

Procurement Bulletin

Massachusetts Office of the Inspector General

Congratulations to New MCPPOs!

The Inspector General's office extends congratulations to the most recent recipients of MCPPO designations based on applications reviewed between September 15, 2001 and January 1, 2002.

MCPPO

Everett Brown, City of Gloucester

Roger Hammond, Town of Grafton

Lauren Sartori, Town of Great Barrington

Associate MCPPO

Tonia Renee Rodriguez, Cambridge Housing Authority

MCSPPO

Carl Boyd, Division of Medical Assistance

Procurement Bulletin Distribution Update

Thank you to everyone who recently sent in their e-mail addresses to receive the *Procurement Bulletin* via e-mail. Our goal is to phase out paper distribution of the *Procurement Bulletin* to save money and natural resources.

If you sent in your e-mail address before February 28, 2002 and did not receive this *Procurement Bulletin* via e-mail, you may need to consult with your systems administrator to determine whether your e-mail account is set up to block bulk e-mail. If you need the *Procurement Bulletin* re-sent via e-mail, please contact Beth Hayward at 617-727-9140.

If you have not yet sent your e-mail address to Beth Hayward for *Procurement Bulletin* distribution, please send a fax containing your e-mail address to 617-723-2334. Be sure that capitalization of your e-mail address on your fax is exactly as it appears on your actual e-mail address.

Anyone who does not have access to e-mail, please fax Beth Hayward at 617-723-2334 to request that your name be kept on the paper distribution mailing list. Be sure to include your current mailing address with your request to remain on the paper distribution list.

Inside this issue:

Case Law Update page 2

Vendor Supplied IFBs page 2

Governmental Bodies Creating
Non-Profits: M.G.L. c. 30B
Implications page 4

M.G.L. c. 30B Questions and
Answers page 4

Case Law Update: “Or Equal” Specifications

The Massachusetts Appeals Court recently decided a case dealing with “or equal” specifications under M.G.L. c. 30, §39M.

The case, *E. Amanti & Sons, Inc. v. R.C. Griffin, Inc.*, 53 Mass. App. Ct. 245, involved specifications for an emergency vehicle exhaust system as part of an IFB by the Town of Danvers for construction of a new fire station.

The Town required that the emergency vehicle exhaust system be as specified by Plymo Vent or equal as approved by the

fire department.

Amanti, the HVAC sub-bidder sought approval to use an emergency vehicle exhaust system manufactured by Carmon. The Town’s architect initially agreed, but later found that the alternative exhaust system did not meet the performance requirement in the specifications. Amanti requested that the architect name two additional exhaust systems which were equivalent to the Plymo Vent system. The architect responded with the names of two other

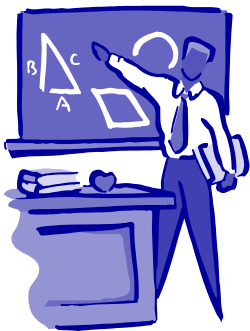
manufacturers, but did not know whether their products met the specified safety features. Ultimately, Amanti, under protest, furnished the Plymo Vent system.

M.G.L. c. 30, §39M (b) requires that specifications be written “to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications may be otherwise written for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given

in writing by the awarding authority to anyone making a written request therefor, in either instance such writing to be prepared after reasonable investigation.” M.G.L. c. 30, §39M (b) further provides that “for each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers, and for the equal of any one of said named or described materials.” (This provision also applies to specifica-

-continued on page 5-

Vendor Supplied IFBs: OIG Issues Opinion Letters



This Office recently issued two letters to awarding authorities who used vendor supplied invitation for bids (IFB) for school furniture and equipment.

The Office had received several complaints about a company which offers to draft IFBs for “furniture and equipment” (a.k.a. FFE) on behalf of school departments at no charge.

These IFBs are usually advertised as a solicitation for

furniture and equipment. However, in addition to traditional FFE items, the specifications included items one would not expect to find in a “furniture and equipment” IFB. Examples include a piano and other musical instruments, custodial supplies, medical supplies, a refrigerator, a microwave, and television sets. Many vendors selling such items would not anticipate that these items would be found in an IFB entitled “furniture and

equipment” and would not pursue the contract.

In addition, vendors (other than the drafter of the IFB) were not afforded the same opportunity to compete for these items. A probable result of an IFB structured and advertised as above is reduced competition and higher prices.

