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INSPECTOR GENERAL

The Commonwealth of Massachusetts  
Office of the Inspector General

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March 5, 2012

Dr. Pia Durkin  
Superintendent  
Attleboro Public School District  
100 Rathbun Willard Drive  
Attleboro, MA 02703

Re: 2009 School Bus Contract

Dear Dr. Durkin:

As you know, the use of Attleboro Public School District (School District) High School parking lot and office space by H&L Bloom Inc. (Bloom) has recently been brought to the attention of the Office of the Inspector General (OIG). Of particular concern is how Bloom came to use school property. Bloom has been providing school bus transportation to the School District since June 2009 pursuant to a three-year \$5.4 million contract.

Subsequent to awarding this contract in June 2009, the School District allowed Bloom use of the High School parking lot to garage its buses and of office space within the school building. Use of High School property had not been stipulated in any solicitation or contract documents. In October 2009, the School District and the City of Attleboro (City) formalized the garaging arrangement with Bloom in a \$1.00 per year license agreement. According to Bloom, garaging costs within City limits could have cost between \$180,000 and \$270,000 for the three year contract term. Concerns have been raised to the OIG that the use of High School property and the \$1.00 per year license, granted four months after the award of the bus contract, amounted to a "sweetheart" deal for Bloom. The School District's post-contract award decision to allow Bloom to use High School property for \$1.00 per year contributed to the appearance of a prejudicial bidding process that favored one specific vendor.

The OIG confirmed that the School District's original bid specifications required the winning vendor to garage buses within City limits. The business manager stated that he "waived" this contract provision through oral instruction to the bidders at the pre-bid conference. He also said that he orally informed bidders that the School District would assist them in identifying garaging locations within the City.

The business manager did not issue a written bid addendum to clarify this substantive contract change, a change that could clearly have a significant financial impact on the pending bids. This violated M.G.L. c.30B, §5(b)(3), which requires that a procurement officer shall include in the invitation for bids all contractual terms and conditions applicable to the procurement. Had it been clear to the other bidders that an option existed at virtually no cost to use school property (including office space) then the School District might have received substantially lower bids.

Another potential violation of M.G.L. c.30B may have been the School District's use of the license agreement. The OIG questions whether the license agreement for the parking lot and the office space may be viewed as a lease. Leases are subject to the competitive bidding requirements of M.G.L. c. 30B whereas licenses are not subject to M.G.L. c.30B. Calling an agreement a "license," does not excuse it from the requirements of M.G.L. c.30B if it is truly a lease. The factors to be considered in determining whether the agreements for use of the parking lot and office space are a lease or a license include the following:

1. whether the instrument (lease/license) gives the so called lessee/licensee exclusive possession of the premises;<sup>1</sup>
2. whether the agreement is revocable at the will of the possessor of the land;<sup>2</sup>
3. whether the character of the license is "evanescent or fleeting"<sup>3</sup> i.e., certain well defined purposes, limited duration, ill-defined or changeable; and,
4. whether the agreement is assignable.<sup>4</sup>

The OIG understands that the City Solicitor drafted the license with Bloom. If the School District plans to continue using the license agreement, the OIG recommends that the School District seek an opinion from its legal counsel to determine, based upon the above factors, whether the agreements between the School District and Bloom is in fact a lease subject to M.G.L. c. 30B or licenses.<sup>5</sup>

Whether a lease or license, the OIG offers that key information was absent from the agreement. Bloom's license agreement with the School District failed to reference the use of office space. Even if truly a license and not a lease, the use of school property as office space should have been clearly defined in the contract specifications,

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<sup>1</sup> In re Harbour House Operating Corp., 26 B.R. 324, citing Gerould Co. v. Arnold Constable & Co., 65 F2d 444, 446 (1<sup>st</sup> Cir. 1933); Roberts v. Lynn Ice Co., 187 Mass. 402, 406 (1905).

<sup>2</sup> Baseball Publishing Co. v. Burton, 302 Mass. 54, 56 (1938).

<sup>3</sup> 3 Powell, Real Property, §428 (Rohan ed., 1986).

<sup>4</sup> In re Opinion of the Justices, 247 Mass. 589, 596 (1929).

<sup>5</sup> If the agreement is a lease, the procedures to be followed are determined by the value of the property, not the price the school will receive for the disposition. For more information on real property dispositions please see Chapter 8 of *The Chapter 30B Manual* <http://www.mass.gov/ig/publ/30bmanl.pdf>.

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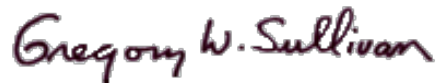
and made an option for all bidders along with any use requirements such as rent, insurance or liability coverage, or safety and security concerns stemming from non school personnel having access to the school premises. The OIG found no document or other information referencing Bloom's use of this space.

The OIG was also informed that the School District may allow other private and not-for-profit entities to use school space without the benefit of written agreements. The School District should consult with legal counsel regarding whether the use of school property in this way is a lease or a license and determine whether bidding and written agreements or other safeguards are required prior to allowing use of school property.

The OIG appreciates the School District's cooperation with this review. The OIG offered its comments to assist the School District to generate a transparent and fair school bus services bidding process for the upcoming school year. Creating a level playing field for all bidders should be the School District's first priority. The School District can do this by providing clear and detailed contract specifications that are communicated in writing to all potential bidders. To ensure fair and open competition, the same opportunities should be made available to all bidders under the same terms. Concessions or accommodations for vendors made after the bid process has the appearance of impropriety and in some cases could violate M.G.L. c.30B.

Thank you for your cooperation and assistance with our review. If you have any questions or concerns, please contact Deputy Inspector General Neil Cohen.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan  
Inspector General

cc: Mayor Kevin Dumas  
Michael Tyler, Chair, Attleboro School Committee