

# Procurement Bulletin

Massachusetts Office of the Inspector General

## Congratulations to New MCPPOs!

The Inspector General's office extends congratulations to the most recent recipients of MCPPO designations based on applications reviewed between April 30, 2001 and June 30, 2001.

### MCPPO

**Henry M.J. Biagi**, Somerville Public Schools

**Robert P. Coleman**, Town of Barnstable

**Jean Johnson Delios**, Town of Saugus

**David J. Ferguson**, New Bedford Public Schools

**Richard C. Joyce**, MWRA

**Sally A. Keelan**, Town of Bedford

**Peter B. Kress**, Braintree Public Schools

**Susan P. Patch**, Kopelman & Paige

**Richard T. Reed**, Town of Bedford

**Bernard J. Schofield**, City of Worcester

**Charles R. Stuart**, Boxborough Public Schools

**Yvonne M.E. van Ossenbruggen**, MWRA

**John P. Touhey**, Milford Fire Department

### Associate MCPPO

**Cliff C. O'Neill**, Gloucester Housing Authority

**William P. Sweeney, III**, Suffolk County Sheriff's Dept.

### MCPPO for Design and Construction Contracting

**Robert S. Danilecki**, DHCD

**Candace J. Tempesta**, DHCD

**Joseph P. Cucinotta**, Medfield Public Schools

**Richard E. Furlong**, Town of Becket

**Phyllis L. Marshall**, Winchester DPW

**Jannine Y. Carson-Griffin**, Fitchburg State College

**Bennet M. Petry**, DPH/Shattuck Hospital

### Associate MCPPO for Supplies and Services Contracting

**Dorothy M. Jay**, Town of Ashland

**Richard J. Pishkin**, Bunker Hill Community College

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## Test Yourself

by Lisa Price

**Do you know when you must reject bids under M.G.L. c. 30B?**

Three of the following situations require bid rejection; the other two involve minor informalities which must be waived. Can you identify them correctly?

**A)** Bid is missing a list of references required by the IFB

**B)** Bid is missing the non-collusion form

**C)** Bid is delivered 15 minutes late

**D)** Bid does not meet a quality requirement included in the IFB

**E)** Bid is missing a tax compliance certificate

**See Page 4 for answers!**

## Massachusetts Appeals Court Decides M.G.L. c. 30B Case

*by Lisa Price*

*Municipalities have broad powers to control and dispose of real property on terms they deem appropriate.*

The Massachusetts Appeals Court recently decided a case concerning a municipality's right to cancel a request for proposal (RFP) for real property. *Mangano v. Town of Wilmington*, 51 Mass. App. Ct. 857 (2001). The Town of Wilmington issued an RFP to sell a parcel of town-owned land. After receiving proposals, but before selecting a proposer, the town decided to cancel the RFP and the sale. The highest proposer sued the town arguing that the town

was obligated to transfer the property. The proposer argued that M.G.L. c. 30B, §9, which governs cancellation of bids and proposals, applied only to supplies and services contracts. The town maintained that it had the right to withdraw the property notwithstanding the omission of specific language within M.G.L. c. 30B, §9.

The Office of the Inspector General wrote a letter in support of the Town's posi-

tion. The Appeals Court held that the omission of specific language in M.G.L. c. 30B authorizing the cancellation of an RFP did not prohibit the town from withdrawing the property from bid. Municipalities have broad powers to control and dispose of real property on terms they deem appropriate. Furthermore, the town had not taken steps which could be interpreted as an acceptance of the proposer's offer and so no enforceable agreement was reached.

## Use of Ordered Alternates under M.G.L. c. 30B

*by Lisa Price*

The Massachusetts Appeals Court recently decided a case, *J.F. White Contracting Co. v. Massport Authority*, 51 Mass. App. Ct. 857 (2001), involving the use of alternates in an M.G.L. c. 30, §39M bid. The use of ordered alternates is explicitly permitted in M.G.L. c. 149 bids. Such alternate pricing is commonly used in M.G.L. c. 30, §39M bids, but the statute does not include any reference to its use.

