Inspector General (Office) filed the original Uniform Procurement Act and has trained thousands of public officials and employees in public procurement and good governance. House 7 strengthens Chapter 30B's promotion of best practices, fair competition and transparency. The proposed changes in House 7 are outlined below.

Sections 1 and 2

The contracting procedures in Chapter 30B enable a local jurisdiction to make best value procurements that are transparent and fair. While the objective of the statute is clear, it is often misinterpreted. House 7 clarifies areas where the statute's intent is often questioned or silent. For example, in certain instances, local jurisdictions are not required to follow the competitive procedures of Chapter 30B. Sections 1 and 2 clarify that although a local jurisdiction does not need to follow the statute in some instances, it may be in the jurisdiction's best interest to do so. For

example, local jurisdictions occasionally believe that if an exemption exists, a jurisdiction is prohibited from using a competitive procurement process. This is not true. A local jurisdiction always has the option to conduct an open and competitive procurement. At the very least, sound business practices should apply to all procurements.

Sections 3 through 14

As described above, certain procurements are exempt from the competitive procedure requirements in Chapter 30B. The Office strongly encourages local jurisdictions to apply fair, open and competitive processes to all purchases, even if the statute allows an exemption. Sections 3 through 14 amend some of the exemptions to ensure the statute's intent is followed. Local jurisdictions may not use the exemptions to circumvent competitive procedures.

For example, Section 3 clarifies that jurisdictions may procure, without following competitive procedures, only special education services specified in M.G.L. c. 71B. Jurisdictions may not use the exemption to procure services not directly related to special education. In other words, a school district may not purchase a vehicle under the exemption simply because a student with special education requirements will use the vehicle. The exemption only applies if the vehicle is tailored for specific special education needs. Similarly, Section 4 clarifies that, without using a competitive process, a local jurisdiction may contract with expert witnesses for active adjudicatory proceedings or litigation only. The exemption applies when a legal proceeding commences.

Section 5 specifies that a municipal gas and electric department, may without using a competitive process, execute a contract for the generation or acquisition of power only. The Office has found that municipal gas and electric departments interpret the exemption too broadly and claim that the exemption applies to all purchases a department makes. Finally, contracts with labor relations representatives, lawyers or certified public accountants are exempt from Chapter 30B. Section 6 mandates that these professionals may only be hired if they will be undertaking work typically expected of their profession. These clarifications ensure that local jurisdictions follow the intent of Chapter 30B.

Moreover, some of the exemptions in Chapter 30B are special carve-outs that could be competitively procured. For example, a local jurisdiction is not required to use a competitive process when procuring motor vehicle towing and storage services. In addition, a school district is permitted to hire a school photography service without an open process. All these services are funded through public dollars. Therefore, the Office contends that a competitive, open and fair process should take place. Sections 10 and 11 eliminate these exemptions. After consultation with local jurisdictions, the Office also requests that the committee remove Sections 7 and 8, relating to snowplowing and moorings, respectively, from the bill.

Additionally, Chapter 30B provides an exemption for purchases made with gift proceeds. Section 9 ensures that purchases made from a gift are only exempt from Chapter 30B if the funds were specified for a defined purchase of a supply, service or real property as we believe was the original intent of the exemption.

Finally, House 7 clarifies some existing exemptions to match the statute's intent. Currently, contracts with architects, engineers and related professionals are exempt from a competitive process. Section 12 of the bill clarifies this language ensuring that only contracts with licensed professionals are allowed under the exemption. The intent of the exemption is to ensure that local jurisdictions hire the best qualified professionals, licensed by the state. This makes Chapter 30B consistent with the statutes regarding professional licensure such as section 60K of Chapter 112 of the Massachusetts General Laws, which requires licensure to use the title of "architect." This requirement applies to other licensed professionals as well. When a local jurisdiction receives federal funds, a procurement is typically exempt from Chapter 30B procedures. Section 13 of House 7 makes it clear that the competitive procedures do not apply if Chapter 30B provisions prevent compliance with federal law and regulations. For consistency purposes, section 14 of the bill amends the definition of "architect and engineer" to include "related professionals" mirroring the exemption in section 1 of Chapter 30B¹.

