



The Commonwealth of Massachusetts
Office of the Inspector General

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INSPECTOR GENERAL

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June 15, 2010

Mayor James M. Ruberto
City Hall
70 Allen Street
Pittsfield, Massachusetts 01201

RE: Softball Complex at 1789 East Street, Pittsfield, Massachusetts

Dear Mayor Ruberto:

The City of Pittsfield (city) owns the Berkshire County Softball Complex ("Softball Complex"), located at the above address. The Softball Complex consists of 20.9 acres of land on which are constructed several buildings, including a restaurant (which serves food and drink, including alcoholic beverages) two garages, one utility building, six dugout structures, a 25,000 square foot parking lot and three lighted softball fields.

Background

In 1989, the city entered into a pre-M.G.L. c.30B, 20 year lease with the Berkshire County Softball Complex, Inc., a Massachusetts M.G.L c.180 corporation ("BCSC"). BCSC paid a fixed rent for the initial term, with adjustments thereafter based on a cost of living increase formula agreed to between BCSC and the city. At no time did BCSC provide the city with any information relating to the cost of operating the Softball Complex or its net profits from rentals and sales.

As a result of the expiration of the BCSC lease in the fall of 2009, the city issued a request for proposals RFP #10-002 (RFP). Among other requirements for an eligible proposer were the following comparative criteria:

Highly Advantageous: Proposer has operated a successful Softball Complex or sports stadium, serving foods and beverages for five (5) or more years;

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Advantageous: Proposer has operated a successful Softball Complex or sports stadium serving foods and beverages for more than three (3) years, but less than five (5) years;

Unacceptable: Proposer has not operated a Softball Complex or sports stadium serving foods and beverages.

There were two proposers, BCSC and a proposer named "The Complex."

BCSC was selected as the most advantageous proposer for a term that, with renewals, would have aggregated 10 years. BCSC's proposal offered to pay the city \$1,500 for the first year, with an escalating annual rent thereafter. The Complex's proposal was \$1,000 for the first three years, with increases based on revenue thereafter.¹ According to the city, BCSC was selected in part on its more favorable price and in part on the fact that The Complex had not operated a successful softball complex or sports stadium, serving foods and beverages for five or more years, which were the requirements for a highly advantageous proposer. As a result of the city's selection of BCSC, a complaint was filed with this Office.

The complainant alleged that the procurement process discriminated in favor of the incumbent. The principal bases for this allegation were that (1) the comparative criteria were restrictive in that they favored BCSC which had, to the exclusion of all others, operated the Softball Complex for the previous 20 years, and (2) none of the income, expense and maintenance information needed to formulate a meaningful price proposal was available to anyone but the incumbent. The complainant alleged that the lack of financial information gave BCSC a decided advantage because it knew the exact operating costs of the fields and could tailor its proposal accordingly.

Analysis

The disposition of real property or an interest therein is a transaction subject to M.G.L. c.30B, the purpose of which is to promote a fair, open, and transparent procurement process. *Municipal, County, District and Local Authority Procurement of Supplies, Services and Real Property* (5th ed.)(9/06)("Manual"), p. 80. Where vendor eligibility is restricted or where one vendor is in sole possession of important information needed to formulate a bid, the competitive process is neither open nor fair. Comparative criteria that are unduly restrictive are also prejudicial to competition.

¹ The price proposals could not be compared. BCSC's price proposal for 10 years was for fixed escalating payments from \$1,500 to \$2,200, for ten year total of \$18,000. The Complex proposed to pay \$1,000 for the first three years, with the greater of \$1,000 or 5% of gross thereafter.

It is a well worn premise that governmental bodies must write specifications that are fair and unrestrictive unless there is justifiable rationale. With respect to a claim that specifications are restrictive, I refer you to *Bowman v. Denzil Drewry*, 1996 Mass. Super. LEXIS 611 (1996). In that case, the Town of Westborough requested proposals for lease of a municipal golf course restaurant. The RFP specified prior experience running a golf course restaurant, as opposed to a restaurant generally. The court reasoned that overly restrictive criteria were inconsistent with M.G.L. c. 30B, and that they should only be allowed if they had a “rational basis.” In the absence of any justification from the town, the court invalidated the RFP, stating that the “use of this restrictive criterion was a deliberate attempt to introduce into the process a factor that would favor [the incumbent’s] proposal and create an excuse for rejecting all other proposals.” *Id.* at 31. In the interests of making the competition more vigorous and reduce the possibility of time-consuming protests, the city should carefully consider what qualifications are essential to running the Softball Complex, and include only those in its specifications.

With respect to inequality of information, the fact that BCSC had 20 years’ knowledge of the income, expenses and maintenance costs related to the running of the Softball Complex which was not available to others put it in a superior position relative to other proposers. A new proposer can only guess at revenue and cost information whereas the incumbent has firm data.

