

Dear Public Officials,

In the June 2011 issue, I announced the publication of the sixth edition of *The Chapter 30B Manual: Legal Requirements, Recommended Practices, and Sources of Advice for Procuring Supplies, Services and Real Property*. Now, I'd like to announce the publication of the seventh edition of *Designing and Constructing Public Facilities*, which is available for downloading from our website at <http://www.mass.gov/ig/publ/dcmanual.pdf>, as well as for sale at the State Bookstore. You can contact the State Bookstore at 617.727.2834 or <http://www.sec.state.ma.us/spr/sprcat/catidx.htm>. The updated manual incorporates statutory changes enacted since September 2005 as well as recent interpretations of the bid laws by the Office of the Attorney General.

This bulletin includes an overview of some recent American Recovery and Reinvestment Act (ARRA) reviews completed by our office. Most of the federal stimulus money has been encumbered through 2012 or spent. However, we are still reviewing certain projects and will continue to report on ARRA news and information.

Over the past months, staff members have traveled around the state doing some outreach with different groups on various topics in public procurement. For example: Barbara Hansberry, General Counsel, spoke at the Massachusetts Association of School Business Officials in Marlborough, Massachusetts Facilities Administration Association in Beverly and the City Solicitors and Town Counsel Association meeting in Westborough; Helen Flaster, Deputy General Counsel, presented at Cape Cod Association of Public Purchasing Officials in Hyannis and the fall Massachusetts Association of Public Procurement Officials' conference in Bernardston; and Nick Read, Deputy General Counsel, provided a web presentation from Framingham State University to a remote audience of school nu-

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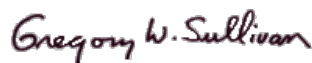
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tritionists and he presented to the Massachusetts Collectors and Treasurers Association at UMass Amherst. As opportunities arise and depending on staff availability, it is important to us to meet with people in different venues.

With this issue, I would like to introduce Erika P. Reis, Deputy General Counsel. She joined our office in August 2011 and has quickly become a valuable member of the Chapter 30B team.

Finally, congratulations to those public officials that have recently been designated as Massachusetts Certified Public Purchasing Officials (MCPPO). A listing of the designations can be found on pages 5-6 of this bulletin.

Sincerely,



Gregory W. Sullivan

Inspector General

Don't forget, a Chapter 30B attorney is available Monday through Friday from 9:00 am to 4:30 pm to answer any Chapter 30B questions you have.

617-722-8838

Chapter 30B Questions and Answers

Q.1. My school district is a member of an educational collaborative that has begun offering school bus transportation to its members. Would I be required to conduct a bid process if I entered into a contract with the educational collaborative?

A.1. No. Educational collaboratives formed pursuant to M.G.L. c.40, §4E are considered by this Office to be instrumentalities of each of their member school districts, and therefore no competitive process is required. Agreements between boards, commissions, authorities, departments or public instrumentalities of one city or town are exempt from M.G.L. c.30B under section 1(b)(7). If the educational collaborative will be contracting with a private company to provide the services (as opposed to performing them in-house) the collaborative must competitively procure the contract using M.G.L. c.30B. Only then will members be able to contract with the collaborative for the services without doing a bid process.

Q.2. My city would like to purchase office furniture for various city buildings using an e-procurement process. The estimated cost of the contract is \$130,000. The e-procurement vendor will not charge the city for its service. It will receive 4% of the total sale to be paid directly by the winning third party vendor. Is the city required to follow Chapter 30B in procuring the e-procurement services?

A.2. Yes. Even though there is no out-of pocket expense to the city for the e-procurement service, the vendor has included the e-procurement vendor fee in the final price. It is important for the city to determine the value of the contract. In this case, the e-procurement vendor will be compensated \$5,200 on the purchase of furniture by the city. Because the dollar threshold is between \$5,000 and \$25,000, under Chapter 30B the city will need to solicit quotes from e-procurement service providers.

Q.3. Are there any types of contracts that are not subject to the 25% limitation on quantity increases?

A.3. Yes. A small number of supply contracts are not subject to the 25% limitation on quantity increases. These contracts are for the purchase of *gasoline, special fuel, fuel oil, road salt and other ice and snow control supplies*. For these contracts, a jurisdiction may increase the quantity by more than 25%, however, the following three conditions must be met before these additional supplies are procured:

- the unit prices remain the same or less;
- the procurement officer documents in writing that an increase is necessary to fulfill the actual needs of the jurisdiction and it is more economical and practical than awarding another contract; and
- the parties agree to the increase in writing.