Sections 15, 16 and 17

Although the intent of Chapter 30B is clear, local jurisdictions often misinterpret some of the requirements. In order to clarify the statute, sections 15, 16 and 17 add new definitions to Chapter 30B. In certain instances, a local jurisdiction may conduct a sole source procurement, that is, a purchase without advertisement or competition. Section 7 of Chapter 30B requires that a local jurisdiction conduct a reasonable investigation to determine that there is only one practicable source for a supply or service. However, reasonable investigation is not defined in the statute. For clarity, the Office recommends defining this term. Section 15 of House 7 defines reasonable investigation to require that a procurement officer use due diligence and exhibit good faith to confirm that a procurement without competition is warranted.

In addition, section 16 of House 7 defines the term "rule for award." This definition ensures that when drafting a solicitation, a local jurisdiction defines the criteria and method it will use to determine which offer provides the best value for the supply or service needed. A clear rule for award is critical to a fair, open and transparent procurement process.

Finally, section 17 defines "special education" specifying that only those special education services in M.G.L. c. 71B are exempt from the competitive procurement requirements. This matches the amended language included in section 3 of the bill.

Section 18

Again, transparency and accountability are central tenets of the Chapter 30B procedures. For all purchases, public employees must keep accurate and updated procurement files. This section clarifies that a procurement officer must keep a record of any procurement for supplies or services of \$10,000 or more.

¹ M.G.L. c. 30B, § 1(b)(32A).

Sections 19 and 20

Further, House 7 enhances the process a local jurisdiction must use when soliciting quotations. For purchases between \$10,000 and \$50,000, a local jurisdiction may solicit written quotations. Section 19 clarifies that a local jurisdiction must draft a written purchase description for the supplies or services needed. In addition, the bill clarifies that quotations must be kept confidential until opened. This maintains the integrity of the quotation process and ensures that other potential bidders may not review other quotations before submitting a quotation of their own.

During the solicitation process, a procurement officer is required to keep a written record of the process. Section 19 specifies the information a procurement officer must record including, the quotation due date, the date received and dollar amount of each quotation and the quotation submissions. In addition, the section clarifies that quotations shall not be considered public records until they are opened. The section also makes clear that quotations solicited for goods and services cannot be negotiated.

Further, section 19 of House 7 would give local jurisdictions the option to use requests for proposals (RFPs) when procuring goods and services estimated to cost at least \$10,000 but less than \$50,000.

Under Chapter 30B, price thresholds govern which procurement procedure a jurisdiction must use. For example, section 4(a) of Chapter 30B generally requires jurisdictions to solicit price quotations to procure a supply or service in the amount of \$10,000 or greater, but not more than \$50,000. However, Chapter 30B also allows for the use of an invitation for bids (IFB) to procure supplies or services in this same price range.²

When using an IFB, local jurisdictions must award the contract to the responsive and responsible bidder offering the lowest price. Unlike IFBs, when using an RFP, local jurisdictions are not required to award the contract to the vendor offering the lowest price; rather, other statutory safeguards are in place that promote open, fair competition for public funds, in particular the statutorily devised rating system. As a result, favoritism is thwarted, and all vendors have greater confidence in the fairness of the process.

Many jurisdictions have asked the Office if they may use RFPs for procurements costing less than \$50,000, because they want to apply comparative evaluation criteria in addition to price when procuring supplies or services. As noted above, RFPs have safeguards in place that make them appropriate for procuring supplies in the \$10,000 to \$50,000 range. Section 19 amends the statute, which would allow local jurisdictions to use RFPs for procurements between \$10,000 and \$50,000.

² M.G.L. c. 30B, § 4(a).

Sections 21 and 22

As mentioned above, local jurisdictions may conduct sole source procurements when purchasing items or services for \$50,000 or less, or for procurements in any amount for certain exceptions identified in Section 7 of Chapter 30B. Section 21 of House 7 clarifies that when used for educational materials, sole source procurements can be used for purchases in any amount. Additionally, Chapter 30B permits sole source procurements for water, gas, electricity, sewer and telephone services. Section 22 requires a local jurisdiction to conduct a reasonable investigation to confirm that only one source exists when procuring utilities. This provision also ensures that local jurisdictions explore the many energy options available in the market today that may not have existed when Chapter 30B was originally drafted.

Section 23

Occasionally, a local jurisdiction may need to purchase a supply or service in an emergency. Section 23 of House 7 clarifies the steps a local jurisdiction must take during a time sensitive procurement. Section 8 of Chapter 30B permits a jurisdiction to waive the requirements of the statute if the time required to comply with the Chapter 30B procedure “would endanger the health or safety of the people or their property.” Currently, under the statute, when a local jurisdiction makes an emergency procurement, it must make a record of the emergency as soon after the procurement as practicable. The procurement officer is required to submit the record at the earliest possible time to the state secretary for publication in the *Goods and Services Bulletin*.

