

Letter from the Inspector General

Dear Public Official:

I am pleased to announce the addition of a new MCPPO seminar entitled Charter School Procurement. This seminar will assist charter schools in satisfying the requirement that certain charter school administrators earn a Massachusetts public purchasing official certificate. Charter School Procurement is a two day seminar and is scheduled for June 7 and 8, 2006. Space is limited. For more information and a registration form, please visit our website at <http://www.mass.gov/ig/mcppo/regisinf.htm>.

Construction Management at Risk Under M.G.L. c.149A: Legal Requirements and Practical Issues, a one day seminar, has reached record numbers! This seminar is tailored to procurement officials who are not construction experts, provides an overview of the legal requirements, explains the roles of the major participants in the process, and identifies sources of risk and best practices for controlling risk in construction projects. For more information, please visit our website, as noted above.

Our outside seminars, Bidding Basics 101 and Bidding Basics and Contract Administration, which are available for local on-site presentation, have received excellent reviews. An attorney from my office will come to your jurisdiction, instructing a minimum of 20 participants on topics such as basic legal requirements for purchasing supplies and services, provide an overview of the public construction, public works construction and designer selection laws, and lastly, recommend best practices for basic contract administration. For more information on how to schedule a seminar, please visit our website at <http://www.mass.gov/ig/mcppo/bbtrain.htm#101>.

Recently, the City of New Bedford's mayor, Scott W. Lang asked my office to review the chapter 30B disposition process for the proposed sale of the Fairhaven Mills property by the city's redevelopment authority. This office found several violations of Chapter 30B. For more information on my response please see page 6 of this Procurement Bulletin. The

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complete letter may be accessed at <http://www.mass.gov/ig/publ/newbedlt.pdf>.

As always, I encourage you to visit our website periodically to obtain the most up-to-date information on the public bidding laws and the MCPPO program, and to access our reports, advisories, and other publications.

Sincerely,



Gregory W. Sullivan
Inspector General

OIG Articles

DESIGNER CONTRACTS AND CHAPTER 30B: WHEN ARE DESIGNER CONTRACTS EXEMPT FROM CHAPTER 30B?

Massachusetts General Laws Chapter 30B, §1(b)(15) exempts contracts with designers from the Uniform Procurement Act. However, only certain design contracts are exempt.

M.G.L. c.30B, §2 defines a designer as a person performing any of the following services in connection with the construction, reconstruction, alteration, repair, development, installation, maintenance, or demolition of any building, road, bridge, or other physical property: preparation of master plans, studies, surveys, soil tests, cost estimates or programs; preparation of drawings, plans or specifications; supervision or administration of a construction contract; or construction management or scheduling.

Therefore, if a designer is hired to do one or more of the listed services, the contract for the listed services will be exempt from the competitive bidding requirements of M.G.L. c.30B, and you need only to determine whether the designer selection law, M.G.L. c.7, §§38A½-0, applies. For a governmental body, M.G.L. c.7, §§38A½-0 applies to design services contracts for any building construction, reconstruction, alteration, remodeling or repair work estimated to exceed \$100,000. If there is no estimated cost of construction, the guidelines published by the Designer Selection Board recommend that the designer selection law be followed if the design fee is estimated to cost \$10,000 or more. For state agencies M.G.L. c.7, §§38A½-0 applies when the construction work is estimated to cost \$100,000 or more and when the design fee is estimated to cost \$10,000 or more. Even if a building is only a small part of the construction project, the project is still a building project subject to the designer selection law. For purposes of M.G.L. c.7, §§38A½-0, designer services include the following services that are in connection with a public building project: preparation of master plans, feasibility and other studies, surveys, soil tests, cost estimates and programs; preparation of drawings, plans and specifications, including schematic drawings and preliminary plans and specifications; supervision or administration of a construction contract; and management and scheduling.