Q.4. An afterschool program has offered my jurisdiction a fee in exchange for permission to use our middle school cafeteria during after school hours. The school would retain the right to revoke its permission to use the cafeteria, if it is needed for a school activity. Is this transaction subject to Chapter 30B?

A.4. No. This agreement would be characterized as a license. A license is a permit to use real property and is not subject to M.G.L. c. 30B, because it is not an interest in real property. A license is revocable at the will of the licensor and is generally non-assignable. A license often grants permission to enter property only for a certain well-defined purpose and may be of limited duration. Generally, a jurisdiction will have procedures in place relative to requests to obtain a permit to use public property.

On the other hand, a lease is an interest in real property and is subject to M.G.L. c. 30B if the value of the lease is more than \$25,000. In determining the value of the lease, over multiple years, you must consider the aggregate dollar amount for the entire

Chapter 30B Questions and Answers

lease period. A lease is an agreement in which the owner of the real property grants to another the right of possession in the property, retaking possession at the expiration of the lease. The usual test of whether a right to use space is a lease is whether the instrument gives the lessee exclusive possession of the premises. If it does, then most likely it is a lease.

In order to determine whether there is an interest in real property or not, you should consult with town counsel.

Q.5. My jurisdiction is preparing an invitation for bids for fire vehicle repair. May I require potential bidders to attend a pre-bid conference?

A.5. Yes. A pre-bid conference can be useful for complex contracts, such as equipment repair contracts or construction contracts. You may require bidders to attend whenever it makes sense to do so. If you make attendance mandatory, include it as a quality requirement.

However, be careful that mandatory attendance at a pre-bid conference does not restrict competition. You should provide bidders with plenty of notice of the pre-bid conference. If important information comes out at the pre-bid conference you should put it in writing and send out an addendum.

Q.6. I am the town CPO and I regularly get questions on the Chapter 30B requirements for transactions with other municipalities. Are all governmental transactions exempt from Chapter 30B?

A.6. As a general rule, M.G.L. c.30B is less restrictive where governmental transactions are concerned, but all such transactions are not exempted entirely. M.G.L. c. 30B has four specific governmental exemptions: contracts for governmental services rendered by one public agency for or with another public entity, as defined in M.G.L. c. 40, §4A (M.G.L. c.30B, §1(b)(3)); transactions with the commonwealth (M.G.L. c.30B, §1(b)(4)); agreements

between different departments of a single city or town (M.G.L. c. 30B, §1(b)(7)); a contract to purchase supplies or services from or dispose of supplies to any national, state or local public entity (M.G.L. c.30B, §1(b)(9)). Notwithstanding the exemption for transactions with the commonwealth, for real property transactions governmental bodies are still required to comply with certain administrative and notice requirements, as provided in M.G.L. c. 30B, §16(i).

Q.7. What are examples of each of the governmental exemptions?

A.7. For M.G.L. c. 30B, §1(b)(3), when one town contracts with another town to provide recreation services.

For M.G.L. c. 30B, §1(b)(4), where a town sells the commonwealth a parcel of land to be used for a recreation area (although since it is a real property transaction, the town must comply with M.G.L. c. 30B, §16(i)).

For M.G.L. c. 30B, §1(b)(7), when your town's school department leases unused space to the police department to store unclaimed property.

For M.G.L. c. 30B, §1(b)(9), when your town purchases a used fire truck from, or sells a used fire truck to, a New Hampshire municipality.

Q.8. Must my town execute a written contract or obtain a non-collusion form if a transaction is exempt under M.G.L. c. 30B, §1(b)?

A.8. No. If a transaction is exempt from M.G.L. c. 30B, it is exempt from all M.G.L. c.30B requirements, including a written contract when the transaction amount is greater than \$5,000 (M.G.L. c. 30B, §17(a)) and the delivery of a non-collusion form (M.G.L. c.30B, §10). The only exception is where the exemption itself requires that a M.G.L. c. 30B requirement be met, e.g., M.G.L. c.30B, §1(b)(4) (which requires compliance with M.G.L. c.30B, §16(i) for real property transactions). Of course, this Office recommends that you follow reasonable

Chapter 30B Questions and Answers Contd.

business practices, including a written agreement and some sort of competitive process, even when they are not required on account of an exemption.