To promote transparency, section 23 of House 7 states that notification of the emergency procurement must be submitted to the Secretary of the Commonwealth within 30 days, unless the emergency prohibits submission. Even in a time of hardship, a deadline instills transparency and accountability in government transactions, reflecting the intent of public procurement laws.

Section 24

Chapter 30B includes a number of safeguards a local jurisdiction may use throughout a procurement process. For example, Chapter 30B permits a local jurisdiction to cancel a solicitation, an invitation for bids or a request for proposals prior to the submission deadline. Section 24 of House 7 clarifies that a procurement officer may cancel a solicitation for supplies or services if it is in the best interest of the awarding authority and the procurement officer documents the reason for cancellation. A local jurisdiction must have the flexibility to cancel a solicitation. For example, the procurement officer might discover errors in the specification or bid package that could compromise the process. A budget issue may arise that makes the procurement no longer feasible. Local jurisdictions should consider it a best practice to document the reason for cancellation.

Section 25

Additionally, when submitting a bid or proposal a bidder or proposer must submit a written certification that they are acting in good faith. Section 25 amends the statute to clarify that a written certificate of good faith is required for the acquisition and disposition of supplies, services and real property. Currently, the statute does not require written certification for real property transactions.

Section 26

Section 26 clarifies that a local jurisdiction may enter into a contract for any period of time provided that the time period serves the best interest of the government body. However, they must follow any other statutorily prescribed time limits.

Section 27

In addition to acquisitions, Chapter 30B outlines the disposition of supplies and services. When a supply is no longer needed, local jurisdictions may use competitive procedures, including public auctions to dispose of the supply. Over the years, the Office has received inquiries regarding whether online auctions may be used. The Office has determined that online, electronic auctions meet the requirements of fair and open competition for the disposal of supplies, under Chapter 30B. Section 27 permits local jurisdictions to use both in-person and electronic auctions to dispose of supplies.

Section 28

Section 28 would require awarding authorities that do not have written procedures for the disposal of surplus supplies to use sound business practices to dispose of surplus supplies valued at less than \$10,000. This is a recommended best practice that protects the local jurisdiction that should be codified.

Section 29

Section 16 of Chapter 30B defines the process local jurisdictions must follow for acquiring and disposing of real property. House 7 requires that a local jurisdiction, when disposing of real property, maintain an annually updated valuation of the property until the property's disposition is complete. This ensures that the valuation of the property is up-to-date and that the local jurisdiction receives a fair price for the disposed property.

Sections 30 and 31

In critical situations, local jurisdictions may acquire or dispose of real property without following the procedures in Chapter 30B. House 7 mandates that if a local jurisdiction is unable to follow Chapter 30B requirements during an emergency that requires acquiring or disposing of real property, the local jurisdiction must submit the emergency contract to the *Central Register* within

30 days, unless the emergency prohibits submission. Similarly, if a local jurisdiction disposes of real property for a price below the determined value, notification of the disposition must also be placed in the *Central Register* within 30 days of disposition.

Section 32

Chapter 30B also includes provisions to protect local jurisdictions if a contract is deemed invalid. Currently, a person who violates Chapter 30B is subject to a fine and damages. The Office recommends adding investigatory costs to the penalties for which a violator of Chapter 30B would be liable. This should serve as a further deterrent to those circumventing the requirements of Chapter 30B. Furthermore, this would supplement the Office's funding to prevent and detect violations of Chapter 30B.

Section 33

Finally, House 7 permits the Office to promulgate regulations related to the enforcement and interpretation of Chapter 30B. The Office has the expertise needed to administer, interpret and enforce the statute. By promulgating regulations, the Office can develop mechanisms for enforcing Chapter 30B. These regulations will help local jurisdictions by allowing the Office to clarify gaps that may currently exist in the law. These regulations will also deter activities that violate the statute. House 7 requires the Office to follow the regulation process in Chapter 30A of the Massachusetts General Laws.

I respectfully request the Committee favorably report out House 7. If you have any questions about these proposals, please contact me. Thank you.

Sincerely,



Glenn A. Cunha
Inspector General

Enclosure: House 7 redline