



**KOPELMAN AND PAIGE, P.C.**  
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February 22, 2012

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BY FACSIMILE - (781)344-5048

Hon. John J. Stagnone and  
Members of the Board of Selectmen  
Stoughton Town Hall  
10 Pearl Street  
Stoughton, MA 02072

Re: Procurement Issues

Dear Members of the Board of Selectmen:

As you recall, I have been working with the Town Manager, the Acting Chief Procurement Officer and the Board chairman in trying to negotiate the procurement disputes with the School Department. Based on our meeting and my further research, I will summarize my view of the status of these issues below.

1. Construction of Public Buildings, G.L. c.149, §§44A – 44H

Chapter 149 governs public construction of public buildings and public works, and offers little in the way of definitions or designation of an "Awarding Authority." In my opinion, in view of the provisions of G.L. c.71, §68 and §C4-2(G), it is my opinion that the School Committee is the Awarding Authority for building construction projects under G.L. c.149 for school buildings. It must be recognized, however, that any and all design services contracts related to such projects must be awarded in accordance with the Designer Selection Law (see below), and this means pursuant to the Board of Selectmen's written procedure adopted in March 2011.

2. Designer Selection Law, G.L. c.7, §§38A½ - 38O

This Law applies to the contracting for "design services" for any public construction project that will cost more than \$100,000 and require design services worth over \$10,000. "Design services" includes:

any of the following services provided by any designer, programmer, or construction manager in connection with any public building project:

- (i) preparation of master plans, studies, surveys, soil tests, cost estimates or programs;

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- (ii) preparation of drawings, plans, or specifications, including but not limited to schematic drawings, preliminary plans and specifications, working plans and specifications or other administration of construction contracts documents;
- (iii) supervision or administration of a construction contract;
- (iv) construction management or scheduling.

Chapter 7, §38K provides that before a design services contract is awarded, it must be procured in accordance with a written "selection procedure" adopted in writing by the Town. While the Town lacked such local procedures until March 2011, all such contracts must nonetheless comply with the requirements of the Designer Selection Law. The written procedures apply to any and all Town departments, in my opinion.

The Inspector General has issued directives and sample policies for municipalities in this regard. As with most towns, there is no local charter or by-law provision regarding the adoption of these procedures and such adoption has been accomplished by the Board of Selectmen, as the Town's chief executive officers. The procedures adopted by the Stoughton Board of Selectmen in March 2011 follow the model procedure established by the Inspector General. The model procedure provides that an authorized governmental unit ("e.g., Board of Selectmen, City Council") shall be designated as the "Approving Body" with authority to conduct the designer selection process for the Awarding Authority, or the Approving Body may delegate such duties if it chooses. The Approving Body shall also designate the "Committee" to conduct the selection process. The procedure adopted by the Board designated the Board of Selectmen as the Town's Approving Body. There is no support in the Designer Selection Law that a city or town may have *two or more* sets of written designer selection procedures – this would go against the goal of the Law to insure a consistent and uniform procurement process within the Town, in my opinion.

In accordance with the Designer Selection Law and the directives of the Inspector General, therefore, a design services contract cannot be legally awarded unless the Board of Selectmen's procedures and all other requirements of the Law have been followed. The Statute does not recognize a distinction between a school department and any other department of the Town, except that the local designer selection process does not apply to projects involving funding from the Massachusetts School Building Authority (i.e., a new or renovated school building). When a school building project that will involve SBA funding is initiated, the reason that the Town's local designer selection procedure is preempted is because the state's Designer Selectmen Panel performs this function.

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3. G.L. c.41, §57 – Custody of Contracts

One point of contention with the School Department was the Town Accountant's inability to obtain contracts, or complete contracts, from the Department so that he could assess whether all aspects of procurement and performance were in order, such that payment could legally be made. The School Department has also been unwilling to turn over contract originals, which the Town Accountant believes is required by law.

In my opinion, all Town departments, including the School Department, must turn over all original contracts to the Town Accountant. The question raised at the meeting was whether G.L. c.41, §57 mandates that the Town Accountant receive all original contracts or if copies would suffice. Section 57 provides that "The town accountant shall have custody of all contracts of the town." Since this is not modified in any way, this suggests that it should be the originals. In addition, I refer to the language in G.L. c.41, §17, which is the companion statute to §57 but applicable only to cities. Section 17 provides the following:

Every officer of a city who makes or executes a contract on behalf of the city shall furnish said contract or a copy thereof to the city clerk and the city auditor within one week after its execution; and the city clerk shall keep such contract or copy on file, open to public inspection during business hours. (*emphasis added*)

There is a judicial standard of statutory construction that says if the General Court words a statute one way and a related statute a different way, the General Court is deemed to have been aware of the difference and done so intentionally. In my opinion, therefore, the Town Accountant must receive all original contracts entered into by the Town. This includes final employment contracts and collective bargaining agreements. These are public records anyway, so there are no legal or policy grounds to withhold any of them from the Town Accountant, in my opinion.

