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December 24, 2013

Winchendon Board of Selectmen
Winchendon Town Hall
109 Front Street
Winchendon, MA 01475

Re: Procurement of Site for New Winchendon Police Station

Dear Select Board:

The Office of the Inspector General (“Office”) reviewed the procurement process the Town of Winchendon (“Town”) followed for the acquisition of a new site for its police station. This review identified significant concerns regarding the integrity of the procurement process the Town followed in awarding the Request for Proposals (“RFP”) to Winchendon Court, LLC. These concerns were derived from a detailed review of thousands of documents related to the matter. Unfortunately, the Town’s procurement process did not comply with the Uniform Procurement Act (M.G.L. c. 30B).

The Office’s review, including the associated findings, is summarized below.

BACKGROUND:

Shortly after the Winchendon District Court relocated to the Gardner District Court in June of 2009, the Town began a process aimed at acquiring the old courthouse building in order to convert it into a “new” police station. In August 2009 the Town, through its Town Manager, James Kreidler, contracted with Jacunski Humes Architects, LLC (“Jacunski”) of Berlin, Connecticut to prepare a schematic design plan and cost estimate for relocating the Town’s police department to the former courthouse property. The Town worked with the owner of the old courthouse, Elias Hanna, on a plan that would allow the Town to purchase the property after the owner renovated the building based on the plans Jacunski developed for the Town.

In September 2011, Mr. Kreidler filed a public disclosure with the Board of Selectmen (“BOS” or “Board”) indicating that he anticipated that he would soon be in a business relationship with Mr. Hanna. This business association would involve Kreidler soliciting leases (related to solar power projects) for properties Hanna owned outside of the Town.

In December 2011, the Attorney General’s Office informed the Town that its “turn-key” plan for the construction of a new police station at the old courthouse violated the public construction bid law, the designer selection law, and the prevailing wage law for the Commonwealth. Although the Town formally denied the assertions made by the Attorney General’s Office, the Town abandoned its plan that solely targeted the old courthouse.

I. The RFP

In January 2013, the Town issued an RFP for “The Purchase of Land Suitable for Use as a Site for a Police Station.” The RFP indicated that the requirements for any parcel of land and/or building to be acquired as the site for a new police station were detailed in the “Space Needs Assessment for the Winchendon Police Department,” dated September 2009 and prepared for the Town by Jacunski.

The Town, through its RFP, stated that it would evaluate proposals based upon identified minimum and comparative criteria. The Town also established a three-person evaluation committee to review and evaluate the proposals. Based on the Town’s evaluation process and rules for award as referenced in the RFP, any proposal that did not meet the minimum criteria would be rejected. Only those proposals meeting the minimum criteria would then be rated based on five comparative evaluation criteria and each proposal would be assigned a composite rating. The Town would award the sale to the most advantageous proposal, taking into consideration the identified criteria and the total project cost. The deadline for proposals was set for 12:00 p.m. on March 4, 2013.

II. The RFP Process

Three proposals were submitted to the Town in response to the RFP. One of the three proposals was rejected at the outset because it was received thirteen minutes after the noon deadline. The other two proposals – from Winchendon Furniture Co., Inc. and Winchendon Court, LLC (the old courthouse) – were accepted and submitted to the evaluation committee for further review and determination.

At the Police Station RFP-2013-04 Evaluation Committee meeting on April 25, 2013, the three-member committee unanimously recommended that the BOS award the RFP to Winchendon Court. The committee stated that this recommendation was based on an evaluation of both the minimum and the comparative criteria identified in the RFP.

The committee agreed unanimously that both proposals met all the pertinent minimum criteria. After determining that both proposals met the minimum criteria, the committee proceeded to

perform a comparative evaluation of the two proposals. The comparative criteria focused on the following five areas: total project cost, location of parcel, parcel size, size of building, and zoning and permitting. Each criterion was rated on a scale of highly advantageous (HA), advantageous (A), and not advantageous (NA), with a scoring of 3 points, 2 points and 1 point, respectively. Summarized below are the results of the comparative evaluation, based on unanimous roll call votes by the committee for each of the criterion.

	Cost	Location	Parcel Size	Size Bldg.	Zoning/Perm.	Total Score
Winchendon Court	A (2 pts.)	HA (3 pts.)	HA (3 pts.)	HA (3 pts.)	A (2 pts.)	13 pts.
Winchendon Furniture	NA (1 pt.)	HA (3 pts.)	HA (3 pts.)	HA (3 pts.)	A (2 pts.)	12 pts.