DESIGNER CONTRACTS THAT ARE SUBJECT TO M.G.L. c.30B

Contracts for architectural, engineering, project man-

agement or similar services that do not relate to a public building construction project or a public works project are subject to the competitive bidding requirements of M.G.L. c.30B. Further, a contract for reviewing another designer's plan is for a service that does not meet the specific definition of a designer under M.G.L. c.30B, §2 and, therefore, is not exempt from the procurement process of M.G.L. c.30B. For example, when a developer submits a subdivision plan for municipal approval and the municipality contracts with another designer to review that plan, that contract is subject to M.G.L. c.30B.

DESIGNER CONTRACTS NOT IN CONJUNCTION WITH A BUILDING PROJECT

Contracts for designer services that do not relate to a building project may be subject to M.G.L. c.30B. For example, you must follow M.G.L. c.30B when selecting an engineering firm to conduct a community traffic study that is not in connection with a road construction or a repair project. M.G.L. c.30B would also apply when hiring an engineering firm to operate and maintain a public facility such as a wastewater treatment plant.

DESIGNER CONTRACTS FOR PUBLIC WORKS CONSTRUCTION

Designer services contracts for public works projects, also known as "horizontal" construction projects, such as highway and sewer projects are not subject to either M.G.L. c.7, §§38A½-0, or M.G.L. c.30B. Other examples of contracts for designer services that are exempt include preparing plans for public works construction projects such as road construction or sewer line installation, and hiring a licensed site professional to assess hazardous waste contamination in connection with a remediation project.

Although you are not legally required to do so, the Inspector General recommends that you conduct an advertised, competitive procurement process to award public works designer contracts. Whether you follow the M.G.L. c.7, §§38A½-0 or the M.G.L. c.30B procurement procedures, fostering competition among design firms is the best way to ensure that you obtain the quality services you need for the best price.

As with all procurements, you should contact your legal counsel to determine whether any local ordinances, rules or bylaws apply to the procurement of designer contracts for public works construction.

If you have any questions regarding whether your designer contract is exempt from M.G.L. c.30B, contact your legal counsel or call the Chapter 30B hotline at 617.722.8838.

OIG Articles, Cont.

Purchasing Photocopier Supplies and Services from the Statewide Contract

This office has recently reviewed certain local jurisdictions' procurements of photocopier equipment, supplies and services. We had received a complaint that these jurisdictions were purchasing copiers and copier supplies and services, without conducting a bid process, from the vendors on the statewide contract who were not authorized to sell such items under the terms and conditions of the statewide contract. This office found that the jurisdictions did not independently verify whether the vendors were on the statewide contract or whether, as part of the statewide contract, the vendors were authorized to sell copiers. Although the vendors offered prices that were equal to those of the statewide contract, the vendors were not in fact authorized to sell copiers. To avoid problems in your own jurisdiction, this office recommends the following when using the statewide contract or purchasing products for which the statewide contract exists.

Under M.G.L. c.30B, §1(c), governmental bodies may purchase from the statewide contract without conducting a separate procurement process; the state's Operational Services Division (OSD) conducts the competitive procurement. For example, in 2004, OSD conducted a complex procurement for photocopiers, laser printers, facsimile equipment, and related supplies and services. OSD entered into an umbrella contract with various vendors, OFF16, for the period January 01, 2004 to November 30, 2009 with three one year options to renew through November 30, 2012.

Governmental bodies may purchase supplies or services directly off of that contract. However, when using the statewide contract in lieu of conducting your own procurement, you must abide by the state's contract terms and conditions, including but not limited to:

- Purchasing only the specific equipment identified on the contract;
- Purchasing only from the vendor or vendors authorized to sell a specific manufacturer's equipment as identified on the contract; and

- Processing orders, payments and paperwork for all transactions through the prime contractor identified on the contract, even though you may receive equipment, supplies or services from authorized sales and service subcontractors. The prime contractor pays the authorized subcontractors and completes all state reporting requirements.

For all purchases from the statewide contract, we recommend: 1) that you conduct appropriate due diligence and verify that a vendor actually has a valid contract, 2) that the products or services offered are identified on the contract, and 3) that you review all other terms and conditions of the contract. OSD makes most of this information available online at its website, <http://www.mass.gov/osd>. In those instances where the information regarding subcontractors might not be available, you should contact OSD at 617.720.3300. This office cautions against relying on a vendor's statements of assurance.