Massport had solicited bids for a bridge renovation project. Massport asked bidders for alternate pricing: one price for the use of "type 5" cement concrete for the project and one price for the use of "silica fume" concrete. *J.F. White Contracting Co.* (White) was the lowest

bidder for the type 5 concrete and M. DeMatteo Construction Co. (DeMatteo) was the lowest bidder for the silica fume concrete. Massport elected to award the contract to DeMatteo even though its overall price was higher, as it considered the silica fume concrete to be the superior product and the price differential was minimal. White filed suit challenging Massport's use of alternate pricing in the bid.

White's request for a preliminary injunction – to prevent Massport from awarding the contract to DeMatteo – was denied by the Superior Court and the Appeals Court affirmed that decision. The Court stated that Massport was not prohibited from using alternate pricing in the

manner that it did in this case. Massport's invitation for bids fully explained the alternatives under consideration and bidders were placed on an equal footing to win the contract.

After the *White* decision was issued, the Office of the Inspector General's M.G.L. c. 30B Team met to discuss its impact on M.G.L. 30B bids. In the past, our Office has advised awarding authorities to avoid the use of alternates for supplies and services bids unless the rule for award identifies one low bidder. This advice was based on the fact that M.G.L. c. 30B, like M.G.L. c. 30, §39M, includes no reference to alternate pricing, and we felt that its use would raise a "protestable"

issue, which in fact it did for Massport. However, given the *White* decision, we see no reason why the Court's rationale should not be extended to M.G.L. c. 30B bids.

Therefore, it is now this Office's opinion that awarding authorities may use ordered alternates in an M.G.L. c. 30B bid if the awarding authority deems it appropriate. A common use of alternates is to try to maximize buying power while staying within budget. For example, you may want to purchase state-of-the-art computers, but you may not be sure how much you can afford. One way to approach this bid is to conduct market research, decide what you think you

*–continued on page five–*

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

***A recent Boston Globe article stated several school systems have hired employment agencies to find and place substitute teachers in their schools whenever necessary. Is the hiring of the employment agency that places substitutes subject to M.G.L. c. 30B?***

The May 29, 2001 *Boston Globe* article to which you refer was entitled "Schools Give Temp Firms an Opening: Lack of Substitute Teachers Leads Some Districts to Outsource Hiring."

The hiring of a temporary staffing or placement firm to find and provide substitute teachers to a school system is subject to M.G.L. c. 30B. Several of the communities that have done this told this Office that they conducted an RFP process in which they dictated the substitutes' salaries and asked the temporary staffing or placement firms to submit a bid based on a percentage markup.

In order to establish the price, the jurisdictions included the estimated number of substitute teaching hours anticipated. In addition, most of the RFPs cover when a firm would be eligible to receive a placement fee for substitutes that were later hired as school employees, and gave preferences to substitute relationships existing prior to the hiring of a firm. To date, our Office knows of at least three firms that can provide

such services. If your jurisdiction is thinking about doing this, feel free to call our Office for more information (be sure to ask to speak with an M.G.L. c. 30B attorney).

***I recently issued a bid for janitorial services. Several days before the bid opening, I issued an addendum increasing the number of sites to be cleaned by the contractor. My addendum required all bidders to acknowledge receipt of this addendum in their bids. My lowest bidder did not acknowledge the addendum, but claims he can do the extra work for his stated price. The other bidders are protesting that this is unfair. What should I do?***

The general rule you should apply to these situations is the following: If the addendum affected price or scope of work, then you should reject a bidder that fails to acknowledge the addendum. A bidder's post-bid assurances that it can do the work does not affect this determination because those assurances are made with the benefit of knowing everyone else's prices. Absent an acknowledgment with the bid, it is impossible to know if the bidder meant to include the extra work in its price or is only doing so now after seeing that it was out-bid.