As reflected above, the committee found that the Winchendon Court proposal scored one point higher than the Winchendon Furniture proposal. Based on these evaluations and the budget, the committee voted to recommend that the Town award the RFP to Winchendon Court.

FINDINGS:

The Town's procurement process for the site of the new police station was flawed and did not comply with the Uniform Procurement Act. The Town awarded the RFP to Winchendon Court (old courthouse property) despite the fact that its proposal did not meet all of the minimum criteria required in the RFP. Based on this deficiency, the Town should have rejected Winchendon Court's proposal from the outset. Additionally, this Office questions the independence of the evaluation process and is concerned with an apparent failure by the Town to perform a diligent review. Moreover, the Town specifically tailored its budget constraints to favor the acquisition and renovation of the old courthouse building. This provided a natural bias for the Winchendon Court proposal. The estimates of probable cost for renovating the old courthouse were incomplete and the comparative analysis between the two proposals reflected questionable judgments. Finally, the Office is troubled by an apparent violation of the Open Meeting Law.

The associated detailed findings of the Office's review are highlighted below.

I. Failure to Meet RFP Criteria:

Under M.G.L. c. 30B, the Uniform Procurement Act, municipalities must solicit proposals to lease or purchase real property at a cost of more than \$25,000. Municipalities must conduct an open and fair competition that places all proposals on common footing, solicit information that will allow manageable and meaningful comparisons of offers, and base decisions solely on the information solicited.

A. Minimum Square Footage

The RFP notified all bidders that “[a]ny proposal that does not meet the minimum criteria will be rejected...” One of the twenty minimum criteria identified in the RFP was as follows:

“The property must contain sufficient buildable land to accommodate the physical requirements for a new or newly retrofitted building and the programmatic needs of the Town’s Police Station all as more particularly described in the Needs Assessment attached hereto as Exhibit B.”

The Needs Assessment mentioned above refers to a study that Jacunski prepared for the Town in September 2009. Jacunski determined that the minimum site area for a new police station should be approximately 0.75 acres and that the minimum required square footage of the building should be a net of 10,410 square feet with a minimum gross requirement of 14,000 square feet.

In March 2013, as part of the RFP evaluation process, Jacunski prepared a chart for the Town that identified each of the 20 minimum RFP requirements and compared the responses from the two bidders against each of these 20 minimum criteria. The proposal Winchendon Court submitted in response to the RFP reflected that the total acreage in its proposal was 0.526 acres, or only 70% of the minimum requirement identified in the RFP/Needs Assessment. In addition, the proposal included an existing two-story brick commercial block building (built in 1908) that was described as containing approximately 9,970 square feet, or approximately 440 square feet less than the minimum requirement identified in the RFP/Needs Assessment.

Because Winchendon Court’s proposal did not meet the RFP’s minimum requirements, it was nonresponsive and the Town should have rejected it from the outset. *See* M.G.L. c. 30B. Indeed, the comparison chart Jacunski prepared identified the failure to satisfy the RFP’s buildable lot size requirement. However, the evaluation committee did not acknowledge or act upon this shortcoming.

The RFP also included a minimum requirement regarding existing easements. The RFP stated that easements cannot:

“...at the time of conveyance of the property to the Town, interfere with access to or use of the property for the Town’s intended purpose and must be extinguished at or before such conveyance by duly executed and recordable instruments....”

The proposal Winchendon Court submitted included a request that it retain from the property an easement for five parking spaces. As previously highlighted, since the property did not meet the minimum lot size criteria set out in the RFP, the Town should not have considered the owner’s request to retain an easement for five parking spaces. Giving away five parking spaces would clearly interfere with access to a site that already was undersized (0.52 acres versus 0.75 acres).

B. Hazardous Materials

Another minimum requirement in the RFP was that each offeror must be able to provide sufficient evidence of the existence of hazardous materials on the property. Prior to its recommendation to award the RFP to Winchendon Court, the evaluation committee indicated that the Town had a report prepared by Corporate Environmental Advisors (“CEA”) with respect to the Winchendon Court property. Robert O’Keefe, the Chairman of the evaluation committee, summed up the report stating that in their determination there were no hazardous problems anywhere on the property.