Lastly, local jurisdictions may not purchase supplies or services from Massachusetts Higher Education Consortium (MHEC) contracts. Pursuant to M.G.L. c.15A, §24A, MHEC contracts are only available for use by public and private higher education institutions.

For various reasons, including the possibility of obtaining lower prices, you may prefer to conduct your own procurement using the competitive bidding requirements of Chapter 30B. If you have any questions regarding Chapter 30B, section 1(c), please contact your legal counsel or this office's 30B hot line at 617.722.8838.

Requests for Prevailing Wage

Sheets May Now Be Made Online

The Division of Occupational Safety has made requests for prevailing wage sheets available online. To submit your request for a prevailing wage rate sheet please visit <http://www.mass.gov/dos/pwrequest>.

Alternatively, you may mail the completed form to:

Division of Occupational Safety
399 Washington Street, 5th Floor
Boston, MA 02108
Attn: Prevailing Wage Request

Questions and Answers, M.G.L. c.30B

Q.1: I am the Purchasing Agent for a city, and I would like to purchase a crane, estimated to cost \$40,000, from a neighboring town. Is this purchase subject to Chapter 30B?

A.1: No. Chapter 30B, section 1(b)(9) exempts contracts to “purchase supplies or services from, or to dispose of supplies to, any agency or instrumentality of the federal government, the commonwealth, or any of its political subdivisions or any other state or political subdivision thereof.” A neighboring town is a political subdivision of the commonwealth. Therefore, your transaction is exempt from the competitive procurement procedures of Chapter 30B.

Q.2: My town solicited bids for janitorial services and one of the bidders did not handwrite a signature on the bid and non-collusion form. Instead, the signature was typewritten. May I accept the bid ?

A.2: Yes. Although a signature on the bid is necessary to validate its authenticity, the signature does not need to be handwritten where other indicia of authenticity are denoted which make it clear that the submission was intended for evaluation and would be contractually binding.

Massachusetts courts have held that a signature is valid if it is made with initials only, or if a document is signed by the person to be charged, or in their own name, or by their initials, or by the persons name alone, or by a printed, stamped or typewritten signature, if in signing in any of these methods the person intended to authenticate the document. See M.G.L. c.106, §1-201.

Q.3: I am the CPO of a regional school district and I am conducting an RFP process for the school district in which the school board will be evaluating the proposals received. Chapter 30B, section 6 requires that the contents of the evaluations remain confidential and not be disclosed until the completion of evaluations, or until the time for acceptance specified in the request for proposals, whichever is earlier. However, the school board is subject to the open meeting law which requires the boards' meeting to be open to the public. Which law do I follow?

A.3: Massachusetts General Laws, Chapter 39, §23B generally requires that all meetings of a governmental body be open to the public. A school board is a govern-

mental body subject to the open meeting law. However, the open meeting law contains several exemptions to the open meeting requirement, one of which, M.G.L. c.39, §23B(7), permits a governmental body to go into an executive session “to comply with the provisions of any general or special law,” which includes compliance with Chapter 30B, section 6. In this case, the school board would go into an executive session when evaluating or discussing the proposals. As the open meeting law for municipalities is enforced by the district attorney’s office of the county in which the municipality is located, all questions on the open meeting law should be directed to your county’s district attorney’s office.

Q.4: I am the CPO for my city. Three years ago, the city procured a cleaning services contract pursuant to Chapter 30B, section 5. The city noted in the contract that there would be no extensions. Now the city feels that it would be in its best interest to extend the contract for an additional two years. Can the city extend this contract?

A.4: No. Chapter 30B allows you to extend or renew a contract only when: 1) you have included notice of the provision in your solicitation and 2) the provision is stated in the contract, and gives the governmental body the sole discretion to exercise the option (the exercise of the option shall not be subject to agreement or acceptance of the contractor).

In the case at hand, since you did not meet the above requirements, you would need to conduct a new procurement.

Q.5: I am the CPO of a regional vocational school. Our research has shown that 80–85% of local dentist offices use a particular brand x-ray system. I would like to purchase the system for the dental hygienist program in my school. May I specify in the IFB that I want this particular system?