Conversely, if a bidder fails to acknowledge an adden-

dum that does not affect price or scope of work (for example, the addendum changed the room number for the bid opening), you should not reject the bid.

***Are municipalities able to purchase gasoline without being subject to state gasoline taxes?***

Municipalities are generally not exempt from taxes paid on purchases of gasoline used by municipal vehicles for "on road" travel. However, when municipalities make use of fuel products for "off-road" purposes (e.g. lawnmowers, snowblowers, tractors) they are not subject to fuel taxes. Accordingly, municipalities may apply to DOR for a rebate of the taxes paid on those gallons of fuel products they recorded as being used for "off-road" functions.

This reimbursement issue is addressed under M.G.L. c. 64A, § 7 for gasoline and M.G.L. c. 64E, § 5 for diesel and other specialty fuels. With regard to diesel fuel, a municipality may register as a "supplier" and thereafter acquire it without being subject to taxation. A similar designation as a "distributor" of gasoline products would require that a municipality have a storage tank with a capacity of at least 25,000 gallons.

For more information on this issue, you may call the Fuels and Excise Tax office at the Department of Revenue at (617) 887-5060.



## New IG Report on Wastewater Privatization

The Inspector General issued a report in June 2001 entitled, *Privatization of Wastewater Facilities in Lynn, Massachusetts*. This report describes two complex procurements undertaken by the Lynn Water and Sewer Commission (Commission) to award two design-build-operate contracts, one for a combined sewer overflow project and the other for a 20-year wastewater treatment plant contract. The Commission obtained special legislative

authorization to waive the state's public construction bidding laws to use this alternative procurement approach. Neither procurement generated meaningful competition and both contracts were won by U.S. Filter, the firm that has operated the Commission's wastewater treatment plant since 1985. The Office's report found that both contracts are likely to result in unnecessarily high costs for ratepayers.

The report's most troubling

finding relates to the extraordinarily high cost the Commission has agreed to pay U.S. Filter for sewer construction work under the design-build contract. The Office's cost estimate shows that U.S. Filter's \$47 million price is \$22 million higher than – nearly double – the cost of comparable work performed under the Commission's competitively bid sewer construction contracts. Moreover, under the U.S. Filter contract, the Commission will bear the risks of

sewer overflows and flooding resulting from undersized sewers.

The Commission paid more than \$3 million to privatization consultants to assist with these procurements; unfortunately, this expensive investment in expertise did not protect the ratepayers from a bad deal.

The report can be obtained from the Office's website at [www.state.ma.us/ig](http://www.state.ma.us/ig) or by calling (617) 727-9140 to request a copy.

## Answer to First Page Question

**Answer:** Situations B, C, and D require rejection; A and E are minor informalities.

**Explanation:** Situations A, B, and E deal with bidder omissions – situations where bidders have neglected to submit certain documents required by the IFB. In these instances, the awarding authority must first determine if the required submission is a statutory bidding requirement. If so, that bid must be rejected. Only Situation B deals with a statutory bidding requirement – the non-collusion form – and, therefore, that bid must be rejected. (The tax compliance certificate is not a statutory bidding requirement, but rather a requirement prior to contract execution.)

Situations A and E concern situations where the submission of the documentation

with the bid is the awarding authority's own requirement rather than a statutory one. In these instances, the awarding authority should ask if waiving the omission and obtaining the document after the bid opening will prejudice the awarding authority, other bidders, or any potential bidders. In both A and E, the awarding authority must waive the omission. Obtaining the reference list and the tax compliance certificate after the bid opening will not prejudice the awarding authority or fair competition on the contract<sup>1</sup>.

