

Automatic Renewal Clauses or Provisions Violate M.G.L. c.30B

The Office of the Inspector General sent a letter to the legal counsel for the Mahar Regional School District (District) in Orange, Massachusetts who inquired about the applicability of M.G.L. c.30B to an agreement between an energy broker and the District where the compensation for the broker's services was not paid by the District. Specifically, the District entered into a no-bid agreement with Northeast Energy Partners (NEP), a broker of energy services, who acted as an agent for the District's procurement of electricity ("agency contract"). This Office reviewed the agency contract and determined that it was subject to M.G.L. c.30B, which applies to a contract for services between a governmental body and a vendor, regardless of who pays the vendor. This Office recommended that the District's legal counsel check the payment terms between the District's electricity supplier and NEP, as the District may have unknowingly violated M.G.L. c.30B by not obtaining quotes or soliciting advertised competition for the agency contract if NEP received commissions or other payments from the electricity supplier of \$5,000 or more, or if NEP could obtain commissions or payments of \$5,000 or more over the unlimited term of the automatically renewing agency contract.

In addition, this Office found that the automatic renewal provision in the agency contract violated M.G.L. c.30B, §12(c)(5), which provides in part that where a contract contains an option for renewal, extension, or purchase, the governmental body shall retain sole discretion in exercising the option, and no exercise of an option shall be subject to agreement or acceptance by the vendor. The automatic renewal provision in the agency contract violated that provision of the law because it renewed without affirmative approval by the District. As such, NEP would lack signatory authority to bind the District on any electricity contract, even if the District had procured the services in full compliance with M.G.L. c.30B.

In the opinion of this Office, the agency contract was an invalid contract upon which payment could not be made under M.G.L. c.30B, §17(b). The letter is available at: http://www.mass.gov/ig/publ/mahar_energy_ltr.pdf.

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Letter to Town Administrator Anthony Sasso, Town of Marblehead, Regarding a Furniture Storage and Relocation Contract, April 2010.

This Office was asked to review the quote process used to procure moving, storage and relocation services for school furniture. The Marblehead school committee awarded a contract for \$24,969 based on a quote process, but was later invoiced for \$38,911, due to an exceedingly low estimation of storage space used to solicit quotes. There was a suggestion that the parties knew prior to entering into the contract that the storage space needs were significantly greater than the estimate used in the quote process, given that the vendors were provided with an opportunity to walk through the school prior to providing a quote. The Office advised the town that M.G.L. c.30B prohibited the town from making payment in excess of \$24,969, the contracted amount, and recommended that the town seek advice of counsel in regards to its right to enforce the vendors obligation to return the furniture in accordance with the terms of the contract as well as to consider whether any action should be taken against the participants if they entered into the contract knowing that the estimated square footage was calculated low in order to avoid a competitive bid or proposal process.

The letter can be accessed at:
http://www.mass.gov/ig/publ/marblehead_ltr.pdf.

OIG Articles

Supreme Judicial Court Determines Certain Build-to-Lease Agreements are Subject to the Public Construction Laws

The Massachusetts Supreme Judicial Court (SJC) recently decided a case, *Brasi Development Corp. v. Attorney General*, 456 Mass. 684 (2010), holding that certain build-to-lease agreements are subject to the public construction laws. At issue was an agreement for the development, maintenance and long-term lease of dormitory facilities by the University of Massachusetts, Lowell (UMass Lowell).

In 2008, UMass Lowell issued an RFP for the lease of a student dormitory. Under the terms of the RFP, the selected bidder would construct the dormitory, if required, maintain the building and grounds, provide day-to-day upkeep and assume all costs of operation and maintenance. Brasi Development Corp. (Brasi) was one of seven respondents to the RFP, and one of three respondents that proposed to construct new buildings, and was chosen as the developer subject to negotiations of the lease attached to the RFP. Negotiations to the lease suggested that UMass Lowell intended to use the new building indefinitely.

After receiving a protest, the Attorney General concluded that the RFP was a proposal to construct a public building, subject to M.G.L. c.149, and that the agreement between UMass Lowell and Brasi was entered into in violation of the public bidding laws. Brasi filed action against UMass Lowell and the Attorney General seeking a judgment declaring the bid protest decision was incorrect after UMass Lowell moved to terminate the agreement. A Superior Court judge concluded that the agreement was a lease rather than an agreement to construct a new building. The Attorney General requested direct appellate review.

