



GLENN A. CUNHA
INSPECTOR GENERAL

The Commonwealth of Massachusetts
Office of the Inspector General

JOHN W. McCORMACK
STATE OFFICE BUILDING
ONE ASHBURTON PLACE
ROOM 1311
BOSTON, MA 02108
TEL: (617) 727-9140
FAX: (617) 723-2334

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The Honorable Edward J. Kennedy, Chairman
Joint Committee on Tourism, Arts and Cultural Development
State House, Room 405
Boston, MA 02133

The Honorable Paul McMurtry, Chairman
Joint Committee on Tourism, Arts and Cultural Development
State House, Room 171
Boston, MA 02133

Re: House 2931 and Senate 2029 – An Act Relative to Procurement Services for Artists

Dear Chairman Kennedy and Chairman McMurtry:

I write to address House 2931 and its companion bill, Senate 2029, *An Act Relative to Procurement Services for Artists*. If these bills are signed into law, cities, towns and other jurisdictions (collectively, “jurisdictions”) would no longer have to follow transparent and competitive procedures when purchasing art and a wide range of services. The bills’ intent is to make it easier for jurisdictions to buy artwork. However, the current procurement laws are not burdensome and they give jurisdictions the flexibility to choose art based on subjective criteria. Furthermore, as drafted, the bills would exempt far more than completed artwork from the procurement laws. It also would exempt a broad range of services, from creating a website to designing a public park to repairing carpets. These types of services require a fair, open and competitive process. Finally, the exemption has no dollar limit; thus, a jurisdiction could spend hundreds of thousands of dollars on a purchase with no public oversight and no competition. House 2931 and Senate 2029 should receive an unfavorable report from the committee.

Currently, jurisdictions must follow M.G.L. Chapter 30B (“Chapter 30B”), also known as the Uniform Procurement Act, when purchasing art or related services, such as cleaning artwork. Chapter 30B guides jurisdictions in properly obtaining supplies and services by establishing purchasing procedures based on the total cost of the needed supplies or services. House 2931 and Senate 2029 would exempt art and a range of services from Chapter 30B.

The Office of the Inspector General’s mandate is to prevent and detect fraud, waste and abuse in public spending. To fulfill this mandate, my Office helped draft the original Chapter 30B, and it has developed a specialized expertise in the interpretation and implementation of the

statute. The foundation of Chapter 30B is fairness, transparency, accountability and competition. Exempting jurisdictions from following public procurement laws eliminates fair, open and competitive bidding practices and potentially wastes public dollars.

Proponents of this legislation argue that art is subjective and therefore difficult to obtain using the procedures in Chapter 30B. This position is not entirely justified. It is important to understand that procuring art under Chapter 30B does not need to be complicated or complex. A completed work of art – like ceramics, pottery or a painting – is a supply and a jurisdiction can procure it by following the rules laid out in the statute. Different price thresholds govern which procurement method a jurisdiction must follow. For example, if a jurisdiction would like to spend more than \$10,000 but less than \$50,000, they may solicit written quotes for a piece of art or artistic services. If the item costs less than \$10,000, the jurisdiction may use sound business practices for the purchase.

Procurements over \$50,000 allow even greater flexibility, because the jurisdiction can use an invitation for bids (“IFB”) or a request for proposals (“RFP”). An RFP grants jurisdictions the flexibility to seek ideas and concepts. An RFP also allows for a competitive process that is not based solely on price. A jurisdiction can develop evaluative criteria and may rank proposals based on the advantages each proposal offers. In fact, the city of Boston recently issued an RFP for conceptual proposals for transformative public artwork with the hopes of commissioning four to five projects.

An artist in residence, performance art or other type of visual art is considered a service under Chapter 30B and can be properly procured using the RFP process. If a jurisdiction wants to only receive proposals from people who are experienced as artists and meet certain qualifications, the jurisdiction can establish minimum “quality requirements” in the RFP. If a jurisdiction is not sure what is available for public art, the jurisdiction may perform market research or conduct a request for information (“RFI”) before drafting its solicitation, bid or proposal. In an RFI, artists could display or showcase their work to the jurisdiction and demonstrate other ideas or projects they have created.

There are a number of existing options under Chapter 30B to commission, purchase and obtain art and related services. As a result, there is no need to discard the accountability and transparency provisions in Chapter 30B that instill financial responsibility and purchasing process integrity.

House 2931 and Senate 2029 do not simply exempt artwork and repairs to artwork. The legislation exempts so-called “artistic services” but it defines that term so broadly that it could encompass a wide range of routine services. Specifically, the bills define “artistic services” to mean:

Services provided by an individual or group of individuals who profess and practice a skill in the artistic disciplines such as but not limited to the visual arts, literary arts, performing arts, craft-based arts, traditional arts, textile/fiber arts,

design, digital/web based art forms, functional arts, media based arts, and any other new or emerging art form.

The language is so vague and broad that a jurisdiction may circumvent the procurement process for items or services that should not be exempt. For example, a local jurisdiction could use this exemption when seeking to design its website (“web based art forms”), to create and print brochures (“media based arts”), to document the jurisdiction’s history (“literary arts”), or to operate its social media platforms (“digital based art forms”). The definition even exempts “design” services, but does not define what that means.

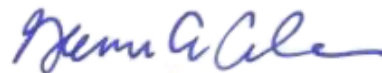
Additionally, as my Office explained to the proponents of these bills, simply exempting creative services from Chapter 30B does not solve the perceived problem. Procuring art and related services often requires following other statutes, including public construction laws, such as M.G.L. Chapter 149 and M.G.L. Chapter 30, § 39M. These laws govern public construction and will affect the process for the procurement depending on the nature of the art and/or its installation. For example, affixing a statue to the ground would trigger public construction and prevailing wage laws.

My Office filed legislation – House 11 – this session that would permit jurisdictions to use an RFP process for purchases that cost between \$10,000 and \$50,000.¹ Local procurement officials state that having the opportunity to use RFPs for lower dollar amount purchases would be extremely beneficial. House 11 would give communities even more flexibility when seeking to buy artwork.

Protecting public funds is a critical concern for my Office, as it is for the Legislature and municipalities. The people of Massachusetts should be assured that public dollars are being used wisely and for the benefit of the community. Exempting art and related services does not foster competition or ensure transparency, which are essential for the proper use of public funds. House 2931 and Senate 2029 should receive an unfavorable report from the committee.

Thank you for your consideration. Please do not hesitate to contact me if you have any questions or would like to discuss this matter further. Thank you.

Sincerely,



Glenn A. Cunha
Inspector General

¹ Currently, under Chapter 30B, a jurisdiction may only solicit quotes or use an IFB process for procurements between \$10,000 and \$50,000.