A.5: Yes. There is an exception to the general rule that specifications be written for full competition. Under Chapter 30B you may use a proprietary specification, such as a brand name of an x-ray system, to describe the requirements to be met, when the procurement officer has determined in writing that no other manner of description will suffice. You must include this determination in your procurement file. Proprietary specifications either ask for a brand name or are written so restrictively that they have the effect of limiting the procurement to a particular product. In this case, you have determined that the majority of local dentist offices use this x-ray system and that in order to be properly prepared for future employment, the students should be trained in using this specific x-ray system.

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Questions and Answers, Cont.

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It is important to note that using a brand name in your specifications may limit competition, but may not eliminate competition. There may be more than one vendor that can provide the x-ray system that you are seeking, so competitive pricing may still be obtained.

Q.6: I am the executive director of my city's urban renewal agency. Are economic development and urban renewal agencies exempt from Chapter 30B when leasing, selling, and acquiring real estate?

A.6: Chapter 30B, §1(b)(25) exempts such agencies from the section 16 request for proposals process when selling, leasing or acquiring residential, institutional, industrial or commercial property only when the urban renewal agency is engaged in the development and disposition of such property in accordance with a plan approved by the agency's authorizing authority. Other real property transactions undertaken by economic development and urban renewal agencies, including all acquisitions and dispositions of real property that are not part of an approved plan, remain subject to all of the requirements of Chapter 30B.

Important Information from the OIG

Publication of Contract Award Information in *The Central Register*

It has come to this office's attention that jurisdictions are not routinely publishing notices of contract awards in *The Central Register*. Chapter 9, section 20A of the Massachusetts General Laws requires that *The Central Register* provide notice of the individual or firm selected for award of any contract advertised in a prior edition of *The Central Register*. This means that if a jurisdiction is required to publish a notice of a bid in *The Central Register*, the jurisdiction must also publish a notice of the award.

Contract opportunities and awards that are required to be published in *The Central Register* include contracting opportunities for design services, public building and public works construction, and notices for the disposition or acquisition of certain real property. *The Central Register* also requires posting of persons who have picked up specifications for projects that have been published in *The Central Register*.

If you have any questions regarding publishing of contract opportunities and contract awards, please contact the Secretary of the Commonwealth Regulations Division at 617.727.2831.

Important Information, Cont.

Selling Surplus Supplies Through On-line Auctions

In June, 2005, this office published an advisory entitled *eProcurement: Chapter 30B and Online Auctions*. In the advisory, this office stated that a jurisdiction may sell surplus supplies through online auctions, such as eBay, if a jurisdiction complies with all requirements of Chapter 30B.

Recently a question was raised as to how a jurisdiction can sell surplus supplies through an online auction while complying with Chapter 30B, §10, which requires that a person submitting a bid for the procurement or disposal of supplies or services certify in writing on the bid, that the bid is submitted in good faith without collusion or fraud.

It is the opinion of this office that Chapter 30B, §10 will be deemed complied with if the jurisdiction disposing of surplus supplies through an online auction states in its item description the following:

"[T]he undersigned [bidder] certifies under the penalties of perjury that this bid or proposal has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals." Upon winning the auction, the winning bidder must submit a signed non-collusion form to the jurisdiction prior to the receipt of the supply.

If you have any questions concerning the sale of surplus supplies through an online auction please contact our 30B hotline at 617.722.8838 and speak with an attorney.

Inspector General Helps to Recover More than \$117,000 for School Districts

A review by the Inspector General led the Commonwealth of Massachusetts Operational Services Division (OSD) to suspend School Specialties Inc. from the statewide "blanket" school supply contract for overcharging school districts. School Specialties was suspended for the period of February 9, 2006 through March 31, 2006. This suspension also led to a financial penalty of more than \$12,000 that will be refunded to overcharged school districts. The Inspector General also caused OSD to have School Specialties refund almost \$105,000 in merchandise credits that had remained unused by school districts. These credits were part of a settlement between the Commonwealth and School Specialties for previous contract violations.