In determining that the agreement was subject to the public construction laws, the SJC provided a list of several factors that may be considered, but may not be dispositive, in determining whether a project is subject to the public construction laws: (1) the extent of control retained by the agency during development and construction; (2) the length of the proposed lease, including any proposed extensions; (3) whether the source of money is public funds; (4) whether payments made under the agreement essentially cover the costs of construction; (5) whether the agency re-

tains an option to purchase for a nominal sum at the end of the lease period or whether the building automatically transfers to the public agency on expiration of the lease; (6) whether the agency initially owned the land and then sold or leased it to the private party, or whether the agency had the building constructed and then leased the newly constructed building; and (7) whether the facility is of a specialized nature that would render it unsuitable for another commercial purpose without significant renovations. It is important to note that, in deciding that this agreement was subject to the public construction laws, the SJC reviewed both the RFP and the executed lease, which contained materially different terms.

Because failure to comply with the public bidding laws may result in an invalid contract upon which payment may not be made, prior to entering into any build-to-lease agreement it is important that you seek advice of legal counsel to assist you to determine whether the public construction laws are applicable.

Chapter 30B Questions and Answers

Q.1. I am the CPO of a city and the accounting department needs new financial software. The contract for the software is estimated to cost \$20,000. May I use Chapter 30B's sole-source provision to purchase financial software and maintenance from the manufacturer?

A.1. Yes, if you determine that the manufacturer is the only practicable source for the software. Chapter 30B allows you to make sole-source procurements for less than \$25,000 when a reasonable investigation shows that there is only one practicable source for the supply or service. A "sole-source" procurement is a purchase of supplies or services without advertising or competition. You must keep a written record of the sole-source procurement, specifying the contractor's name, the amount and type of contract awarded, a listing of the supplies or services procured, and the basis for your determination that there was only one practicable source for the purchase. If you satisfy these Chapter 30B requirements, you may purchase financial software for the accounting department from the manufacturer for \$20,000 dollars on a sole-source basis.

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Chapter 30B Questions and Answers, cont.

Q.2. I am a town administrator and the police department has asked if it may be able to procure software maintenance for its computer-aided dispatch software on a sole-source basis.

A.2. Yes. A purchase of software maintenance is one of several excepted categories of items that you may purchase on a sole-source basis in any dollar amount if you satisfy certain Chapter 30B requirements. Software maintenance includes maintaining and upgrading software and purchasing additional licenses. Chapter 30B does not allow sole-source procurements of \$25,000 or more except for educational materials, library books, software maintenance, and regulated utilities. To use this method of acquisition you must conduct a reasonable investigation showing that there is only one practicable source and you must maintain a written record of the sole-source procurement, specifying the contractor's name, the amount and type of contract awarded, a listing of the supplies or services procured, and the basis for your determination that there was only one practicable source for the purchase.

Q.3. I am the Health Agent for an elected Board of Health. Must elected Boards of Health follow M.G.L. c.30B?

A.3. Yes. M.G.L. c.30B exempts "contracts or agreements entered into by a municipal hospital or a *municipal department of health*." [Chapter 30B, §1(b)(27) (emphasis added).] A municipal department of health is a different statutory entity from a board of health. In order to create a department of health, a town must vote to accept the provisions of M.G.L. c.111, §§26A through 26E. Upon such vote and acceptance, the municipal department of health replaces the board of health. The statute expressly limits the exemption to municipal departments of health. Therefore, contracts entered into by boards of health must comply with M.G.L. c.30B.

Q.4. I am the CPO for a city and have recently solicited proposals for the disposition of real property for cell towers. Are real property proposals opened publicly?

A.4. Yes. Section 16 of Chapter 30B requires that real property proposals be opened publicly, at the time specified in the solicitation. Upon opening, you will read each proposer's name and the amount of the proposal aloud, and record the information in a register of

proposals. This is true regardless of whether you structure your solicitation like an invitation for bid (awarding to the proposer offering you the best price) or an request for proposals (in which you award to the proposer who is most advantageous taking into consideration price and evaluation criteria).

Q.5. If I structure my real property solicitation like a request for proposals for supplies and services, should I require separate price and technical proposals?

A.5. No. Because real property proposals are opened publicly, there is no confidentiality afforded to the proposals. Therefore, it is unnecessary for proposers to submit their prices in a separate sealed envelope.

Q.6. I am the facilities director for a town and I need to procure a vehicle for less than \$25,000. I have located a couple of used vehicles from a dealership that would meet my needs. How can I purchase a used vehicle from the dealership and still comply with Chapter 30B?