Moreover, some of these IFBs have the effect of limiting the pool of potential bidders to a single vendor

-continued on the next page-

Vendor Supplied IFBs: OIG Issues Opinion Letters, cont.

who can provide prices on every item being procured. Although a single contract award may be advantageous for contract administration, it may deprive the jurisdiction of competition on selected categories of items. Therefore, this Office recommends that awarding authorities consider separately grouping related items (e.g., musical instruments, electronics, and medical supplies) and awarding individual contracts to the lowest total price for each group. Each group of items should also be listed in the advertisement.

Some of these IFBs also grouped certain items (such as custodial supplies) together in a “lot” and asked for one price for the lot, with no price breakdown for individual items included in the lot. These IFBs did not require unit prices for items placed in lots. Although M.G.L. c. 30B only requires unit prices for contracts that exceed a term of one year (M.G.L. c. 30B, §12(c)) the amendment allowance in M.G.L. c. 30B (the “25% rule”) requires additional purchases to be made at the same unit price or less (M.G.L. c. 30B, §13). An

IFB which groups items in lots without requesting unit prices would prohibit the awarding authority from later purchasing more of any one item in the lot.

Additionally, several of these IFBs did not adequately describe the supplies required. For example, some specifications for furniture components specified the quantity of each furniture component by merely placing a quantity number next to a manufacturer’s model number. These specifications required vendors to call the furniture manufacturer to obtain the specifications and characteristics of each model number. This type of specification is not a recommended practice and may not comply with long-standing Massachusetts case law which states that “the plans and specifications [prepared by an awarding authority] must contain all the information necessary to enable prospective bidders to prepare their bids.” *Sweezy v. Mayor of Malden*, 273 Mass, 536, 540 (1931). In addition, a recent Massachusetts public bidding case places the burden on the awarding authority to “communicate clearly to

prospective bidders the terms of the specifications.” *E. Amanti & Sons, Inc. v. R.C. Griffin*, 53 Mass. App. Ct. 245, 252 (2001).

These vendor-supplied IFBs also contained an indefinite rule for contract award indicating that awards may be made on unit, group, or total bid basis, whichever is more advantageous to the awarding authority. This rule for award usually results in more than one low bidder and leaves the determination of low bidder to the awarding authority after the bids have been open. Such an indefinite rule for award affords an opportunity for the awarding authority to choose an award rule resulting in contract to a favored vendor. This situation is ripe for bid protests.

This Office has steadfastly advised awarding authorities to only use vendor-supplied specifications as a starting point for writing their purchase description or scope of services. Of course, awarding authorities should always write their own business terms, such as when supplies will be accepted and when payments will be made. Awarding authorities should

strive to protect their interests and generate full competition when procuring supplies and services. As such, awarding authorities should require vendors to supply unit prices and should always include a clear rule for award.

New OIG Publication on Fraud, False Statements, and Bid Rigging in Public Contracting

This Office will soon issue a publication written by Mike Callahan, Esq. which examines federal and Massachusetts laws pertaining to fraud, false statements and bid rigging in public contracting. The publication discusses in detail the full array of criminal laws available to federal and state prosecutors when fraud in public contracting is uncovered. This publication will soon be available on our website, www.state.ma.us/ig.

Chapter 30B Questions and Answers



The following question and answer appeared in the last newsletter and generated several phone calls to our office. We have further clarified this question and answer in this issue and apologize for any confusion:

When may I negotiate with a bidder in order to save money?

If you invited bids, you may negotiate the price of a contract downward with the low bidder only. No change in the quantity, quality, or scope of services is permitted. This type of negotiation

would not be prejudicial to fair competition because the low bidder will be awarded the contract anyway.

If you obtained oral or written quotations for a contract that is less than \$25,000, you may request new prices from all of the vendors that gave you a quote and make a record of the new prices. Of course, if you are changing your purchase description before you solicit new price quotations, you must cancel your first solicitation and award a

contract under the second solicitation.

We procured a three year school bus service contract. We did not include any renewal provision in our initial IFB. May we renew the contract anyway?

No. Chapter 30B places strict limits on contract extension and renewal options.

You may only exercise an extension, renewal, or purchase option if the option terms were advertised in

-continued on page 5-

Governmental Bodies Creating Non-Profits: M.G.L. c. 30B Implications

Over the years, this Office has reviewed the application of M.G.L. c. 30B to non-profit corporations created by governmental bodies.