Situation C requires rejection because a bid that is delivered late is not a responsive bid and its lateness is not a minor informality. In Massachusetts, we have a bright line rule – when bids are delivered late,

regardless of the reason, they must be rejected<sup>2</sup>. Situation D requires rejection because to accept a bid that deviates from a stated quality requirement would be prejudicial to fair competition. Other bidders might have offered different prices, and others may have been deterred from bidding, based on that requirement.

1. Remember, the rules under the public construction bid laws (M.G.L. c. 149, §§44A-J and M.G.L. c. 30, §39M) are slightly different. Under these laws, you must still reject bids that deviate from a statutory requirement in matters of substance, but you have the discretion to reject or accept bids that deviate from your own requirements.

2. For a discussion of the difference between late and overlooked bids, see the December 2000 *Procurement Bulletin*, volume 6, number 4.



## Use of Ordered Alternates under M.G.L. c. 30B, *continued*

by Lisa Price

can afford by looking at market pricing, and issue an invitation for bids (IFB) with a fixed purchase description. A second way to structure such a bid is to set up a base bid for the items you know you want to purchase, and solicit alternate pricing for the items you hope to be able to afford.

If you elect to use ordered alternates, it is important to understand how alternates must be structured to preserve fair and open competition. (These rules are included in M.G.L. c. 149, and it is this Office's recommendation that you follow them for M.G.L. c. 30B bids as well.) First, your IFB must list your alternates in numerical order, and you must

also consider them in order. Using the above-mentioned example, you might set up your IFB for computers as follows:

**Base bid:** All PCs must be configured as follows: 128MB SDRAM, CD-ROM drive, ... [include rest of required specs].

**Alternate #1:** upgrade all PCs to 256MB SDRAM

**Alternate #2:** upgrade CD-ROM to 8x/4x/32x CD-RW Drive

After opening bids, you will look at the prices received and decide what you can afford to buy. You must consider the alternates in your stated order of priority. If the prices are high, you may elect to award only on the

base bid. If you can afford it, you may decide to accept one or more alternates. In this example, you could award a contract for the base bid only, the base bid plus alternate #1, or the base bid plus alternates #1 and #2. You may not consider the alternates out of order and award a contract for the base bid and alternate #2, skipping over alternate #1. A structure that permitted an awarding authority to pick and choose among numerous alternates would open the door to the possibility of favoritism.

For those purchasing officials who have routinely bid public construction contracts, the use of ordered alternates under M.G.L. c.

30B will be familiar territory. For those who have never used alternates, we recommend that you consult this Office's Chapter 30B team

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*A common use of alternates is to try to maximize buying power while staying within budget.*

when you draft your first IFB that includes alternates. In this way, we can answer any questions that you may have about their use and help ensure that your IFB complies with the law.

## Rave Reviews for Real Property Seminar

Many public officials have attended the five-hour seminar *Local Government Real Property Transactions Under M.G.L. c. 30B* since it was added to the MCPPO program in May of 2000 by the Office of the Inspector General. Here are some sample comments on the class received from participants:

*"Presentation was well organized; instructors were extremely well-versed in material covered. Other participants' experiences in their jobs with cities and towns*

*were extremely interesting to hear about."*

*"I thought this seminar was very interesting and will be very helpful in future bids that I will be writing."*

*"Very interesting and informative, Will definitely be able to utilize this material in future procurements."*

*"Course was well presented and answers from instructors were timely and educational."*

Topics covered include the

procedures to be used for acquiring and disposing of land and buildings; requests for proposals for telecommunications leases; *Central Register* advertisements for real property transactions; unique acquisitions; how M.G.L. c. 30B, §16 applies to proposed "land swaps," and issues related to the reuse of surplus buildings. There are ample opportunities for questions and to interact with procurement officials from other communities regarding real prop-

erty transactions.

You may attend one of the scheduled seminars in Boston or arrange to have the class presented in your local area. If you can assemble 35 participants from your jurisdictions, neighboring communities, or a professional association, please contact Anne Tierney at (617) 523-1205 for more information or to schedule *Local Government Real Property Transactions Under M.G.L. c. 30B* in your community.



