

Massachusetts Office of the Inspector General

Procurement Bulletin

Letter from the Inspector General

Dear Public Officials:

Happy Holidays!

I would like to congratulate those public officials that have recently been designated as Massachusetts Certified Public Purchasing Officials. A listing of the designees can be found on page 5 of this publication. Also, please see page 6 for the January – June, 2008 Massachusetts Certified Public Purchasing Official (MCPPO) program schedule.

Since 2006, this Office has been investigating the cost certification process under M.G.L. c.40B, the comprehensive permit law, to determine whether developers have been able to manipulate profits resulting in the denial of excess profits to municipalities for affordable housing purposes. This office found that under the current process certain developers have been able to inflate expenditures and underreport sales revenue, resulting in the appearance of no excess profits. In October, this office issued a letter and I testified before the Joint Committee on Housing, offering recommendations to prevent further abuses of the Chapter 40B cost certification process. In December, I provided testimony regarding Department of Housing and Community Development (DHCD) proposed regulations and urged greater transparency and municipal involvement. A summary of this Office's findings and recommendations to the Joint Committee on Housing, entitled *Inspector General Recommends Changes to Chapter 40B, the Comprehensive Permit Law* can be found on page 2 of this issue. For more information on this Office's review of several Chapter 40B home ownership developments, please visit our website at <http://www.mass.gov/ig/igpubl.htm>.

Earlier this year, the Massachusetts Office of the Attorney General, in conjunction with the U.S. Department of Justice and the Attorneys General from ten other states, filed a complaint in the Massachusetts U.S. District Court regarding the merger of the two largest school bus transportation providers in the United States, First Group plc, providing services through First Student, and Laidlaw International, Inc. The Attorneys General alleged that, in certain markets, the merger would result in the lessening of competition for school bus transportation services. In October, a Consent Decree and Final Judgment completed the settlement among the eleven states and FirstGroup, and the merger was finalized. The settlement, which sought to ensure competitiveness in certain markets, affected several Massachusetts public school districts. For more information on

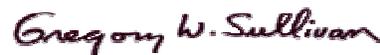
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the settlement and to find out how this merger and resulting settlement has affected your jurisdiction, please see *Attorneys General's Settlement in School Bus Merger Case* on page 3 of this issue.

As always, I encourage you to visit our website periodically to obtain the most up-to-date information on the public bidding laws, the MCPPO program, and to access our reports, advisories and other publications. If you have any questions regarding M.G.L. c.30B, please call 617.722.8838.

Sincerely,



Gregory W. Sullivan
Inspector General

The Office of the Inspector General would be interested in receiving sample specifications for procurements of outside consultants, which are paid from revolving funds pursuant to M.G.L. c.44, §53G. Expert consultants are hired to review plans or applications before certain boards, such as a municipal planning board or conservation commission. Any help providing such specification would be much appreciated and would assist us in educating public officials. Please send an email response to Meghan O'Malley, Staff Analyst, at omalley@maoig.net.

OIG Articles

INSPECTOR GENERAL RECOMMENDS CHANGES TO CHAPTER 40B, THE COMPREHENSIVE PERMIT LAW

On October 23, 2007, the Inspector General issued a letter to the Joint Committee on Housing regarding M.G.L. c.40B, the Comprehensive Permit Law (Chapter 40B), offering recommendations to prevent abuses occurring under the current process. Prior to issuing the letter, this office reviewed seven completed Chapter 40B home ownership developments and found that the current cost certification oversight process is ineffective in rigorously certifying developers' costs and profits. This has resulted in a pervasive abuse by developers of the excess profit provisions. This office has determined that certain developers have been able to inflate their expenditures and underreport their sales revenues, resulting in the understatement and denial of excess profits to municipalities. Ineffective cost certification of developers' profits is directly hurting municipal affordable housing initiatives.

