



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
COMMUNITY DEVELOPMENT**

Charles D. Baker, Governor ♦ Karyn Polito, Lieutenant Governor ♦ Chrystal Kornegay, Undersecretary

MEMORANDUM

TO: Interested Parties
FROM: Sarah Glassman, Associate Director, Division of Public Housing and
Roberta Rubin, Chief Counsel
RE: Procurement, Leasing and Contracting Issues in Connection with Mixed-Income
Public Housing NOFA and RFP
DATE: January 26, 2016

I. Procurement – Disposition of Property and Selection of Developer

Chapter 30B of the Massachusetts General Laws imposes obligations governing the rental, conveyance or other disposition of real property by a governmental body. Under M.G.L. 30B §16, a local housing authority (LHA) seeking to dispose of real property must:

- Formally declare the property available for disposition, and specify restrictions, if any, on subsequent use
- Determine the property's value by a method customarily accepted by the appraising profession as valid
- Solicit competitive proposals
- Comply with specific public advertising requirements; and
- Publish a notice in Central Register if disposition is for a price less than appraised value

DHCD has been advised by the Inspector General's Office (IGO) and the Attorney General's Office (AGO) that procurement of a developer without concurrently complying with M.G.L. 30B §16 requirements governing property disposition could create a conflict of interest problem for the selected developer in any subsequent property disposition.

To avoid potential issues under M.G.L. 30B §16, after consultation with the IGO and the AGO, DHCD is advising that an LHA procuring a developer to participate in a mixed-income development include the following in its developer Request for Proposals (RFP) (a sample form of RFP is attached for reference):

- The property value is assumed to be in excess of \$35,000 and therefore the LHA is following the procedures set forth in M.G.L. 30B §16.
- Selection of the developer to acquire and develop the property will be qualifications based, with considerations including the criteria set forth in the RFP not exclusively based on price.

- In addition to developer qualifications, selection of the developer will be based on the extent to which the developer is presenting a credible proposal for feasible redevelopment of the site providing for:
 - Mixed income housing,
 - Long-term sustainability of public housing, and
 - Minimizing reliance on State resources for redevelopment
- The property value will be determined at time of disposition pursuant to an appraisal applying procedures customarily accepted by the appraising profession as valid
- If at that time the LHA elects to dispose of the property for less than market value, based on other benefits to be provided, the LHA will publish notice of its decision in the Central Register, explaining the reasons for its decision and disclosing the difference between such value and the price to be received.

Each LHA should consult its own counsel regarding the specifics of how value is to be determined, and what else the LHA must do to comply with M.G.L. 30B §16. LHAs are advised to review the Massachusetts Housing Partnership (MHP)'s guidance regarding the development of affordable housing on public land, including applicable land disposition requirements: *Developing Affordable Housing on Public Land: A Guide for Massachusetts Communities* (the "MHP Guidance") at http://www.mhp.net/writable/resources/documents/mhp_public_land_guide2.pdf. Please note, however, that this guidance was published in 2005, and there may have been changes in the law since that date. (For example, the MHP Guidance notes that the requirement to issue an RFP is triggered by a disposition of real property with a value of more than \$25,000; that statutory threshold has since increased to \$35,000.)

Once developer proposals have been submitted, the IGO and AGO consider that they are public documents subject to public records requests, although financial information from private individuals must be treated as private, confidential information in accordance with the Fair Information Practices Act, M.G.L. c. 66A. It is not unusual for an RFP to call for submission of financial statements as a means of assessing a developer's financial capacity; accordingly, LHAs may wish to consider including in their RFPs alternative means for developers to demonstrate financial capacity, other than requiring submission of financial statements or other information that developers may not feel comfortable including in a public document. One option is to ask developers to submit a credit determination by a bank or other credit institution, if they do not want to have their financials become a matter of public record.

- II. Leasing. In general, DHCD expects that a long-term lease will be the means of disposition used for any development involving multi-family rental housing. Guidance on the use of long-term leases in connection with the disposition of housing authority or municipally owned land for affordable housing development is included in the MHP Guidance referenced above. DHCD expects to offer further guidance as to lease forms; however, each bidder is responsible for its own evaluation of applicable legal requirements. Regardless of whether a lease form is attached, the RFP should reference any mandatory lease terms, including the length of the lease, required payment terms, affordability, assignability, and any anticipated future role of the LHA.
- III. Design and Construction. Questions often arise as to the applicability of public bidding laws and design review board requirements to private development of affordable housing on publicly owned land. A copy of a 2004 memo from former DHCD Chief Counsel Alexander Whiteside

to then-Assistant Attorney General Joseph Ruccio, together with the AGO's response, are attachments to the MHP Guidance. Please note that (a) the ultimate business relationship between the LHA and its developer may have an impact on the applicability of public bidding laws and design review board requirements, (b) case law developments since 2005 may impact this analysis, including without limitation the 2010 decision of the Supreme Judicial Court in *Brasi Development Corp. v. Attorney General et. al*, and (c) both the 2004 memo from former DHCD counsel and the AGO response are very fact-specific, and the analysis depends in part on the level of control exercised by the LHA over the exact nature of the construction to be performed. DHCD does not anticipate being able to offer detailed guidance on this issue prior to the deadline for submission of responses to the Mixed-Income Public Housing RFR, but is prepared to work with LHAs and their development teams to seek clarity on these issues in the context of specific proposed projects.