**Massachusetts Certified Public Purchasing Official  
Massachusetts Office of the Inspector General**

State House Station  
P.O. Box 270  
Boston, MA 02133  
(617) 727-9140  
(617) 523-1205

**Who Should Attend**

Local government officials and others interested in local government contracts for supplies, services, real property, and construction

**Earn Professional  
Certification**

**For an in-depth description of courses offered, please visit our website at [www.state.ma.us/ig](http://www.state.ma.us/ig) and download a course catalog, or you may call 617-523-1205 to request a catalog, or fax a request to 617-723-2334.**

**Courses available in your own city or town:**

**Bidding Basics and Contract Administration**

This brief four-hour course is packed with the basics you need to begin understanding public purchasing for local governmental bodies in Massachusetts. You may earn .4 CEUs and 4 CPEs for completion of this course. This course does not contain an examination and may not be applied toward MCPPO certification or recertification. You will receive a certificate of completion. This seminar can be offered at a location in your jurisdiction with a minimum of 35 attendees. Call Anne Tierney to schedule a seminar in your area.

**Bidding For Better Results**

Participants in this six-hour seminar will practice writing and critiquing specifications to maximize best value for supplies and services. Participants will also learn the best way to handle late bids and how to avoid the appearance of bid splitting. There is no written examination. This seminar qualifies for 6 continuing education credits that may be applied toward MCPPO and MCSPO recertification.

**POLICY OF NON-DISCRIMINATION:**

The Office of the Inspector General does not discriminate on the basis of race, color, national origin, ancestry, religion, sex, age, disability, sexual orientation, political affiliation, or Vietnam-era or disabled veteran status in its employment, admission policies, or in the administration or operation of, or access to its programs and policies. The Office of the Inspector General does not discriminate on the basis of disability in violation of Section 504 of the Rehabilitation Act of 1973. Inquiries pertaining to the Office's non-discrimination policy for MCPPO programs may be addressed to Anne Tierney, Program Director, at 617-523-1205.



The Massachusetts Office of the Inspector General has been reviewed and approved as an Authorized Provider of continuing education and training programs by the International Association for Continuing Education and Training. Authorized Provider #101811.



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The Massachusetts Office of the Inspector General is part of the American Council on Education's College Credit Recommendation program.



The Massachusetts Office of the Inspector General is a registered provider with the American Institute of Architects Continuing Education System. Please notify us of your AIA membership number so that we can notify AIA of your participation.



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**MASSACHUSETTS CERTIFIED PUBLIC  
PURCHASING OFFICIAL PROGRAM  
REVISED REGISTRATION 2001**

**Office of the Inspector General  
(617) 727-9140 or (617) 523-1205 Fax: (617) 723-2334**

**REGISTRATION INFORMATION:**

**Registration and payment must be received 10 days prior to course date in order to process a confirmation.**

OFF-SITE REGISTRATION AND PAYMENT MUST BE RECEIVED 30 DAYS PRIOR TO SEMINAR DATE IN ORDER FOR THIS OFFICE TO CONFIRM SEMINAR. **Off-site seminars will be confirmed based on a minimum of 50 registrants.** In the event of cancellation of an OFF-SITE location, an alternate date will be offered. Confirmation letters, with directions, will be mailed 10 days prior to seminar.

**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  
P.O. Box 270- State House Station  
Boston, MA 02133  
ATTN: MCPPO

**MAKE CHECK PAYABLE TO: OIG**

**SUBSTITUTIONS/CANCELLATIONS:**

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. Change in seminar date and/or cancellations received (BY FAX) less than 2 business days prior to the seminar date are subject to a \$25 transfer fee - NO-SHOWS WILL BE INVOICED A \$50 SERVICE CHARGE.

**FOR MORE INFORMATION:**

Please contact the Program Director Anne Tierney at (617) 523-1205.