Chapter 40B, enacted in 1969, sought to address the lack of affordable housing in the Commonwealth by requiring all communities to use a streamlined permitting process to review developer proposals and to grant zoning relief and other local regulatory waivers. Under Chapter 40B, and regulations developed by the Department of Housing and Community Development (DHCD), developers can apply for funding for the construction of affordable housing through authorized subsidizing agencies. The developer must enter into a regulatory agreement with the subsidizing agency, and the subsidizing agency, or other organization, acts as a monitoring agent, ensuring that the developer has met affordability and other requirements set by the regulatory agreement. Typically, the regulatory agreement limits the profits of developers on a Chapter 40B home ownership project to no more than 20% of total allowable development costs. All profits in excess of 20% are to be paid to the municipality for future affordable housing initiatives. At the completion of the project, the developer must submit a certified cost and income statement and a monitoring agent is responsible for reviewing and ensuring that the developer's profits meet the requirements of the established guidelines.

This office found that developers have been able to inflate their costs and underreport the sales revenue to produce the appearance of no excess profit. These actions include, but are not limited to, reporting land acquisition values with the benefit of a comprehensive permit and not the fair market value under existing zoning, disposing of assets to related parties at prices below market rate, including costs from unrelated development projects in project expenses, and hiring an affiliated entity (also known as a related party) to perform work on the project at higher than market rates showing such as an expense but failing to list financial interest received as a result of the affiliation.

Further, this office has found that the cost certification function has been under the direction of the subsidizing agencies or banks resulting in a lender/customer relationship which runs counter to the interests of the municipalities. There is an inherent bias on the part of the subsidizing agencies/banks to support their clients (developers), often at the expense of the municipalities. Also, the cost certification process does not permit monitoring agents to conduct a detailed audit or a thorough investigation of the financial transactions. The audits are conducted by "independent" certified public accounting firms which are hired by the developers. These developer contracted audits jeopardize the credibility of the limited dividend determination. Similar problems arise when the developers select the "independent" appraisers with respect to the land valuation issues.

To counter developer abuses of the cost oversight system, this office recommended that:

- a strong oversight function be developed by DHCD
- appraisers and certified public accountants be pre-qualified by DHCD
- municipalities, and not developers, select appraisers and certified public accountants from DHCD pre-qualified lists
- municipalities be permitted to act as monitoring agents or that DHCD pre-qualify monitoring agents to be selected by the municipality
- land value should be decided at the beginning of the process with full participation of the municipality
- the Zoning Board of Appeals should be permitted to require a developer to post a bond or to require the escrow of a certain percentage of funds until the cost certification process is completed and that the bonds or escrowed funds would be used to pay the municipality if there are excess profits
- related party transactions should be disclosed at the beginning of the process and full documentation should be required to justify the costs incurred
- developers should be required to submit documentation, including applications, under the pains and penalties of perjury
- sanctions should be imposed for the violation of any laws or regulations relating to Chapter 40B.

The Inspector General's October 23, 2007 letter can be viewed at

http://www.mass.gov/ig/publ/40b_hearing_letter.pdf.

For information on a specific Chapter 40B review, please visit our website at

<http://www.mass.gov/ig/igpubl.htm>.

OIG Articles

ATTORNEYS GENERALS' SETTLEMENT IN SCHOOL BUS MERGER CASE

In February 2007, FirstGroup plc (FirstGroup), which provides school bus transportation services through First Student, announced that it planned to acquire Laidlaw International, Inc. (Laidlaw). This news was disconcerting because these entities were the two largest school bus transportation providers in the United States. An investigation by the United States Department of Justice and the Attorneys General of eleven states, including Massachusetts (states), found that, in many school districts, FirstGroup and Laidlaw were each other's closest or only competitors for school bus transportation services. In certain geographic areas, the merger would result in there being only one company, FirstGroup, available to bid on certain contracts. The states alleged that, as a result of the lessening of competition, the costs of school bus transportation services to these school districts would likely increase significantly, and that service quality could decline. In Massachusetts, the geographic areas most impacted by the merger include the South Shore and Cape Cod, Boston, and northern Worcester County. A civil complaint was filed by the states in the United States District Court, District of Massachusetts (U.S. District Court) alleging that the merger would lessen competition for the procurement of school bus transportation services in numerous markets. A settlement was reached between the states and FirstGroup to help to preserve competition.

On October 1, 2007, a Consent Decree and Final Judgment (Civil Action No. 07-11816) formalizing the settlement was approved by the U.S. District Court and the merger was finalized. The Consent Decree requires FirstGroup to comply with certain remedies, some of which impact all eleven states and others that are specific to each state.