Q.9. Our city has several flat top roofs in danger of collapsing if we receive another snow storm. Forecasters are predicting several inches of snow this weekend. May we hire a vendor to remove the snow as an emergency procurement?

A.9. Yes, if the time required to comply fully with a M.G.L.c.30B requirement would endanger the health or safety of people or property due to an unforeseen emergency, you may procure the needed item or service without meeting all of the requirements under M.G.L. c.30B. You may only procure those supplies or services necessary to meet the emergency. In this case, you would hire a vendor for a limited period to handle the immediate needs of the crisis while you develop an estimate of the value of the snow removal services you will need and conduct a quote or bid process to obtain a competitive contract.

Ideally, you have planned ahead and created a list of vendors so that you may quickly call for competitive quotes if needed or send out an invitation for bids, or you have entered into a contract with a vendor to meet the needs of your jurisdiction in the event of a significant snowstorm.

You must maintain a record of each emergency procurement, documenting the basis for determining that an emergency existed, the name of the vendor to which the contract was awarded, the amount and type of contract, and a list of supplies and services purchased under the contract. A few things to keep in mind when conducting emergency procurements:

- Even in an emergency situation, to avoid paying exorbitant rates, do some research to ensure you have negotiated an hourly rate that is reasonable.
- Check to see if the statewide contract or a col-

lective contract offers the supply and/or service you are seeking to procure on an emergency basis.

- Deferral of normal purchases or maintenance does not constitute an emergency.

Bid Protest Decisions Now Available On Line

On August 17, 2011, Attorney General Martha Coakley announced that bid protest decisions regarding public construction contracts in the Commonwealth are available online. The Fair Labor Division of the AG's office adjudicates disputes arising under the construction and related laws. The Division's decisions play an important role in the public bidding process of public projects and provide guidance to state agencies, cities and towns, and contractors regarding the public construction bidding laws and provide insight to citizens into the ways in which their tax dollars are both spent and safeguarded. You may access the decisions at the following link on the AG's website:

<http://www.bpd.ago.state.ma.us/>.

Open meeting law determinations are available at <http://www.oml.ago.state.ma.us/>.

Helpful Tips for Winter IFB's and RFP's

Winter weather in New England can be unpredictable. When bad weather forces offices to close on bid opening days, procurement officials are faced with decisions about how to deal with the situation. One way to prevent this predicament is to include in your invitation for bids a notice concerning unexpected closures. For example:

- If, at the time of the scheduled bid opening, City Hall is closed due to inclement weather or another unforeseeable event, the bid opening will be extended until 2:00 pm on the next normal business day. Bids will be accepted until that date and time.

MCPPO Designations

The following is a list of the MCPPO Program's new Designees on applications **reviewed (not received)** between May 2, 2011 and October 1, 2011:

MCPPO

Wendy A. Andrade, Bristol Cty. Agric. HS
Patricia H. Ansay, Norton Public Schools
Tammy L. Baillargeon, Town of North Attleboro
Melane Bisbas, Needham Public Schools
James N. Brown, Cape Cod Collaborative
Patricia J. Callahan, North Shore Comm. College
Vincent F. Cameron, Jr., Reading Muni. Light
Robert F. Canevazzi, Town of Barnstable
John Danizio, Winchester Public Schools
Maryrose DeGroot, Town of Hopkinton
Kathleen A. Fareas, Greater New Bedford VTHS
Holly Ann Fern, UMASS Dartmouth
Mark C. Fisher, Town of North Attleboro
Brian L. Forget, Triton RSD
Thomas E. Geary, Lynnfield Public Schools
David A. Genereux, Town of Uxbridge
Nicholas S. Gove, MA DCR
Robert Graham, Natick Public Schools
Debra A. Harvey, Lexington Public Schools
Thomas F. Hayes, Town of Burlington
Dragica Ivanis, City of Chelsea DPW
Erica L. Johnson, Pioneer Valley Plan. Comm.
Kevin D. Johnson, Town of Ashland
Robert Kachinski, Chicopee Housing Authority
Jacquelyn M. Kelly, Town of Holden
M. Lane Kelly, Greenfield Public Schools
Martha B. Kelly, UMASS Boston
Michael P. LaGrassa, UMASS Dartmouth

MCPPO cont.