A.6. Chapter 30B requires that you determine your needs (establish a purchase description) and then based on the applicable dollar threshold, solicit quotes, bids or proposals. In order to ensure that you are promoting fair and open competition, your purchase description should be drafted in a way that would encompass comparable used vehicles. You should state what model, years and mileage you would consider among other requirements. When soliciting three quotes, you may contact other dealers, check online listings (such as www.autotrader.com or others) or check local advertisements.

Q.7. I am the business manager for a regional school district I have found a used vehicle for less than \$25,000 listed on an auction block listing. Can the town bid on the used vehicle at auction and still comply with Chapter 30B?

A.7. Yes. When procuring goods or services with a value of less than \$25,000, you are required to solicit three oral or written price quotes. While you will still be required to solicit two other quotes, the price that you bid at auction will be considered your third quote. Prior to going to the auction, you should solicit at least two quotes for comparable used vehicles and then, if you are able to obtain the vehicle at auction for a price that is lower than the lowest quote received you may procure the vehicle at the auction.

Recent Publications

Letter to the Town of Groton Regarding Allegations of Fuel Theft, May 2010.

This Office investigated a complaint alleging that Town of Groton Highway Department (Department) employees misappropriated fuel on a number of occasions. It was also alleged that the Highway Surveyor knew about the misappropriation and chose to ignore the theft of public property. The Office's investigation found that in the past, the Surveyor did condone a Department practice that allowed employees to reimburse themselves for out-of-pocket expenses by using fuel for personal use. A letter was sent to the Town indicating that this inappropriate practice, which was no longer in use by the Department, lacked the audit trail and accountability normally required for expense reimbursements. The Office recommended that the Town develop a fuel and vehicle use policy and implement fuel controls consistent with the Office's Fuel Management Advisory.

The letter can be accessed at: http://www.mass.gov/ig/publ/groton_fuel_ltr.pdf.

Letter to Commissioner Mitchell D. Chester, Ed. D., Regarding Changes to the Procedures for Reviewing and Approving Charter School Applications, May 2010.

This Office provided the Department of Elementary and Secondary Education (DESE) its comments on DESE's "Application Review Process for the Award of New Charters, Department of Elementary and Secondary Education, April 26, 2010." These procedures appear to change the standard for disapproval of charter applications from failing to meet "one or more" criteria, to "substantially meets the criteria as set forth in the statute, regulations, and application guidance." It is this Office's opinion that this change makes the standard of approval for charter school applications less clear and less defined, making the process more vulnerable to abuse. Under the new process, the safeguard requiring applications to meet stated criteria has been eliminated and the independence of the charter school office was diminished, thereby setting a lower standard for approval of a new charter school by replacing the previous objective standard for approval with a more subjective one. Additionally, the new procedures have eliminated a former step in the review and approval process

whereby DESE Charter School officials and outside reviewers had been required to complete lengthy, detailed, written, criterion-by-criterion assessments of each final charter school application. The elimination of this previously-documented criterion-by-criterion assessment process will prevent outside parties, including oversight agencies such as this Office, from being able to effectively audit and review the process for fairness, objectivity, and legality. Finally, because of the significant procedural changes to the charter school application process, it is this Office's opinion that the changes should have been subject to input from public officials and the general public before adoption.

The letter can be accessed at: http://www.mass.gov/ig/publ/dese_cs_review_ltr.pdf.

OIG Investigation Leads to Nearly \$200,000 in Cost Recovery

The Office conducted an investigation, in cooperation with the Massachusetts Department of Revenue (DOR) and the Massachusetts Registry of Motor Vehicles (RMV) that focused on Massachusetts residents allegedly purchasing and registering large recreational vehicles (RVs) through Limited Liability Companies (LLC) established in the State of Montana. The three agencies investigated a small sample of RVs purchased with Montana LLCs to determine whether a larger investigation was warranted. Thus far, the preliminary investigation has collected nearly \$200,000 and led to enforcement action that has billed errant taxpayers for hundreds of thousands of dollars in taxes and fees. In addition to enforcement action, the RMV has increased its monitoring of RV purchases, and plans to contact municipal tax collectors so municipalities can assess excise tax against these RVs.

The report of the investigation can be accessed at: http://www.mass.gov/ig/publ/montana_rv_rpt.pdf.