The remedies that impact all eleven states include:

- During the six year period from entry of the Consent Decree and Final Judgment, FirstGroup must provide sixty days advance written notice prior to the closing of any intended acquisition or partial acquisition of a school bus services company to the Attorney General in any of the eleven states in which the school bus services company to be acquired does business.
- First Group will not negotiate or impose any non-compete agreement on any former or current employee who did not, as of February 8, 2007, have a written non-compete agreement with either FirstGroup or Laidlaw.
- FirstGroup shall not, either directly or indirectly, threaten to refrain from submitting a bid or threaten to withdraw a pending bid for school bus services because the school district will not include in the bid specific terms or conditions that FirstGroup proposes. This prohibition does not apply to proposed terms and conditions that are required by law, nor does it prevent FirstGroup from presenting issues of concern to school districts.

Those remedies that are specific to Massachusetts include:

- In the Boston Public Schools, FirstGroup agreed to perform the remaining five years of an existing contract pursuant to the Release and Settlement Agreement between First Student, Inc. and the School Committee of the City of Boston, executed on September 12, 2007. When the contract goes out to bid, either before or at the end of the current contract, if FirstGroup does not bid or is not the winning bidder, FirstGroup must make available to the school or to the winning bidder any depot, repair or maintenance facility and any buses at commercially reasonable terms. FirstGroup shall also take no action to prevent drivers or other employees who exclusively or primarily serviced the most recent contract from being employed by the winning bidder.
- Pursuant to specific terms provided in the Consent Decree, FirstGroup must sell all assets used in connection with the nine current Laidlaw regular school bus services contracts listed below, to a competing school bus services company or companies approved by the Massachusetts Attorney General. The assets required to be divested include all bus depot property and/or facilities, all repair and maintenance facilities, all local offices and the fixtures, equipment, software and records used to service the contracts. The nine contracts are as follows:
 - ◊ Harwich Public Schools, Harwich
 - ◊ Cape Cod Technical School, Harwich
 - ◊ East Bridgewater Public Schools, East Bridgewater
 - ◊ Bridgewater-Raynham Public Schools, Raynham
 - ◊ Freetown-Lakeville Public Schools, Lakeville
 - ◊ Middleborough Public Schools, Middleborough
 - ◊ Easton Public Schools, North Easton
 - ◊ Old Rochester Regional School District, Mattapoisett
 - ◊ Ashburnham-Westminster Regional School District, Ashburnham.

This divestiture remedy is designed to ensure some level of competitive bidding for these contracts going forward.

The complete Consent Decree and Final Judgment can be found at

http://www.atg.wa.gov/uploadedFiles/Home/News/Press_Releases/2007/FirstGroupConsentDecree.pdf.

The Massachusetts Office of the Attorney General's press release regarding the Consent Decree and Final Judgment can be found at

http://www.mass.gov/?pageID=pressreleases&agId=Cago&prModName=cagopressrelease&prFile=2007_09_26_bus_settlement.xml.

Chapter 30B Questions and Answers

Q.1. I am the procurement officer of a city. Is the sale of advertising space on the city's website subject to Chapter 30B?

A.1. No. Chapter 30B applies to the acquisition of supplies, services and real property and the disposition of surplus supplies and real property. It is this office's opinion that the sale of advertising space on a website, in a pamphlet, or on a banner that is not permanently affixed to real property (or other similar types of advertising) are not subject to Chapter 30B as this type of advertising cannot be considered the acquisition of a supply or service or the disposition of a supply as defined in section two of Chapter 30B.

This office recommends that prior to selling advertising space, comprehensive guidelines and rates be established by the appropriate governing body. An agreement detailing the cost, duration, type, size and placement of the advertising should be signed by all parties. Lastly, you should discuss with your legal counsel whether any other requirements (such as a vote by the governing body) must be met prior to entering into any agreement for advertising.

Q.2. The police chief of my town is interested in purchasing a trained dog for the police department. Is the purchase of a dog, or other animal, subject to Chapter 30B?

A.2. Yes. An animal is considered by law to be property, and therefore the purchase of such would be considered the procurement of a supply subject to Chapter 30B.