Nathan P. Lavalley, City of Springfield
Anthony R. LeMay, Jr., Grafton Public Schools
Michelle D. Loglisci, Monson Public Schools
Ann MacNaughton, Town of West Bridgewater
James D. Malary, MA BSOB
Frank Martin, Town of Belmont
Lisa R. Matarazzo, Town of Burlington
Julianne M. McCarthy, Town of Lynnfield
James M. McDaid, MA College of Art
Troy E. Mitchell, Atlantis Charter School
Timothy W. Mullen, Town of Bourne
Barry S. Nectow, Norton Public Schools
Stephen N. Nembirkow, Chicopee Public Schools
Christopher W. Norris, City of Northampton
Joyce A. Ostrowski, Town of Millbury
Aldo E. Petronio, Brockton Public Schools
Andrea L. Phillips, Town of North Attleboro
Amy L. Priest, Town of Ludlow DPW
Dennis M. Roache, Boston Parks & Rec. Dept.
Craig F. Robinson, Burlington Public Schools
Mark E. Rousseau, MA DET
Clinton S. Rowe, SEEM Collaborative
Brian L. Salzer, Marblehead Public Schools
Brian S. Schlegel, Westborough Public Schools
Steven T. Soule, Berkshire Hills RSD
Robert T. Spain, Town of Millbury

MCPPO Designations

The following is a list of the MCPPO Program's new Designees on applications **reviewed (not received)** between May 2, 2011 and October 1, 2011:

Kerry A. Speidel, Town of Lunenburg

Sarah A. Stanton, City of Woburn

Chad G. Thompson, Town of Longmeadow

Richard J. Viscay, City of Salem

Karl L. Warnick, Town of Dover

Karla D. Youngblood, City of Springfield

MCPPO for Supplies & Services

Michael R. Ciesla, Hampshire Educ. Collab.

Mark C. Gabriel, Plymouth Cty. Sheriff's Dept.

Kevin O'Donnell, Town of Great Barrington

MCPPO for Design & Construction

Maureen G. Anderson, City of Boston DND

Greg L. Balukonis, Town of North Reading

William J. Cundiff, Town of Douglas

Michael Gorenstein, Barnstable DPW Water

Gary Kaczmarek, Town of Holden

Evan T. Katz, Ayer Shirley RSD

Marjorie E. McGinnis, Town of Leverett

Peter F. Shipman, Town of North Brookfield

M. Phaldie Taliep, UMASS

William J. Trifone, Dudley-Charlton RSD

Associate MCPPO

Brian W. Boyd, MA DET

Adam J. Garvey, Lowell Housing Authority

Kelvin Molina, Pioneer Valley Plan. Comm.

Jennifer L. Pacheco, UMASS Dartmouth

E. Ross Perry, Southeast Regional Planning

Amy L. Putney, Town of Framingham

Ellie Villano, Town of Ludlow

Associate MCPPO for Supplies & Services

Lindsay B. Pope, Metro. Area Planning Council



ARRA

American Recovery and Reinvestment Act

Grant Administration Advisory Issued

The Office of the Inspector General (OIG) issued an advisory entitled *Advisory to Grantees and Sub-Grantees of the Recovery Act Funded Homeless Prevention and Rapid Re-Housing Program (HPRP)*. Under the American Recovery and Reinvestment Act (ARRA), Massachusetts received more than \$44.5 million in U.S. Department of Housing and Urban Development's HPRP funding. The OIG based the suggestions contained in the advisory on reviews of a majority of HPRP grantees and sub-grantees in Massachusetts including the largest recipients of HPRP funds. For a listing of individual reviews, see the website at <http://www.mass.gov/ig/oigarra/igarradv.htm>.

The advisory highlights some key findings and offers suggestions and recommendations to increase program efficiency and accountability and to reduce program risks to fraud, waste, and abuse. Although the issues discussed in the advisory are based on a review of the HPRP program, many of the issues that arose and suggestions for future grant administration serve as valuable lessons learned for administering grant money generally. The OIG intends for the advisory to assist grantee agencies in addressing and mitigating risk.

OpenCape Review

The OIG reviewed the OpenCape Corporation's (OpenCape) receipt of a \$32,072,093 American Recovery and Reinvestment Act (ARRA)-funded grant from the U.S. Department of Commerce's Broadband Technology Opportunities Program (BTOP). According to OpenCape, the purpose of the grant is to provide a high capacity communications infrastructure for the region by constructing a core fiber optic backbone on Cape Cod with extensions to two major regional network connection centers in Providence and Brockton, a microwave radio overlay that included Martha's Vineyard, and a regional collocation center in Barnstable Village. OpenCape also received funding from other sources.