MCPPO Designations

The Following is a list of the MCPPO Program's new Designees on applications reviewed (not received) between January 1, 2010 and June 30, 2010:

MCPPO

Garrett D. Baker, Swampscott Public Schools
John M. Batchelder, Town of Norfolk
Gerard R. Boyle, City of Somerville
David Brunell, Town of Framingham DPW
Diane Connor, Town of Framingham
Rita Coppola-Wallace, City of Springfield
James F. Costa, New Bedford Housing Authority
Robert DeFusco, City of Haverhill
Edward S. Donoghue, Bourne Public Schools
Richard D. Fitzpatrick, Jr., Norfolk Agricultural HS
Marge K. Foster, Central Berkshire RSD
Chris J. Gallagher, Raynham Sewer Commission
Anne L. Gulati, Needham Public Schools
Heidi L. Kardenetz, Salem State College
Cortney A. Keegan, Southbridge Public Schools
Christopher J. Ketchen, Town of Wellesley
James A. Kiely, Somerset Public Schools
Maria C. Lopez-Santiago, City of Springfield
Donald A. Lowe, Town of Bolton
Charles F. Mahoney, Town of Boxborough
Christopher F. Martin, Town of Granby
Karen M. Murphy, Town of Westminster
Mary K. Murphy Guerrera, Masconomet RSD
Robert P. Parsons, Spencer Fire Dept.
Sarah A. Pawluczzonek, Town of Framingham
Gregory C. Rounseville, Town of Dennis
James P. Tassinari, Southeastern RSD
Patricia Vaillancourt, UMASS Lowell
Kenneth C. Wertz, Sharon Public Schools

Associate MCPPO

Robert Alconada, Shore Educ. Collaborative
Karen A. Bushee, Malden Police Dept.
Jeanne M. Foti, Reading Municipal Light Dept.
Kathryn R. Hobin, City of Quincy
Meredith A. Marini, City of Quincy
Marie E. Reddington, Town of Belmont
Peter J. Romano, Revere Housing Authority
Lauren P. Stabilo, City of Springfield
Daniel R. Thompson, MWRA
Wayne E. Walkden, City of Taunton

MCPPO for Supplies & Services

Robert J. Detweiler, Amherst-Pelham RSD
Gregory J. Falcone, Pathfinder Regional VTSH
David A. Ferris, Quincy Housing Authority
Kathleen Isernio, Old Rochester RSD
Susan E. Owen, Sharon Public Schools

Associate MCPPO for Supplies & Services

Michael R. Eaton, Springfield Public Schools

MCPPO for Design & Construction

David E. Anderson, Concord Public Schools
Manuel Cordeiro, Jr., Dartmouth Public Schools
Todd D. Gundlach, Dept. of Correction
Kevin D. Johnson, Town of Ashland



MASSACHUSETTS CERTIFIED PUBLIC PURCHASING OFFICIAL PROGRAM
REGISTRATION FORM July-December 2010

Office of the Inspector General
Gregory W. Sullivan, Inspector General
MCPPO@maoig.net Fax: (617) 723-2334

REGISTRATION INFORMATION:
All seminars will be confirmed based on a minimum of 20 participants.

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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.

Register/ 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
One Ashburton Place, Rm. 1311
Boston, MA 02108

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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. NO-SHOWS or LATE CANCELLATIONS will be invoiced a \$100.00 service charge

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PUBLIC CONTRACTING OVERVIEW

No Prerequisite

- September 21, 22, 23-2010
November 2, 3, 4-2010

3-day seminar

BOSTON
BOSTON

Tuition: \$450 for government/non-profit employees
\$700 for all others

SUPPLIES & SERVICES CONTRACTING

Prerequisite: Public Contracting Overview or Charter School Procurement

- August 10, 11, 12-2010
August 10, 11, 12-2010 Video Conference hosted by Gateway RSD HUNTINGTON Limited seats available
October 19, 20, 21-21010

3-day seminar

BOSTON
BOSTON

Tuition: \$450 for government/non-profit employees
\$700 for all others

DESIGN & CONSTRUCTION CONTRACTING

Prerequisite: Public Contracting Overview or Charter School Procurement

- September 28, 29, 30 -2010
November 30 & December 1, 2-2010

3-day seminar

BOSTON
BOSTON

Tuition: \$650 for government/non-profit employees
\$900 for all others

ADVANCED TOPICS UPDATE

- October 26 & 27-2010

2-day seminar

BOSTON

Tuition: \$350 for government/non-profit employees
\$600 for all others

CERTIFICATION for School Project Designers & Owner's Project Managers

- October 6, 7, & 13, 14-2010
December 8, 9, & 15, 16-2010

4-Day Training

BOSTON
BOSTON

Tuition: \$1200 -Private Sector

CONSTRUCTION MANAGEMENT AT RISK

Under M.G.L. c. 149A: Legal Requirements & Practical Issues

*Introductory material geared to procurement officials who are not construction experts

