



The Commonwealth of Massachusetts
Office of the Inspector General

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April 12, 2010

Anthony Sasso, Town Administrator
Town of Marblehead
Abbot Hall
188 Washington Street
Marblehead, Massachusetts 01945

RE: Diamond Relocation, Inc.

Dear Mr. Sasso:

On December 24, 2008, the Marblehead School Committee ("School"), acting for the Town of Marblehead, executed a contract with Diamond Relocation, Inc. ("Diamond") for the moving, 18-month storage and relocation of certain furniture in connection with the Village School repair project. The contract price was \$24,969.00, presumably based on the amount of Diamond's price quotation which stipulated labor moving expenses from and back to the Village School of \$20,992, materials expenses of \$1,437 and a storage fee based on an estimate of storage space of 200 square feet. The School did not prepare or use a written scope of services. The School allowed vendors to walk through the school rooms in order to see the furniture and supplies the School wished to have moved and stored. Two other vendors submitted quotes. The other vendors provided storage fees using different criteria ("\$135 per trailer per month" and "\$200 per trailer").

There is a troubling suggestion that the School awarded the contract to Diamond knowing in advance that Diamond's storage space estimate of 200 square feet was woefully inadequate. Diamond's quoted price of 70¢ for 200 square feet equals \$140 per month for a total contract storage charge of \$2,520 for 18 months. Diamond, however, is using 2,500 square feet of storage space to store the Village School.

furniture. Since execution of the contract, Diamond submitted four invoices for moving and storage, as follows:

Invoice Date	Invoice Number	Supplies/Services Provided	Invoice Amount	Payment Made	Payment Date
1/16/09	6077-1	Labor and materials for moving furniture 12/26/08-12/31/008	\$17,575 ¹	Yes	3/6/09
1/31/09	6100	Move and store cafeteria tables	\$336	Yes	3/6/09
6/15/09	6077-2	Storage for six months (2500 s.f. x 70¢) or \$1750/mo.	\$10,500	No	N/A
12/15/09	6077-3	Storage for six months (2500 s.f. x 70¢) or \$1750/mo.	\$10,500	No	N/A

The total of the invoices tendered by Diamond to date is \$38,911, well over the quote amount. While the contract term is nearly completed, and the town accountant has refused to pay invoices 6077-2 and 6077-3.

Procurements of supplies and services by governmental bodies such as the School are subject to the Massachusetts Uniform Procurement Act, M.G.L. c. 30B. An award of a contract for supplies or services valued between \$5,000 and less than \$25,000 must be made to the vendor offering the specified supply or service at the lowest price, based on the solicitation of at least three written or oral quotes. M.G.L. c. 30B, §4. The quote process is flexible, straightforward, and well suited to making small purchases rapidly without getting bogged down in paperwork. While the law does not require that a scope of services be in writing, this Office always advises governmental bodies that a scope of services be in writing because it ensures that each vendor receives the same information on which to base a quote. Whether or not in writing, the awarding authority

¹ It is noteworthy that the charges for materials and moving from the Village School total 72% of the total contract cost. The unpaid portion of the contract between Diamond and the School calls for Diamond to store the furniture for over a year and move the furniture back, all for \$7,058. This lopsided initial invoice amount should have been a red flag of a potential problem.

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must ensure that each vendor provides a quote based on the same scope/description. The School did not do this.

A governmental body's authority to use the quote process is limited to contracts of less than \$25,000; contracts in amounts of \$25,000 or more must be procured using a competitive sealed bid or proposal process found in M.G.L. c. 30B, §§5 or 6. In addition, a governmental body cannot increase the value of a contract procured using a quote process by an amount which would result in a total contract amount of \$25,000 or more. Any supplies or services in excess of that amount would have to be purchased under a new procurement process.

In addition to the \$17,911 payment made for removal of the furniture from the Village School, Diamond has demanded payment for storage in invoices totaling \$21,000. You have asked whether the town can pay Diamond's invoices. You have acknowledged that the School cannot pay Diamond any amounts under the contract of \$25,000 or more. If the School has complied in full with M.G.L. c. 30B and the parties have fully performed under the December 2008 contract, the contract amount totaling \$24,969 may be paid.