In September, 2011 the OIG issued a letter to OpenCape that raised many issues about the organizational structure of the private not-for-profit and how the entity will manage, use, and protect from the risks of fraud, waste, and abuse the millions of dollars it will earn from this publicly-funded project during the next 40 years. The OIG expressed concern that OpenCape and CapeNet (the

private network operator selected by OpenCape to manage, construct and operate the broadband network) rather than the taxpayers, stand to gain significantly from public funding. Based on its review, among other recommendations, the OIG recommended that more private profits be used for public purposes, such as subsidiary broadband for area schools. Also, the OIG recommended that OpenCape's bylaws be amended in several areas to ensure high ethical standards and to prevent conflicts of interest for public employees associated with OpenCape. In addition, the OIG found that the safeguards OpenCape currently has in place to maintain the accountability and transparency of its expenditures both during the project and beyond need strengthening. To view the letter go to the OIG ARRA website.

SFSF Grant Review

The OIG issued a letter on New Bedford Public Schools' (NBPS) use of a Fiscal Year 2009 State Fiscal Stabilization Fund (SFSF) Grant of \$11,668,556. NBPS received this grant through the Massachusetts Department of Elementary and Secondary Education as a result of ARRA. In a previous letter, the OIG reported its findings regarding the NBPS purchase of 497 computers using nearly \$281,000 of this ARRA funding. This second letter addresses OIG findings regarding NBPS' use of more than \$2.2 million towards a contract for a special education provider, Behavioral Development and Educational Services, LLC (BDES) whose owner and Clinical Director is Dr. Sheldon H. Wagner (Wagner). In addition, the OIG commented on the long-term arrangement that has been in place for nearly 20 years.

Overall, the review found that NBPS has an inadequate one-page contract with BDES/Wagner and that for nearly 20 years, NBPS has been using BDES/Wagner's services without formally evaluating program costs. Although the special education services provided by BDES/Wagner may be exempt, the OIG suggested that NBPS could benefit from a competitive process. The letter outlines many other concerns with the arrangement. The OIG noted, however, that NBPS has already initiated discussions with Wagner to implement certain OIG recommendations and to clarify some program elements.

Confidential Fraud Hotline: (800) 322-1323



MASSACHUSETTS CERTIFIED PUBLIC PURCHASING OFFICIAL PROGRAM REGISTRATION FORM July–December 2011

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

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PUBLIC CONTRACTING OVERVIEW

No Prerequisite

- September 20–22, 2011
- October 18–20, 2011

BOSTON
BOSTON

3-day seminar

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

SUPPLIES & SERVICES CONTRACTING

Prerequisite: Public Contracting Overview or Charter School Procurement

- October 25–27, 2011
- October 25–27, 2011

BOSTON
HUNTINGTON

Video Conference hosted by Gateway RSD

3-day seminar

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

DESIGN & CONSTRUCTION CONTRACTING

Prerequisite: Public Contracting Overview or Charter School Procurement

- September 27–29, 2011
- September 27–29, 2011
- November 1–3, 2011

BOSTON
HUNTINGTON
BOSTON

Video Conference hosted by Gateway RSD

3-day seminar

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

ADVANCED TOPICS UPDATE

- November 8 & 9–2011
- November 8 & 9–2011

BOSTON
HUNTINGTON

Video Conference hosted by Gateway RSD

2-day seminar

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

CERTIFICATION for School Project Designers & Owner's Project Managers

- September 7, 8, 14, 15–2011

BOSTON

4-Day Training

Tuition: \$1200 for private sector

- November 30, December 1, 7, 8–2011

BOSTON

RE-CERTIFICATION for School Project Designers & Owner's Project Managers

- October 4–2011
- November 29–2011

BOSTON
BOSTON

1-Day Training

Tuition: \$600 for private sector

CONSTRUCTION MANAGEMENT AT RISK

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

- October 5–2011

BOSTON

1-day seminar

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

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

CHARTER SCHOOL PROCUREMENT

No Prerequisite

- December 13 & 14–2011 *

BOSTON *PLEASE NOTE DATE CHANGE

2-day seminar

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

Drafting A Model IFB

Disk program requiring Microsoft Word 7.0 or higher

Self-paced

Tuition: *\$75 ea. for govt./non-profit employees
\$200 for all others

*Registration for this course must be accompanied by a check

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