Recent Publications

Letter to Mayor Scott W. Lang: Proposed Sale of the City of New Bedford's Fairhaven Mills Parcels, April 2006

The mayor of New Bedford, Scott W. Lang, requested that this office review the Chapter 30B disposition process for the Fairhaven Mills property directed by the former mayor, Federick M. Kalisz, and conducted by the city's redevelopment authority. This office determined that the proposed sale violated Chapter 30B in that: 1) the RFP was drafted with the knowledge that only one bidder could meet the city's requirements, 2) the city and the winning bidder had negotiated the sale prior to the issuance of the request for proposals, 3) the city improperly declared the transaction an emergency, and 4) that the winning bidder failed to meet the requirements set forth in the RFP.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/newbedlt.pdf>.

The Virtual Gateway: MassHealth and Uncompensated Care Pool Web-based Data Intake and Eligibility Determination System, Review and Evaluation, March 2006

In this third report to the House and Senate Committees on Ways and Means, this office has reviewed the effectiveness and impact of the Virtual Gateway System. The Virtual Gateway is the online screening, referral, and data collection tool, designed to facilitate enrollment into various Executive Office of Health and Human Services programs. In the report, this office made seven recommendations to the Executive Office of Health and Human Services for improvement of the Virtual Gateway to support and enhance the system to become more effective, economical, accessible and practical.

The complete report may be accessed at <http://www.mass.gov/ig/publ/virtgate.pdf>.

School District Control and Oversight of Administrative Expenses, March 2006

Over the past few years, there have been a number of reports or allegations of fraud and/or inappropriate financial activity in school districts in the commonwealth. It is this office's belief that with adequate oversight and control many of the alleged improprieties could have been prevented. This report details eight recommendations for effective management of discretionary administrative expenses.

The complete report may be accessed at <http://www.mass.gov/ig/publ/wachadex.pdf>.

Advisory for Local Public Officials: Public Records, February 2006

This advisory discusses M.G.L. c.4, §7(26), the Public Records Law and the roles that public employees play in the maintenance of public records. This advisory also contains links and public resources regarding the public records law.

The complete advisory may be accessed at <http://www.mass.gov/ig/publ/publicrd.pdf>.

Letter to DOR and Follow-up: Economic Incentive Tax Credit Decertification, December 2005 and February 2006

In the December letter to the Department of Revenue (DOR), this office requested that DOR review the status of projects decertified from receiving tax credits from the Economic Development Incentive Program, which is managed by the Economic Assistance Coordinating Council (EACC).

In February 2006, this office posted a follow-up statement on its website stating that DOR is working with the EACC to set up a process to alert DOR when any business is decertified from the tax increment financing program.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/decertlt.pdf>.

The follow-up statement may be accessed at <http://www.mass.gov/ig/publ/decerttrp.htm>.

Letter to Selectmen in the towns of Georgetown, Hamilton and Wenham: Employment of the Building Inspector, December 2005

In this letter addressed to the selectmen of Georgetown, Hamilton and Wenham, this office details its investigation of Charles Brett, a full time building inspector for the town of Georgetown and part-time building inspector for the towns of Hamilton and Wenham. Through its investigation, this office found that Mr. Brett was paid for roughly 72-75 hours per week while employed in the three jurisdictions, despite the fact that he was being paid by Georgetown for full time work, while performing work for, and being paid by, Hamilton and Wenham. This office set forth six recommendations to these towns, regarding this inappropriate and unacceptable situation.

The complete letter may be accessed at <http://www.mass.gov/ig/publ/brettltr.pdf>.

Procurement Bulletin **Subscription Information**

The *Procurement Bulletin* is published on a quarterly basis by the Massachusetts Office of the Inspector General. There is no charge to subscribe. To receive the *Procurement Bulletin* via e-mail, please send an e-mail containing your first and last name, along with your e-mail address, to Eva Benoit at benoittev@maoig.net. To receive a paper copy via mail, please fax your mailing address to Eva Benoit at 617-723-2334.

If you previously subscribed to the *Procurement Bulletin* and have not received a copy, please contact Eva Benoit by phone at 617-727-9140.

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