However, it is well established in Massachusetts that a governmental body cannot make payments on a procurement contract that does not comply with the law. *Majestic Radiator Enclosure v. County Commissioners of Middlesex*, 397 Mass. 1002 (1986); *Baltazar Contractors, Inc. v. Town of Lunenburg*, 65 Mass.App.Ct. 718 (2006); *Cox v. Norton Police Dep't*, 2000 Mass. Super. LEXIS 699 (Mass. Super. Ct. 2000). In *Majestic Radiator*, a vendor informed a county hospital of a state law that required the hospital to have radiator covers in sleeping areas. The vendor inspected the facility and told the county hospital it needed 293 safety covers at a cost of \$54,000. The county commissioners approved and signed the purchase order with the vendor without going out to bid. The vendor installed the covers and sent an invoice to the county treasurer. The county treasurer refused to pay the vendor's bill because the no-bid contract violated competitive bidding laws. The court agreed with the county treasurer, saying the contract was invalid and unenforceable. The court said "to permit any deviation from the statutory requirements would undermine the legislative goal." This principle – that public contracts awarded in violation of competitive procurement laws are invalid, and that no payments can be made on them--has been upheld in court cases since *Majestic Radiator* and has been codified in M.G.L. c. 30B. M.G.L. c.30B, §17(b).

Knowledge or lack of knowledge by either the governmental body or the vendor does not affect this result. "It is familiar law that one dealing with a city or town cannot recover if statutory requirements ... have not been observed. ... Moreover, [a vendor] carries

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the burden of determining the limitations on a municipality's power to contract and is bound by those limitations." *Cox v. Norton Police Dep't* at 11. Nor can a vendor rely on some alternative theory to recover monies that might have been payable under an invalid contract. In *Baltazar Contractors* the court stated that the vendor, Baltazar, could not

recover if statutory requirements, such as those mandating that municipal contracts be in writing, have not been observed. Furthermore, "a party cannot evade the statutory limitations on a municipality's contracting power by rendering services and subsequently seeking recovery based on alternative theories," such as *quantum meruit*. Although Baltazar appears to have incurred the expenses in question in good faith, it acted at its peril in performing work that was not authorized in accordance with law.

Baltazar Contractors at 724 (citations omitted).

In the December 2008 contract, Diamond agreed to remove and return furniture for a fixed price and to store that furniture in accordance with the 70¢ for 200 square feet formula. The total amount for Diamond's services was \$24,969. Assuming the School complied with M.G.L. c. 30B, §4 requirements, the contract between Diamond and the School is valid and enforceable since the contract amount is less than \$25,000. However, there is a question about good faith in the determination of the estimated square footage of storage space needed. Specifically, there is a suggestion that Diamond and the School may have known prior to contract execution that the storage space needs would be nearly ten times greater than the scope estimated in the quote process, given that the vendors were given an opportunity to walk through the Village School prior to submitting a quote.

More troubling still is evidence, provided by Diamond, that suggests that Diamond and School personnel discussed several questionable stratagems to make payments to Diamond in violation of M.G.L. c. 30B, §4. According to a Diamond internal email dated February 11, 2010, the School Business Manager, the School Facilities Director and the Village School renovation project owner's project manager considered getting the project contractor, Groom Construction, to pay invoices barred by M.G.L. c. 30B, §4 "as part of the construction project." Having Groom pay Diamond's storage invoices and having it then bill that amount to the town was agreed to by the School's Superintendent, Business Manager and Facilities Director at a meeting with Diamond on February 24, 2010.

The accuracy and extent of these and any other expedients to pay Diamond should be fully vetted with legal counsel and appropriate action should be taken if the participants

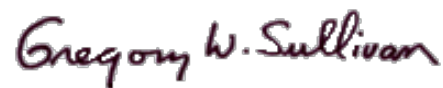
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entered into the contract knowing that the estimated square footage was calculated solely to avoid a competitive bid or proposal process, or a scheme involving Groom aimed at directing payments to Diamond in knowing violation of the law and for the purpose of defrauding the taxpayer.

In conclusion, if the School complied fully with M.G.L. c. 30B, it cannot pay Diamond for services in excess of \$24,999. The statute and case law are clear that a public entity may make no payment whatsoever for supplies or services that were not obtained in accordance with the applicable procurement law. See, e.g., M.G.L. c.30B, §17(b).

This Office also recommends that you discuss with legal counsel the School's rights with respect to Diamond's nonperformance and refusal to return the furniture. Specifically, the School should discuss its right to enforce Diamond's obligation to return the furniture in accordance with the terms of the contract.

Sincerely,

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

Gregory W. Sullivan
Inspector General

cc: Dr. G. Paul Dulac, Superintendent of Schools
John McGinn, Finance Director
Patrick J. Costello, Esquire
Mary Pichetti, MSBA Director of Capital Planning