This determination was not accurate. The Town’s contracted engineering firm later ascertained that the CEA report did not satisfy the requirements of the RFP; most notably, the report did not address any potential hazardous building materials within the existing structure. The Town should not have chosen Winchendon Court as the winning bidder, as the report it submitted did not meet the minimum requirement. Indeed, after the Town awarded the RFP, hazardous materials were in fact discovered in the building.

II. Budget Bias:

The RFP stated that the Town would consider the acquisition of an existing site with a building thereon or the acquisition of vacant land. The RFP also stipulated that the purchase price, when taking into consideration the remodeling or renovation of an existing building, would have to be accomplished within a predetermined budget of \$2.75 million.

This budget figure of \$2.75 million had been approved at the May 2012 Annual Town Meeting. It had been developed in anticipation of acquiring the old courthouse property and renovating it using prevailing wage rates and according to the pre-existing plan that included schematic drawings Jacunski had provided to the Town in 2009. The proposal Winchendon Court submitted in response to the RFP included copies of these very same plans.

Although the RFP indicates that the Town would consider proposals for either a vacant lot or a property with an existing building, this claim is disingenuous. By including a budget constraint that had been developed specifically for the acquisition and renovation of the old courthouse property, the procurement process was biased in favor of that particular building. The \$2.75 million budget constraint adversely affected all new-build proposals. The hard construction costs alone (\$250 to \$300 per square foot, according to RS Means¹) for a new 14,000 square-foot police station would exceed the total budget figure. Clearly, the budget constraint favored a building renovation project: in particular, the old courthouse.

¹ Industry source for construction cost information.

An open and fair competition should place all proposers (new-build versus renovation) on common footing. Critical to the success of a Chapter 30B public procurement is the establishment of a rating scheme or evaluation criteria that preserves open and fair competition and allows for manageable and meaningful comparisons.

To provide for open and fair competition, the Town should have established a methodology for evaluating the total cost of acquiring a new police station over the useful life of the building. The methodology should have considered ongoing costs of ownership, including such costs as ongoing maintenance and utilities. This approach would have rationalized the cost comparisons for purchasing and renovating a 100+ year-old building versus constructing a new building on a vacant lot. This practice would have eliminated the predetermined budget bias in the procurement process, which favored the old courthouse property.

III. Missing Costs and Erroneous Comparisons:

This Office also has concerns regarding the completeness of cost estimates provided and considered during the evaluation process. The estimate of probable costs Jacunski provided to the Town on March 29, 2013 shows a total project cost estimate for the Winchendon Court proposal at \$2,731,324.15 (or just \$18,675.85 below the budget constraint) and \$5,148,700.00 for the Winchendon Furniture proposal. As discussed below, however, the probable cost estimate for the Winchendon Court proposal was developed using previous cost estimates that did not include all the expected hard and soft construction cost elements. If these costs had been included they would have brought the Winchendon Court project cost estimate above the imposed budget constraint of \$2,750,000. The Office also questions the methodology used to calculate the construction cost elements that were included in the estimate.

In December 2009, Jacunski developed a project budget for the renovation of the courthouse property into a police station. The project budget was broken out into hard costs, soft costs and project contingencies, with a total for project spending. The project budget worksheet provided to the Town clearly indicated that certain costs had not yet been determined and therefore were not included in the estimated budget figures. Missing costs that had not yet been determined included site work, audio-visual systems and equipment, legal fees, bonding costs, and administrative costs.

Jacunski used this December 2009 project budget as the foundation for developing the \$2.73 million estimate that it provided to the Town in March 2013. In particular, Jacunski increased the 2009 costs by 5% and then added in the purchase price for the property. A summary of both budget estimates is reflected below.

	Dec. 2009 Project Budget	Mar. 2013 Probable Cost Est.
Land Acquisition	NA	\$ 835,000.00
Hard Costs	\$1,326,023.00	\$1,392,324.15
Soft Costs	\$ 380,000.00	\$ 399,000.00
Project Contingency	\$ 100,000.00	\$ 105,000.00
Project Total	\$1,806,023.00	\$2,731,324.15

As previously stated, the evaluation committee used the \$2.73 million estimate (with the missing cost elements) to rate the RFP proposals and, ultimately, to recommend that the RFP be awarded to Winchendon Court. The \$2.73 million estimate was just \$18,000 below the \$2.75 million budget constraint. Had all of the hard and soft construction costs been included in the estimate, the Winchendon Court project costs certainly would have exceeded \$2.75 million.

Finally, the \$2.73 million cost estimate is problematic because it was a refresh of the December 2009 project budget that simply marked up the older identified construction cost estimates with a 5% inflation factor and included the cost of the property acquisition.