**THIS FORM MAY BE DUPLICATED**

**PAYMENT:**

- CHECK/M.O.
- PURCHASE ORDER #
- I E/IV

**PUBLIC CONTRACTING OVERVIEW**

3-day seminar  
Tuition: \$250

EARN 20 CPE and 2 CEU CREDITS and QUALIFY FOR PDP and LU hours

- SEPTEMBER 18-20, 2001 TAUNTON
- OCTOBER 2-4, 2001 BOSTON
- DECEMBER 4-6, 2001 BOSTON

**STATE CONTRACTING OVERVIEW**

4-day seminar  
Tuition: \$375

EARN 26 CPE and 2.6 CEU CREDITS and QUALIFY FOR PDP and LU hours

- OCT 31-NOV 1, NOV 7 & 8, 2001 BOSTON

**SUPPLIES & SERVICES CONTRACTING**

3-day seminar  
Tuition: \$250

**Prerequisite: Public Contracting Overview**

EARN 20 CPE and 2 CEU CREDITS and QUALIFY FOR PDP and LU hours

- OCTOBER 24-26, 2001 TAUNTON
- NOVEMBER 28-30, 2001 BOSTON

**DESIGN & CONSTRUCTION CONTRACTING**

3-day seminar  
Tuition: \$350

**Prerequisite: Public or State Contracting Overview**

EARN 20 CPE and 2 CEU CREDITS and QUALIFY FOR PDP and LU hours

- SEPTEMBER 12-14, 2001 AMHERST
- NOVEMBER 13-15, 2001 TAUNTON
- DECEMBER 12-14, 2001 BOSTON

**LOCAL GOVERNMENT REAL PROPERTY TRANSACTIONS  
UNDER M.G.L. c. 30B**

1-day seminar  
Tuition: \$75

EARN 5 CPE and .5 CEU CREDITS and QUALIFY FOR PDP and LU hours

- OCTOBER 16, 2001 BOSTON

**BIDDING FOR BETTER RESULTS**

1-day seminar  
Tuition: \$90

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- OCTOBER 17, 2001 BOSTON
- DECEMBER 19, 2001 BOSTON

**DRAFTING A MODEL IFB**

Self Paced BY MAIL Program  
Tuition: \$60

EARN .4 CEU CREDITS

- Disk Program requiring Microsoft Word 7.0 or higher

Registration for this course must be accompanied by a check

**SPOTLIGHT ON SCHOOLS: PROCUREMENT**

1-day seminar  
Tuition: \$90

EARN 6 CPE and .6 CEU CREDITS and QUALIFY FOR PDP and LU hours

- OCTOBER 10, 2001 MARLBORO (ASSABET VALLEY RSVD)
- NOVEMBER 20, 2001 BOSTON

**DESIGNED FOR  
STATE EMPLOYEES**

NAME: \_\_\_\_\_ PHONE: \_\_\_\_\_

SIGNATURE OF APPLICANT: \_\_\_\_\_ E-MAIL: \_\_\_\_\_

ORGANIZATION/JURISDICTION: \_\_\_\_\_

TITLE: \_\_\_\_\_ FAX: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

CITY: \_\_\_\_\_ STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_

HOW LONG HAVE YOU BEEN EMPLOYED AS A PURCHASING OFFICIAL? \_\_\_\_\_

American Institute of Architects (AIA) members must provide a membership number for LU credit. \_\_\_\_\_

**Coming to the IG Web site this Fall:**

***Model Designer Selection  
Procedures for Municipalities***

**Check our Web site  
periodically at [www.state.ma.us/ig](http://www.state.ma.us/ig)**

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Sometime in the future, the Office will be distributing the *Procurement Bulletin* via e-mail, in order to save printing and mailing costs. If you would like to be included on the distribution list, please fax your name, jurisdiction and e-mail address to 617-723-2334, Attn: Beth Hayward.

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