M.G.L. c. 30B defines a governmental body as “a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county.” A govern-

mental body, as defined above, is subject to the procurement procedures set forth in M.G.L. c. 30B.

For non-profit corporations created by governmental bodies who may be unsure of whether they must follow M.G.L. c. 30B, this Office recommends applying a five-factor test articulated by the Supreme Judicial Court in *Globe Newspaper Company v. Massachusetts Bay Transportation Au-*

thority Retirement Board, 416 Mass. 1007 (1993). This five-factor test considers the following:

- the means by which the entity was created
- whether it performs an essentially governmental function
- the extent to which the entity receives and/or expends public funds
- the involvement of private interests
- the extent of control

and supervision exercised by governmental officials or agencies over the entity.

Application of these five factors should be done in consultation with your municipal attorney.

Chapter 30B Questions and Answers, cont.

the original IFB or RFP. Also, the contract must provide that your jurisdiction has the sole discretion, without the consent of the contractor, to exercise the option.

Before exercising any renewal, extension, or purchase option, you must determine whether it is more advantageous to your jurisdiction to exercise the option or to undertake a new procurement.

To make this determination, you must conduct a reasonable investigation of the cost and benefits and document your findings in writing.

A reasonable investigation must establish that the prices you will pay after exercising the option or renewing the contract are reasonable under current market conditions.

It may be possible to make such a determina-

tion based on a comparison of prices recently obtained through competition by other jurisdictions on similar contracts.

Alternatively, you may consider conducting a formal, advertised competition for the term of the extension or renewal. Then, if you do not receive a better bid or proposal, you may exercise the contract option.

Also keep in mind that supplies and services contracts with a term of more than

three years, including the term of any renewal or extension option, are permissible only if the authorized by a majority vote of the governing body of your jurisdiction before you award the contract.

Case Law Update: “Or Equal” Specifications, cont

tions for the procurement of building construction contracts under M.G.L. c. 149.)

The lower court found that the Town’s specifications were proprietary. Although the Town made a reasonable investigation, it did not make a written report in the public record or respond in writing to written requests about the specifications.

The lower court found the Town of Danvers liable for Amanti’s lost profits for having failed to disclose to bidders that Plymo Vent was a sole source.

On appeal, the Town contended that its bid specifications complied with M.G.L. c. 30, §39M because the statute does not prohibit specifications from occupying a middle ground between specifications that allow for full

competition and those that are proprietary.

Amanti argued that the Town did not comply with M.G.L. c. 30, §39M because it required a sole source for the vent system without notifying bidders that it was the only vent system that would meet the Town’s needs.

The Appeals Court stated that “[p]roviding the name of a single vendor and placing the burden

on the bidder to discover alternatives did not constitute competitive specifications.” *E. Amanti & Sons, Inc. v. R.C. Griffin, Inc.*, 53 Mass. App. Ct. 245, 253.

The appeals court agreed with the lower court and upheld the decision requiring that the Town pay Amanti for lost profits.



**Massachusetts Certified Public Purchasing Official Program
Massachusetts Office of the Inspector General**

State House Station
P.O. Box 270
Boston, MA 02133
(617) 727-9140
(617) 523-1205

Who Should Attend

Local government officials and others interested in local government contracts for supplies, services, real property, and construction

**Earn Professional
Certification**

For an in-depth description of courses offered, please visit our website at www.state.ma.us/ig and download a course catalog, or you may call 617-523-1205 to request a catalog, or fax a request to 617-723-2334.

Courses available in your own city or town:

Bidding Basics and Contract Administration

This brief four-hour course is packed with the basics you need to begin understanding public purchasing for local governmental bodies in Massachusetts. You may earn .4 CEUs and 4 CPEs for completion of this course. This course does not contain an examination and may not be applied toward MCPPO certification or recertification. You will receive a certificate of completion. This seminar can be offered at a location in your jurisdiction with a minimum of 35 attendees.

Bidding For Better Results

Participants in this six-hour seminar will practice writing and critiquing specifications to maximize best value for supplies and services. Participants will also learn the best way to handle late bids and how to avoid the appearance of bid splitting. There is no written examination. This seminar qualifies for 6 continuing education credits that may be applied toward MCPPO and MCSPO recertification.