IV. New Building Code – Cost Exposure:

The Office is also concerned that in addition to the missing costs identified above there may be significant financial exposure to the Town with respect to bringing the old courthouse building into compliance with current building codes. For example, other communities that recently have tried to renovate public safety facilities are finding it extremely costly. Primarily due to new seismic-related requirements, many older buildings, particularly those made of unreinforced masonry, must incorporate protections to ensure the building can stand up to an earthquake. The cost of quake-proofing an older building can easily transform a planned renovation into a new acquisition/build project.

A Town citizen raised a similar concern at the Board of Selectmen meeting on April 30, 2013. The concern focused on whether the engineering cost estimates for the conversion of the old courthouse included consideration of the new building codes. The Chairman of the Board of Selectmen responded by indicating that Jacunski's entire line of business is public safety buildings and that he trusted their estimate.

As part of this Office's review, we requested the scope of all services (including all analyses and associated work product in estimating the costs to bring the old courthouse into compliance with all building codes) that Jacunski had provided to the Town since January 1, 2008. The Office reviewed the scope of services Jacunski provided to the Town. Based on the documents the Town and Jacunski produced, Jacunski was not asked for and did not provide an analysis of the old courthouse to ascertain if it was in compliance with the new seismic building regulations.

If the building does not comply with the new seismic-related building codes, the financial impact to the citizens of the Town could be substantial in order to bring the building into compliance with these code requirements.

V. The Evaluation Committee:

At the February 11, 2013 Board of Selectmen meeting, Chairman O'Keefe moved to appoint an RFP evaluation committee, made up of himself as the committee chairman, Guy Corbosiero (a member of the Board) and Lieutenant David Walsh (Winchendon Police Department). The motion passed unanimously.

Based on their record of service to the Town, the three committee members are clearly dedicated public servants. However, all of them, based on public statements they made before the establishment of the committee, had been on the record as supporters of the courthouse renovation project. An evaluation committee comprised solely of individuals who are on the record as supporting one of the competing proposals creates, at a minimum, the appearance of bias for a predetermined result.

Specific actions the evaluation committee took further the appearance of bias and predetermined outcomes. For instance, the committee failed to reject Winchendon Court's proposal as non-responsive even though it did not comply with the minimum criteria set out in the RFP. The committee also neglected to question Winchendon Court's request to reserve a parking easement for five parking spaces. This is especially troubling since giving away five parking spaces in an undersized lot would understandably interfere with access to or use of the property.

In awarding the RFP to Winchendon Court, moreover, the evaluation committee accepted CEA's environmental report at face value. Yet the report did not address the status of the building and therefore did not meet the minimum requirements of the RFP. Similarly, the evaluation committee did not question Jacunski's cost estimates. A basic understanding of how these numbers were developed would have highlighted the fact that estimates had not been developed for all aspects of the project (such as for site work).

Furthermore, the minutes for both the March 11, 2013 and April 9, 2013 evaluation committee meetings reflect citizen questions and concerns regarding the potential impact of new building codes. Citizens raised concerns regarding whether the cost estimates for renovating the old courthouse included compliance with the new building codes, including those related to seismic standards. There was no apparent follow-up to these concerns by the committee prior to the award.

Finally, the evaluation committee rated the parcel size of the old courthouse as "highly advantageous" even though (1) it did not meet the minimum required size; and (2) the owner had asked to retain an easement for five parking spaces. This rating is especially suspicious given that the committee rated the Winchendon Court proposal more favorably than the Winchendon Furniture proposal by a rating differential of just one point over the five criteria.

All of these actions reinforce the appearance of bias on the part of the evaluation committee. The committee's lack of diligent review enabled what appears to be a predetermined outcome. This outcome did not comport with an open and fair competition that should have placed all proposers on equal footing.

VI. Violation of the Open Meeting Law:

On August 22, 2013, the Office alerted the Town to a potential Open Meeting Law violation associated with the acquisition of the old courthouse property. The violation had been identified through this Office's review of the procurement process for the new police station site. This violation occurred on June 17, 2013, when the BOS entered executive session purportedly under exemption 6 of the Open Meeting Law. On September 11, 2013 the Town, through its lawyers, responded to our concern by indicating that it was the Town's position that the executive session meeting was procedurally consistent with the Open Meeting Law.

