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AUDITOR

AUDITOR OF THE COMMONWEALTH
STATE HOUSE, BOSTON 02133

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97-2507-9

August 15, 1996

James J. Kerasiotes
Secretary
Executive Office of Transportation and Construction
10 Park Plaza
Boston, MA 02116-3969

Dear Secretary Kerasiotes:

On July 23rd, this office received from the Massachusetts Highway Department (MHD) five contract proposals relative to highway maintenance. Upon receipt, and in conjunction with our Privatization Guidelines, our staff conducted a preliminary review of MHD's submission. This review is to determine whether the submission meets the core requirements of the privatization law and to assure that it is complete for the purposes of beginning our review. Due to the limited time period that this office has (30 business days) to review an agency's proposal, it is essential that the submission be complete prior to beginning our process.

Pursuant to the requirements of Ch. 7, s.52-55, MGLs, the privatization law, this office has made the following determinations relative to MHD's submission.

1. The three proposals submitted that call for the work to be "awarded" to the state employees currently performing the work do not fall within the jurisdiction of the privatization law and therefore need not be submitted to this office. Because this work is to remain in-house, the privatization law does not define these management decisions as privatization contracts.

The law defines a privatization contract, in pertinent part, as "an agreement or series of agreements or series by which a non-governmental person or entity agrees with an agency to provide services, " Clearly, state employees are not a "non-governmental person or entity" and therefore, by definition, this office is not obligated (or authorized) to formally review these proposals.

As our privatization Guidelines explain, if any agency decides, at some point during the competitive bidding process, to keep the work in-house, the agency may enter into a written agreement with its employees delineating the obligations of both parties. This arrangement does not preclude the agency from going out to bid at some later point and, as the Guidelines make clear, if the agency selects a private contractor to perform the work, that proposal would be subject to the requirements of the privatization law. This last provision makes it clear that in-house "decisions" are not privatization contracts; if they were, the agency would not be required to submit the proposals to our office when the work was re-bid.

In conclusion, MHD does not require any decision from this office to “award” the work to its current in-house employees.

2. The State Auditor’s Office has conducted a preliminary review of the two proposals for private highway maintenance submitted in MHD’s July 23rd package. Pursuant to the requirements of Chapter 7, s.54(7) and 55(a), MGLs, this office hereby notifies the MHD of our objection to the awarding of these contracts. Specifically, we cannot approve this proposal as the agency has failed to meet the following requirements of Section 54(7):
 - a) Pursuant to Section 54(7)(iii), the agency must certify and demonstrate the proposed contract cost will be less than the estimated cost of keeping the service in-house, taking into account all comparable types of costs.

Based on the structure and presentation of the cost information supplied to this office, it cannot be demonstrated that the costs of contracting out this service will result in a cost savings. The main reason for this finding is that the two figures used in the cost comparison, the “contracting-out” price and the in-house estimate, both contain cost data related to the portion of the highway maintenance that will be “awarded” to the current in-house employees. Therefore, it cannot be determined whether the two private contracts, as compared with the historical in-house costs associated with the two service areas being contracted out, are of less cost. MHD must identify and present in a segregated manner the costs associated with work that is proposed to be contracted out.

- b) Pursuant to Section 54(7)(ii), the agency must certify and demonstrate that the quality of the services to be provided by the designated bidder is likely to satisfy the quality requirements of the written statement of services and to equal or exceed the quality of services which could be provided by the regular agency employees.

MHD’s submission provides no information whatsoever on this requirement and therefore this office cannot evaluate MHD’s certification in this area. As a result, MHD leaves us with no alternative but to cite it a deficient in this area.

MHD’s submission states that, due to the restrictions of Chapter 29, s.8B, MGLs, it is unable to provide this information. We disagree. Putting aside for the moment whether Ch. 29, s.8B precludes MHD from providing information gathered during the prequalification stage, MHD can certainly gather information from the selected contractor evidencing the ability of the contractor to perform this type of service. Examples of evidence may include prior experience with the contractor, references from other entities who have contracted with the company, or a portfolio of the contractor’s key personnel and performance history.

In addition, it is our legal position that the requirements of the privatization law would permit MHD to share with this office pertinent data gathered during the prequalification stage that both MHD and ourselves require to perform our respective duties. Although the privatization law cites specific laws that would take precedence in the event of a conflict (such as the prevailing wage law), Chapter 29, s.8B is not one of the specifically cited exceptions. In any event, MHD concerns relative to the confidentiality of this information could easily be addressed through discussions with this office.

MHD's submission fails to meet one of the core requirements of the law.

- c) Pursuant to Section 54(7)(iv), the agency must certify and demonstrate that the designated bidder and its supervisory employees have historically complied with the relevant federal or state regulatory statutes.

MHD's submission provides no substantive information whatsoever on this requirement and therefore this office is precluded from evaluating MHD's certification in this area. As a result, MHD leaves us with no alternative but to cite it as deficient in this area.

MHD again cites Chapter 29, s.8B, MGLs as the reason that it is unable to provide any information in this area. For the reasons stated above in (b), this office believes that MHD is capable of and required to provide us with information sufficient to support its certification under Section 54(7)(iv), and which would allow us to fulfill our responsibilities under the statute.

Therefore, pursuant to Section 55(a) of Chapter 7, MGLs, the State Auditor hereby notifies the MHD of his objection to the awarding of this contract. Please note that, in accordance with Section 55(d), this objection is final and binding on the MHD, until such time as a revised certificate free of the above mentioned defects is submitted and approved by this office. This office takes no position at this time on the balance of the material submitted to this office as it was not part of our preliminary review.

In addition, we did not review, at this time, the issue of whether MHD violated the privatization law throughout the bidding process by maintaining that the law did not apply to the maintenance contracts. If a formal review is conducted subsequently, we would anticipate discussing this issue with MHD as well as affected bidders.

As always, this office is available to discuss our findings and provide further assistance to the agency. In that regard, you should contact John Parsons, my General Counsel, at 727-6200 ext. 34.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph DeNucci". The signature is written in a cursive, flowing style.

JOSEPH DeNUCCI
AUDITOR OF THE COMMONWEALTH

AJD/gm