Call Mike Callahan to schedule a seminar in your area at 617-523-1205.

POLICY OF NON-DISCRIMINATION:

The Office of the Inspector General does not discriminate on the basis of race, color, national origin, ancestry, religion, sex, age, disability, sexual orientation, political affiliation, or Vietnamera or disabled veteran status in its employment, admission policies, or in the administration or operation of, or access to its programs and policies. The Office of the Inspector General does not discriminate on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973. Inquiries pertaining to the Office's non-discrimination policy for MCPPO programs may be addressed to Mike Callahan, Program Director, at 617-523-1205.



The Massachusetts Office of the Inspector General has been reviewed and approved as an Authorized Provider of continuing education and training programs by the International Association for Continuing Education and Training. Authorized Provider #101811.



Registered with the National Association of State Boards of Accountancy as a sponsor of continuing professional education on the National Registry of CPE sponsors. State Boards of Accountancy have final authority on the acceptance of individual courses. Complaints regarding sponsors may be addressed to NASBA, 150 Fourth Avenue North, Suite 700, Nashville, TN 37219-2417, (615) 880-4200. Membership #103866.



The Massachusetts Office of the Inspector General is part of the American Council on Education's College Credit Recommendation program.



The Massachusetts Office of the Inspector General is a registered provider with the American Institute of Architects Continuing Education System. Please notify us of your AIA membership number so that we can notify AIA of your participation.



The Massachusetts Office of the Inspector General is registered with the Department of Education to award professional development points (PDP).



MASSACHUSETTS CERTIFIED PUBLIC PURCHASING OFFICIAL PROGRAM REGISTRATION

Office of the Inspector General
(617) 727-9140 or (617) 523-1205 Fax: (617) 723-2334

REGISTRATION INFORMATION:

Registration and payment must be received 10 days prior to course date in order to process a confirmation.

OFF-SITE REGISTRATION AND PAYMENT MUST BE RECEIVED 30 DAYS PRIOR TO SEMINAR DATE IN ORDER FOR THIS OFFICE TO CONFIRM SEMINAR. **Off-site seminars will be confirmed based on a minimum of 50 registrants.**

In the event of cancellation of an OFF-SITE location, an alternate date will be offered. Confirmation letters, with directions, will be mailed 10 days prior to seminar.

GOVERNMENT/NON-PROFIT COURSE PRICE:

Government employees shall include all employees of the commonwealth, employees of the commonwealth's political subdivisions, employees of other state governments, employees of the federal government and employees of any other municipality, county, or local district. Non-Profit employees include any employee of a 501(c)(3) corporation. Proof of non-profit status must be provided with registration.

RESERVE SEATING:

To reserve seating, fax registration and purchase order to (617-723-2334).

MAIL ORIGINAL TO:

Commonwealth of Massachusetts
Office of the Inspector General
P.O. Box 270- State House Station
Boston, MA 02133
ATTN: MCPPO

MAKE CHECK PAYABLE TO: OIG

SUBSTITUTIONS/CANCELLATIONS:

Each seminar is limited and filled on a space available basis. No refunds for cancellations. Registration transfer to someone in your organization is possible with prior notice. The OIG reserves the right to cancel/reschedule any seminar and is not responsible for any costs incurred by registrants. Terms and conditions may change without notice. Alternate course dates may be substituted in the event of an emergency, upon notification. Change in seminar date and/or cancellations received (BY FAX) less than 2 business days prior to the seminar date are subject to a \$25 transfer fee - NO-SHOWS WILL BE INVOICED A \$50 SERVICE CHARGE.

FOR MORE INFORMATION:

Please contact the Program Director Mike Callahan at (617) 523-1205.

THIS FORM MAY BE DUPLICATED

PAYMENT:

- CHECK/M.O. PURCHASE ORDER #
 I E/IV

PUBLIC CONTRACTING OVERVIEW	3-day seminar	Tuition:	\$300 for government/non-profit employees \$500 for all others
<input type="checkbox"/> MARCH 19-21, 2002	TAUNTON		
<input type="checkbox"/> APRIL 2-4, 2002	GREENFIELD		
<input type="checkbox"/> MAY 8-10, 2002	TEWKSBURY		
SUPPLIES & SERVICES CONTRACTING	3-day seminar	Tuition:	\$300 for government/non-profit employees \$500 for all others
Prerequisite: Public Contracting Overview			
<input type="checkbox"/> APRIL 10-12, 2002	TAUNTON		
<input type="checkbox"/> MAY 21-23, 2002	NORTHAMPTON		
<input type="checkbox"/> JUNE 4-6, 2002	BOSTON		
DESIGN & CONSTRUCTION CONTRACTING	3-day seminar	Tuition:	\$400 for government/non-profit employees \$600 for all others
Prerequisite: Public or State Contracting Overview			
<input type="checkbox"/> MARCH 5-7, 2002	BOSTON		
<input type="checkbox"/> APRIL 23-25, 2002	TAUNTON		
<input type="checkbox"/> MAY 15-17, 2002	MARLBORO		
LOCAL GOVERNMENT REAL PROPERTY TRANSACTIONS UNDER M.G.L. c. 30B	1-day seminar	Tuition:	\$75 for government/non-profit employees \$125 for all others
<input type="checkbox"/> MARCH 15, 2002	BOSTON		
BIDDING FOR BETTER RESULTS	1-day seminar	Tuition:	\$90 for government/non-profit employees \$150 for all others
<input type="checkbox"/> MARCH 11, 2002	BOSTON		
<input type="checkbox"/> MAY 13, 2002	BOSTON		
DRAFTING A MODEL IFB	Self Paced BY MAIL Program	Tuition:	\$60 for government/non-profit employees \$100 for all others
<input type="checkbox"/> Disk Program requiring Microsoft Word 7.0 or higher			
Registration for this course must be accompanied by a check			
SPOTLIGHT ON SCHOOLS: PROCUREMENT ISSUES, CHALLENGES, AND TRENDS	1-day seminar	Tuition:	\$90 for government/non-profit employees \$150 for all others
<input type="checkbox"/> MARCH 25, 2002	BOSTON		
<input type="checkbox"/> MAY 3, 2002	CHICOPEE		
DRAFTING SPECIFICATIONS FOR PUBLIC SAFETY VEHICLES	1-day seminar	Tuition:	\$90 for government/non-profit employees \$150 for all others
<input type="checkbox"/> APRIL 8, 2002	STOW		
<input type="checkbox"/> JUNE 11, 2002	BARNSTABLE		
INFORMATION TECHNOLOGY PURCHASING		Tuition:	\$60 for government/non-profit employees \$100 for all others
Self Paced CD-ROM Course			
<input type="checkbox"/> CD-ROM requiring Windows 95 or higher and Internet Explorer 5.0 or higher			
Registration for this course must be accompanied by a check			

NAME: _____ PHONE: _____

SIGNATURE OF APPLICANT: _____ E-MAIL: _____

ORGANIZATION/JURISDICTION: _____

TITLE: _____ FAX: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP CODE: _____

HOW LONG HAVE YOU BEEN EMPLOYED AS A PURCHASING OFFICIAL? _____

Do you need special accommodations? _____

American Institute of Architects (AIA) members must provide a membership number for LU credit. _____

New Course on CD-ROM: *Information Technology Purchasing*

The MCPPO program is now offering a continuing education course on CD-ROM, entitled, *Information Technology Purchasing Under M.G.L. c. 30B*. The learning objective of this course is to improve knowledge of technical language and information technology components in order to obtain best value through the IFB or RFP process.

In addition to reviewing the c. 30B process and its application to IT procurement, you'll improve your knowledge about IT system

components, IT planning, and technical IT terminology. This self-paced course includes illustrative exercises, reinforcing quick quizzes, helpful forms, sample specifications, a glossary of IT terms, and links to additional resources.

This course is geared to the purchasing official with little or no technical experience. (This course is not geared toward the technically savvy.)

Topics covered in *Information Technology Purchasing* include:

- Assessing your information technology (IT) needs
- Conducting IT market research
- Drafting specifications and quality requirements for IT purchases
- Using statewide contracts
- Making sole source procurements, and
- Soliciting bids and proposals with an IFB or RFP.

The course provides 4 continuing education credits and costs \$60 for government or non-profit employees

and \$100 for all others.

This course will operate on systems that have Windows 95 or later and have Internet Explorer 5.0 or later.

To purchase the course, please fill out the registration form in this newsletter or contact Mike Callahan at 617-523-1205.

For information or questions about the course, please contact Beth Hayward at 617-727-9140.

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