In the opinion of this Office, the BOS violated the law because it failed to list topics with sufficient specificity in its meeting notices for the executive session and improperly discussed matters behind closed doors that were not appropriate for executive session. Matters discussed in executive session included topics that were not subject to negotiation and could not have had a detrimental effect on the Town's negotiating position. These topics therefore would not fall within exemption 6. These discussions should have occurred in open meeting and not in executive session.

First, although the Town's meeting notice for the June 17, 2013 BOS meeting indicated that there would be an executive session topic under exemption 6, the meeting notice did not identify the specific property to be discussed. In addition, minutes of the open session and an audio-visual recording of the open meeting show that there was no indication as the selectmen entered executive session that the ensuing discussion would be about the old courthouse property.

Second, the Town's September 11, 2013 letter states that at the time of the June 17, 2013 executive session meeting there were still some material terms that needed to be negotiated with respect to the purchase and sale agreement for the old courthouse property and that some of these terms needed to be evaluated with respect to their relative value (emphasis added). However, this Office's review found that at no time during the executive session did the BOS engage in any discussion affecting the Town's negotiating position vis-à-vis the price to be paid for the property.

The public record shows that the purchase price (\$835,000) for the old courthouse property had already been decided before the selectmen entered executive session. The price was fixed and not subject to negotiation. Kopelman, in a May 3, 2013 email to the Town Manager reinforced the fixed nature of the purchase price when it stated, "*[a]lthough the Board used the term 'negotiate', we understand that the essential terms of Winchendon Court's proposal, including the offering price and property location, is not subject to negotiation....*"

Moreover, the Town represented to this Office that it entered executive session to discuss issues relating to the purchase and sale agreement. However, the discussions in executive session related mostly to hazardous material and easement issues pertaining to the Winchendon Court property. There were also discussions related to communications between this Office and the Town. Hazardous material remediation, easements on the property and conversations with this Office are irrelevant to the purchase and sale agreement. Therefore, the Town should not have claimed exemption 6 to enter executive session.

As an example, some executive session discussion focused on Winchendon Court's request (made in its RFP response) to retain an easement for five parking spaces. As previously highlighted, the RFP included both a minimum lot size requirement and a minimum requirement that easements cannot "*at the time of conveyance of the property to the Town, interfere with access to or use of the property for the Town's intended purpose and must be extinguished at or before such conveyance by duly executed and recordable instruments evidencing same...*" Giving away five parking spaces would clearly interfere with access to a site that already was undersized (0.52 acres versus 0.75 acres) based on the minimum size requirements articulated in the RFP. Minimum RFP requirements are non-negotiable and therefore the use of exemption 6 would not be valid.

Assuming the Town's position is correct that the BOS executive session discussion was procedurally consistent with the Open Meeting Law, the BOS should have released the executive session minutes as soon as the BOS voted to approve the purchase and sale agreement. The BOS went back into open session immediately following the executive session and approved the purchase and sale agreement. At that point, there was no longer a reason to withhold the executive session minutes, as there could be no detrimental effect on the BOS's "negotiating" position to purchase the old courthouse property.

Rather than release the executive session minutes, the BOS elected instead to withhold them from the public until the BOS agreed to accept the deed from Winchendon Court on September 23, 2013. This three-month delay helped to ensure that the conveyance of the old courthouse property to the Town would proceed without full public scrutiny and would result in a situation where it would be difficult to invalidate the property deed.

It was injudicious for the BOS to proceed with the conveyance of the old courthouse property, especially after being informed by this Office of associated Chapter 30B violations and while there were outstanding open meeting complaints. These actions reinforce this Office's view that the BOS's violation of the Open Meeting Law was intentional and was done in order to conclude a targeted real estate transaction.

CONCLUSION:

The procurement process the Town followed in acquiring the new site for its police station did not comply with Chapter 30B. It did not provide for an open and fair competition that placed all proposers on equal footing. The process was biased in favor of the old courthouse property and

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resulted in a predetermined outcome. The Town should therefore consult with counsel to evaluate the validity of the purchase of the old courthouse property. In addition, to prevent similar problems from occurring, this Office is available to the Town for guidance in conducting future procurements covered by the Uniform Procurement Act (M.G.L. c. 30B).

Sincerely,



Glenn A. Cunha
Inspector General

cc: Jocelyn Jones, Deputy Chief Fair Labor Divisions, AGO
Amy Nable, Director of the Division of Open Government, AGO
John Giorgio, Member, Kopelman and Paige
John Jarvis, District Five State Building Inspector