- November 23-2010

1-day seminar

BOSTON

Tuition: \$275 for government/non-profit employees
\$600 for all others

CHARTER SCHOOL PROCUREMENT

No Prerequisite

- November 16 & 17-2010

2-day seminar

BOSTON

Tuition: \$400 for government/non-profit employees
\$600 for all others

Drafting A Model IFB

Self-paced

Tuition: \$75 ea. for govt./non-profit employees

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ARRA

American Recovery and Reinvestment Act

Introduction

This section of the *Procurement Bulletin* focuses on matters pertaining to American Recovery and Reinvestment Act (ARRA) funds. It serves as an information source for issues, questions, guidelines and deadlines concerning ARRA. For more information on ARRA, visit our website at: www.mass.gov/ig

ARRA Audit Services

As you know, ARRA funding includes a mandate for accountability, transparency and improved controls to combat fraud, waste and abuse. To help meet this mandate, the federal Office of Management and Budget (OMB) has released a number of ARRA specific updates to Circular A-133 that will assist ARRA recipients to comply with federal audit requirements under ARRA. A-133 provides extensive guidance to auditors regarding what compliance requirements should be included in audits of federal grant recipients.

A-133 is a tool used by external auditors who conduct audits under the mandate of the federal Single Audit Act of 1984 (as amended). A jurisdiction or recipient of \$500,000 or more in federal funds is required by federal law to have an audit performed under the Single Audit Act requirements.

ARRA has funneled significant funding into many jurisdictions, including school districts, thereby triggering the applicability of the Single Audit Act for many jurisdictions not previously subject to the Act. As a result, this is creating new audit, compliance, internal control and audit procurement responsibilities and challenges for many.

The following is an abbreviated version of ten audit service principles offered by the Association of Government Accountants (AGA) that should be considered for audit services. To ensure that a jurisdiction can meet both ARRA and Single Audit Act requirements as well as obtain a sound, useful audit, a jurisdiction should review and consider the following:

1. Understand what you need
2. Think about how you will be able to use the results of the audit
3. Know what the audit will entail
4. Understand the different audit types and choose the one that best meets your needs
5. Understand the concepts of reasonable assurance and negative assurance
6. Know what professional standards should apply to the audit

Notice:

Next ARRA reporting period is July 1-14, 2010.

7. Remember that only an independent auditor may be able to satisfy auditing standards pertaining to auditor independence
8. Understand that independent auditors may be prohibited by auditing standards and independence principles from providing both audit and non-audit services
9. Select an auditor/audit firm whose experience and qualifications best meet your needs
10. Understand any potential limitations so that your audit expectations are realistic.

Your jurisdiction can also review the Office of the Inspector General's "A Local Official's Guide to Procuring and Administering Audit Services" http://www.mass.gov/ig/publ/audguide_revised.pdf and should check if any state or local audit rules apply to your jurisdiction or if "best practices" or other guidance is offered by appropriate professional organizations such as the AGA, the Intergovernmental Forum, and the American Institute of Certified Public Accountants.

Please remember that audits are not simply performed to meet legal, compliance or grant requirements. Audits are important internal control, anti-fraud, and evaluative tools that should be used to more fully understand and improve operations.

Healthy Homes Grant Review

After a review of the Healthy Homes grant, the OIG put out two letters directed toward the two primary recipients of the grant with comments and suggestions on how they could improve controls when spending the funds so as to prevent possible fraud, waste and abuse. The Healthy Homes grant focuses on remediating homes of health and safety hazards.

http://www.mass.gov/ig/oigarra/healthy_homes_umass_ltr.pdf

http://www.mass.gov/ig/oigarra/healthy_homes_ltr.pdf

Report Fraud Online

Report fraud, waste, or abuse electronically through a confidential complaint form found on Mass.gov/recovery:

<http://www.mass.gov/?>

[pageID=stimutilities&L=1&sid=Fstim&U=Fstim_fraud_report_form](http://www.mass.gov/?pageID=stimutilities&L=1&sid=Fstim&U=Fstim_fraud_report_form)

Confidential Fraud Hotline:

Please don't hesitate to use the OIG hotline (800)322-1323 to report waste, fraud, or abuse of ARRA funds. All calls are confidential. For general questions about ARRA spending call (617) 727-9140.

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