Q.3. My city conducted a bid process to dispose of surplus supplies. One of the bidders failed to submit a signed certification of good faith (non-collusion form). Must the bidder be rejected?

A.3. Yes. Chapter 30B requires that all bidders submitting a bid or proposal for the acquisition or disposition of supplies or services must submit a signed certification of good faith (non-collusion form) **with the bid or proposal**. A bidder that fails to submit a signed certification of good faith for either the acquisition or disposition of supplies or services must be rejected.

Q.4. I am the Chief Procurement Officer for a town. My town is interested in entering into a contract with an ambulance service provider (which is exempt from Chapter 30B under section 1(b)(24)). May the town require that the ambulance provider make a gift of money or equipment to the town for the right to be the town's exclusive provider of ambulance services?

A.4. This type of agreement may violate the federal anti-kickback statute (42 U.S.C. § 1320a-7b) and a similar Massachusetts law (M.G.L. c.175H, §3). The federal anti-kickback law prohibits any individual or entity from knowingly

and willfully soliciting, receiving, offering, or paying any form of remuneration (cash or supplies/equipment) to induce the referral of an individual for the furnishing of any item or service payable under the Medicare or Medicaid programs. In Massachusetts, this prohibition extends to services payable under any private health plan or insurer. Before entering into any agreement with an ambulance provider (or other health care provider) which requires the provider to make a payment to the town, please contact the fraud hotline operated by the Office of the Inspector General of the U.S. Department of Health and Human Services at 1.800.447.8477 for an opinion.

Q.5. I have been delegated authority to make procurements for the school department. As Chapter 30B contracts are limited to three years, unless authorized by majority vote, I would like to know whether the following language is suitable for a majority vote under Chapter 30B: *The School Committee is hereby authorized to enter into contracts for five years as the School Committee may determine.*

A.5. No. It is this Office's opinion that the proposed language is too broad, and as such, does not comply with the statute. The statute, Chapter 30B, §12(b) allows "any number or types of contracts" to be approved by majority vote. A best practices interpretation of that requirement would be to identify specific types of contracts, such as school bus transportation or food services contracts that would be in effect for a specified period of longer than three years. Unless specifically stated, the majority vote approval to allow a longer term contract would apply until a vote is taken to revoke the authorization.

Q.6. I am a town planner and my jurisdiction is considering disposing of real property. May the town issue a request for information, which is also known as a request for interest (RFI), for the purpose of determining if there are any interested purchasers? We would use the information to decide whether to issue a request for proposals pursuant to Chapter 30B, §16.

A.6. Yes. A request for information (or interest) (RFI) may be a useful planning tool. While it is not addressed in Chapter 30B, there is nothing in the statute that would prohibit using an RFI. An RFI may not be used to pre-qualify or shortlist potential proposers. This office recommends that you discuss what to include in an RFI with your legal counsel, including making clear that the RFI is not an offer to sell real property. A best practices approach would be to state that an RFI is preliminary to a possible (or planned) disposition pursuant to Chapter 30B, §16.

Congratulations!



The following is a list of the MCPPO Program’s new designees on applications **reviewed (not receivea)** between September 1, 2007 and December 1, 2007:

MCPPO

Mary C. DeLai, Reading Public Schools
Cheryl A. Duval, Quabbin Reg. School District
William J. Framgiamore, Taunton Public Schools
Melanie L. Hagman, Shawsheen Valley RSVD
Paul B. Kitchen, Fairhaven Public Schools
Howard G. LaRosee, Jr., Mass. College of Art
Natalie T. Lashmit, Town of Grafton
Terry M. Longley, Blue Hills RSD
Geoffrey MacDonald, Hopkinton Public Schools
Joseph Messina, Tyngsborough Public Schools
Ian J. Newton, Boston Public Health Commission
Joseph P. Pedulla, City of Everett
Richard L. Reino, Sandwich Public Schools
John F. Stanbrook, Town of Halifax
Lara R. Thomas, S.E. Regional Services
Kenneth E. Walto, Town of Dalton

MCPPO for Supplies & Services

Janara L. Healy, Holyoke Housing Authority
J. Curt Malonson, Shawsheen Valley RSVD