Receipt of full information about the revenue generated from the lease is also important for the city. In a recent advisory on golf course leases, this Office addressed the importance of a cash flow analysis in connection with the lease of municipally-owned enterprises in order to determine the true value of a public asset:

Knowledge of a facility’s financial status is critical for municipalities. It is one of the best methods to ensure the course is being operated properly and in the taxpayer’s interest. Also, when it is time to re-procure golf course services the municipality must be able to provide accurate income and expense information to bidders and proposers and the municipality should be able to determine if a vendor’s price proposal accurately and fairly reflects a course’s revenue potential. Keep in mind that an inability to provide income and expense information to potential proposers or bidders is detrimental to fair and open competition and therefore in violation of M.G.L. c.30B.

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Advisory on Municipal Golf Course Management Contracts (6/09), p. 4. See also OIG Letter, *Nahant Beach Parking Contract (9/08)*. Moreover, if financial information is publicly available, protests or complaints might be rendered unnecessary.

Finally, M.G.L. 30B establishes procedures that the city must follow in disposing of real property by sale or rental: the city must “determine the value of the property through procedures customarily accepted by the appraising profession as valid.” M.G.L. c.30B, §16(b). The real property provisions of M.G.L. c.30B otherwise allow governmental bodies to structure transactions as they see fit, provided they meet all the requirements of M.G.L. c.30B, §16 and conduct the transaction in a manner that is both open and fair. See generally *Manual*, pp. 95-106.

The circumstances of this procurement reflect that the city did not meet these requirements. After it had been notified of a complaint being received by this Office, the city, through its Board of Assessors, conducted an after-the-fact valuation (February 12, 2010) of the leasehold. The appraisal was prompted by an inquiry from this Office as there apparently was no valuation done before the RFP was issued, which would be the customary practice under M.G.L. c.30B. Even so, the valuation does not appear to have any relevance to the 10-year going concern value for the appraisal states that

[b]ased on my judgment and knowledge in determining the value of rental agreements, it is my opinion that the value of this rental agreement is \$32,700.

In an email dated March 29, 2010 the appraiser said that he multiplied the value of the property (\$344,000) by a factor (9.5%), which he said reflects the terms and conditions of the lease. Again, without information of the operator’s cash flow, the appraiser can only estimate the going concern value.

Due to this Office’s concerns about the city’s compliance with M.G.L. c.30B, §16(b), the city cancelled its RFP for the procurement of the 10 year lease. The city has committed to leasing the Softball Complex to BCSC for a one year term to expire on April 30, 2011 at an annual rent of \$2,400. (However, this Office notes that, in order to be consistent with the city’s February 12, 2010 valuation, the annual rent should be \$3,270.) As the value of the lease is less than \$25,000, no public proposal process is required. The city has made a commitment to the Office that, between now and when it issues an RFP for a longer term lease starting in 2011, it will take steps to obtain revenue information from BCSC that will serve to inform prospective bidders and make the disposition fair and open, thereby maximizing the city’s rental income from its lease of the Softball Complex.

Accordingly this Office recommends that the city procure the lease for 2011 in accordance with the following:

- (1) That the city obtain from BCSC objective data for three of the last preceding fiscal years, using procedures customarily accepted by the accounting profession as valid, showing the revenues and operating costs of the Softball Complex;
- (2) That the city amend the current lease to require that BCSC maintain complete and accurate financial records of its operations and allow the city to inspect them on a reasonable basis, it being understood that BCSC's failure to maintain and allow access to this information will be considered evidence that it is not "responsible," as that term is defined in M.G.L. c.30B, §2;
- (3) That the city do a income and expenses valuation of the lease (in addition to a land valuation) before reissuing the RFP for the lease term beginning in 2011;
- (4) That relevant financial information provided by BCSC and generated pursuant to M.G.L. c.30B, §16(b) be made available to all prospective proposers;
- (5) The provisions of all future leases include a requirement that the lessee provide the city with regular cost and expense information--at a minimum, monthly reporting of all revenue regardless of source or whether the revenue is to be shared with the municipality—and the right of the city to audit the vendor's books to assure compliance;
- (6) That the city include a bid price form in its RFP so that vendors' price proposals can be fairly compared; and
- (7) That the city require that all proposers certify that they have complied with all applicable laws of the Commonwealth.

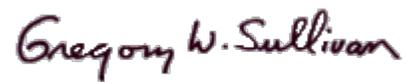
I suggest that the city consult this Office's *Advisory on Municipal Golf Course Management Contract* at http://www.mass.gov/ig/publ/golf_rpt.pdf for additional suggestions and guidance.

A procurement made in accordance with the forgoing will better facilitate an open and

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fair process that will help to instill public confidence in the integrity of the lease of city lands, reduce the likelihood of protests, and may increase income to the city's treasury.

Sincerely,

A handwritten signature in black ink that reads "Gregory W. Sullivan". The signature is written in a cursive style with a large initial 'G'.

Gregory W. Sullivan
Inspector General

cc: Gerald M. Lee, President
Pittsfield City Council

Colleen Hunter, Purchasing Agent