



The Commonwealth of Massachusetts  
Office of the Inspector General

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September 17, 2010

Mitchell Chester, Commissioner  
Department of Elementary and Secondary Education  
75 Pleasant Street  
Malden, MA 02148-4906

Dear Commissioner Chester:

As you know, after receiving this Office's request for a review, the Attorney General has confirmed that the Gloucester Community Arts Charter School (GCACS) in fact:

“violated G.L. c. 149, §§ 44A-44M, the public construction bid law, and G.L. c. 7, § 38A/2-380, the designer selection law, by entering into a lease agreement with the Cape Ann Medical Office Building, LLC ("Cape Ann") and undertaking construction for a school facility located at 2 Blackburn Drive in Gloucester.”

And further,

“that the construction of four temporary modular classrooms at the Blackburn Drive property for GCACS's use did not comply with the modular construction law, G.L. c.149, §44E (4).”

Massachusetts case law is clear, public procurement contracts created in violation of the competitive bidding statutes are invalid and unenforceable. See *Majestic Radiator Enclosure Company, Inc, & Another v. County Commissioners of Middlesex & others*, 397 Mass 1002 (1986) citing *Phipps Products Corp v. Massachusetts Bay Transportation Authority*, 387 Mass 687, 691 (1982).

The Legislature enacted the bidding statutes “to establish an open and honest procedure for competition for public contracts. *Majestic* at 1003 citing *Modern Continental Construction Co. V. Lowell*, 391 Mass. 829, 840 (1984). To permit any deviation from the statutory requirements would undermine the legislative goal. Further, “the public interest in adherence to statutory bidding procedures overrides any equitable considerations.” *Majestic* citing *Phipps Prods. Corp. v. Massachusetts Bay Transp. Auth.*, supra at 693. Thus, failure to follow the bidding procedure in any respect is fatal. *Majestic* at 1003.

The longstanding holdings in case law present a legal bar to the GCACS making any lease payments to Cape Ann Medical Office, LLC. Only special legislation will authorize payments on an illegal contract.

In light of the Attorney General's opinion that GCACS has violated state procurement law in the design and on-going construction of its school facilities and in the rental of its temporary modular classrooms, I am calling to your attention that such violations likely also represent violations of the conditions of federal and state grant aid received by GCACS and DESE. Grant awards most generally include requirements that the grant recipient be in compliance with federal and state procurement and applicable disability-related laws.

Accordingly, I am asking that you provide to my office all records in your possession concerning federal and state grants and other aid applied for and/or received by GCACS to date from any federal or state source. Please also provide all relevant grant assurance documents executed by GCACS and DESE.

It is my intention to request a review by appropriate federal agencies of GCACS's and DESE's compliance with grant provisions.

This Office is bringing two additional violations of bid law to your attention at this time. We request that you review these matters and report back to this Office expeditiously.

Specifically, the Department of Elementary and Secondary Education (DESE) requires that charter schools follow procurement procedures for purchases. DESE's *Massachusetts Charter School Recommended Fiscal Policies & Procedures* Guide states in relevant part at section 701 that:

. . . the school will use a formal bid process for items greater than \$5000, in which three bids will be received and evaluated using a formal evaluation process."

The GCACS represented to DESE as part of the charter approval process that it had adopted procurement procedures to meet DESE's requirement.

GCACS did not comply with DESE policy or the conditions of its own charter when it engaged in a no bid contract for the services of FHO Partners LLC (FHO) to locate space for the school.

According to documents received by this Office including GCACS minutes, it is clear that GCACS engaged FHO Partners<sup>1</sup> to assist it with locating suitable space to occupy a school. Michael Brown of FHO contacted Sovereign Realty Advisors in August of 2009 to help find a location for the GCACS. As a result of a presentation made by the two entities to the GCACS Board in September 2009, the GCACS Board requested FHO to assist it in locating a space in Gloucester for the school. FHO then requested the formal assistance of Sovereign Realty Advisors, LLC. There are no written agreements between GCACS and either entity. Ultimately, payment was made to the two entities by the successful leasee, Cape Ann Medical Office

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<sup>1</sup> BESE Chair, Maura Banta disclosed to the BESE that her brother is a partner in FHO Partners. She disclosed this to BESE in early 2010 after consultation with the State Ethics Commission.

Building, LLC of which Sovereign Realty Advisors, LLC was a listing broker. FHO ultimately received \$48,000 from Sovereign Realty Advisors, LLC.

DESE's *Fiscal Policies & Procedures Guide (Guide)* at section 701 requires that the services contract between GCACS and FHO, valued at \$48,000, be bid. Specifically, the *Guide* requires that three bids be received and formally evaluated. The GCACS, like other charter schools, voted to adopt DESE's fiscal policies as conditions of their charters. GCACS specifically stated: "... the school will follow sound business practices for purchases including a formal bid process if required." DESE's *Guide* requires a formal bid process for items valued at amounts greater than \$5000. While FHO was ultimately compensated via Cape Ann Medical Office Building LLC through Sovereign Realty Advisors, LLC, the valuable services contract was awarded to FHO on a no-bid basis in August of '09.

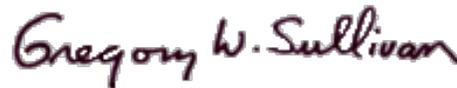
The GCACS entered into a no bid lease with Cape Ann Medical Office Building, LLC for school space in violation of DESE policy and the GCACS charter.

According to documents received by this Office, the lease with Cape Ann Medical Office Building, LLC, was valued at substantially more than \$5000. In accordance with the above citations, GCACS was obligated by the conditions of its charter and DESE policy to bid this lease. However, the GCACS failed to bid this lease and DESE has failed to enforce its policies.

This Office recommends that the DESE ensure that the state not reimburse or further fund GCACS for school space invalidly procured.

Thank you in advance for your prompt attention to these important matters.

Sincerely,



Gregory W. Sullivan

Inspector General

Cc: Rhoda Schneider, DESE General Counsel  
Kevin Conroy, Office of the Attorney General  
Thomas Hopkins, Director, Architectural Access Board  
Senator Bruce Tarr  
Representative Ann Margaret Ferrante  
Attorney Colin Zick