MCPPO for Design & Construction

Theresa Olejarz, E. Longmeadow Public Schools

Associate MCPPO

Alice Clapper, Town of Framingham
John S. Mangiaratti, Town of Westford
Timothy O. Sheehan, Groton Dunstable RSD
Debra L. Travers, City of New Bedford

Associate MCPPO for Supplies & Services

Kendra Amaral, Town of Amesbury
Joyce A. Ostrowski, Town of Millbury

Associate MCPPO for Design & Construction

Jennifer L. Wolowicz, Town of South Hadley

MCPPO CERTIFICATION AND RECERTIFICATION INFORMATION

Just a reminder— the various Massachusetts Certified Public Purchasing Official (MCPPO) designations are valid for three years from the date of issuance. For purposes of certification, this office strongly recommends that you apply for your designation as soon as you have met the requirements. In addition to the seminar requirements, applicants must meet educational and experience requirements. For more information, see the application for designation at <http://www.mass.gov/ig/mcppo/mcpdesig.pdf>. Please note that it may take up to 90 days to process the application. Additionally, please keep in mind that the seminars are valid for three years.

In order to recertify as an MCPPO, designee’s must earn at least 25 continuing education credits during the three year period following the designation, some of which must be earned through taking one of the following three seminars; Supplies and Services Contracting (17 credits), Design and Construction Contracting (17 credits) or MCPPO Advanced Topics Update (14 credits). Again, this office strongly recommends that you apply for recertification as soon as possible as it may take up to 90 days to process the application.

For more information on the MCPPO program, please visit our website at <http://www.mass.gov/ig/mcppo/igmpo.htm>.



MASSACHUSETTS CERTIFIED PUBLIC PURCHASING OFFICIAL PROGRAM
REGISTRATION FORM January-June 2008

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.

GOVERNMENT/NON-PROFIT COURSE PRICE:

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.

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

ATTN: MCPPO Program

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.

NO-SHOWS WILL BE INVOICED A \$100.00 SERVICE CHARGE.

For more information regarding administrative policies, such as complaint and refund resolution, please email Joyce McEntee Emmett, Director of the MCPPO Program at MCPPO@maoig.net or go to our website at www.mass.gov/ig.

PUBLIC CONTRACTING OVERVIEW

No Prerequisite

- January 23, 24, 25-2008
March 4, 5, 6-2008

3-day seminar

BOSTON
BOSTON

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

- May 6, 7, 8-2008
June 3, 4, 5-2008
BOSTON
BOSTON

SUPPLIES & SERVICES CONTRACTING

Prerequisite: Public Contracting Overview or Charter School Procurement

- February 5, 6, 7-2008
April 1, 2, 3-2008

3-day seminar

BOSTON
BOSTON

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

- May 20, 21, 22-2008
BOSTON

DESIGN & CONSTRUCTION CONTRACTING

Prerequisite: Public Contracting Overview or Charter School Procurement

- February 26, 27, 28-2008
April 29, 30, May 1-2008

3-day seminar

BOSTON
BOSTON

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

- June 10, 11, 12-2008
BOSTON

ADVANCED TOPICS UPDATE

- April 17 & 18-2008

2-day seminar

BOSTON

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

CERTIFICATION for School Project Designers & Owner's Project Managers

NEW March 19, 20 & 26, 27-2008

4-Day Training

BOSTON

Tuition: \$1200

- June 18, 19, 20 & 26-2008
BOSTON

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

- March 13-2008

1-day seminar

BOSTON

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

- May 14-2008
BOSTON

CHARTER SCHOOL PROCUREMENT

No Prerequisite

- Fall 2008 - To be announced

2-day seminar

BOSTON

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

Drafting A Model IFB

Disk program requiring Microsoft Word 7.0 or higher

*Registration for this course must be accompanied by a check

Self-paced

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

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The Commonwealth of Massachusetts 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 Joyce McEntee Emmett, Program Director, at 617-727-9140.



The Commonwealth of Massachusetts Office of the Inspector General is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE sponsors. State Boards of Accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be addressed to the National Registry of CPE Sponsors, 150 Fourth Avenue North, Suite 700, Nashville, TN 37219-2417, www.nasba.org.



The Commonwealth of Massachusetts Office of the Inspector General is registered with the Department of Education to award professional development points (PDP).

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