At the meeting, it was suggested that we obtain input from DOR on this issue. I contacted John Gannon, an attorney with DOR's Division of Local Services, who agreed with my interpretation and sent me the following response:

This office has recognized a statutory distinction involving the custody of contracts in cities and towns. Under the General Laws, duties are ascribed to various officials. In a city, contracts, or copies thereof, are filed with the city clerk, pursuant to G.L. c. 41, s. 17. In a town, the town accountant has custody of all contracts, in accordance with G.L. c. 41, s. 57. Unlike G.L. c. 41, s. 17, G.L. c. 41, s. 57 does not authorize town accountants to maintain copies of contracts.

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4. G.L. c.30B, Supplies and Services

As you know, the Town Manager submitted new procurement delegations to the Inspector General in early December 2011, and one aspect limited the Superintendent of School's procurement authority to supplies and services under \$25,000 per procurement. There has been some dispute as to the School Department's authority to purchase "supplies" and/or "services," each of which is governed by G.L. c.30B, the Uniform Procurement Act.

First, in my opinion, it cannot be questioned that the Town can have only one 'Chief Procurement Officer' under Chapter 30B. We start from the provisions of G.L. c.30B, §2, which states that the CPO is appointed "to procure all supplies and services for the city or town and every governmental body thereof." The Inspector General's 30B Manual restates this as "The CPO is responsible for all activities related to buying, leasing, renting, or otherwise acquiring supplies and services for all departments regardless of the contract value." Manual, pg. 9. There is no way to read this provision of Chapter 30B, in my opinion, that would exclude a school department from this language.

The Town Charter, in §C4-2(H), states that the Town Manager has the authority to:

**purchase all supplies for every department of the Town, except books for the schools or the public library. He may delegate the responsibility to purchase supplies to an authorized representative and may revoke such delegation at his will.**

With regard to supplies, the Charter provision does not conflict with Chapter 30B, which already gives the CPO authority to purchase all supplies (the Charter's limitation as to school and library books does apply, however). The second sentence then authorizes the Town Manager to delegate such purchasing authority, which he did in December. I note that according to the Inspector General, if that second sentence was not present, the Manager could not make this delegation:

*If your local jurisdiction has a charter, bylaw, or ordinance governing the exercise of purchasing powers, any delegation of Chapter 30B powers and duties is subject to those provisions. For example, a bylaw that requires the town manager to purchase all supplies would prohibit the transfer of that responsibility through a Chapter 30B delegation. A delegation filed with our Office will remain in effect until amended or revoked by the CPO unless the delegation includes an expiration date.*

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Manual, pg. 11.

Section C4-2(H) of the Town Charter is silent as to "services." This does not mean, however, in my opinion, that the School Department or any other Town department is authorized to procure all service contracts as it pleases. Rather, it means that the procurement of all service contracts is governed by Chapter 30B, and not the Charter. As noted above, Chapter 30B, §2 provides that the Chief Procurement Officer procures "all supplies and services for the city or town and every governmental body thereof," unless the CPO has delegated any of that authority, as he did in December 2011. All prior delegations that may have been made by previous Town Managers were rescinded and the new ones filed with the Inspector General, which is mandatory before any rescission or delegation is legal. In my opinion, the status of procurement authority under Chapter 30B is now clear, pending any additional rescission or delegation of the CPO.

In conclusion, the various procurement statutes apply to virtually any contract entered into by "the Town," and this includes the School Department as well as all other Town departments. The Town Manager has, in recent months, established a centralized procurement office with the goal of achieving uniform practices and, ideally, fewer procurement problems. For example, the Town Accountant referred an issue to me last week involving a Chapter 149 HVAC contract entered into by the School Department last year, but the availability of the contract was not published in the state's Central Register as part of the bidding process. While this may appear to be a technicality, procurement laws provide that contracts entered into without full compliance with the statutes are void, and the Town may not legally make a payment on an invalid contract. See, for example, G.L. c.30B, §17(b) ("Subject to the provisions of section three A of chapter forty, a contract made in violation of this chapter shall not be valid, and the governmental body shall make no payment under such contract."). In addition, both the Supreme Judicial Court and the Appeals Court have found that a failure to comply with the advertising requirement of public bidding laws renders the resulting contracts invalid and unenforceable. See Phipps Products Corp. v. MBTA, 387 Mass. 687 (1982) ("The general rule in this Commonwealth is that failure to adhere to statutory bidding requirements makes void a contract entered into without such compliance."); Baltazar v. Town of Lunenburg, 65 Mass. App. Ct. 718, 721 (2006):

It is true, as Baltazar argues, that G.L. c. 149, § 44J [which mandates local and Central Register advertisement] does not explicitly state that a contract made in violation of its terms will be void. However, it is evident that the Legislature placed great importance upon compliance with this provision, since it specified that violation is punishable by fine or imprisonment. See G.L. c. 149, § 44J(7). In any event, this is an instance where the contract must be deemed void in order to accomplish the objectives of the statute...Because the failure to give proper public notice of a project subject to the public bidding laws frustrates these legislative objectives, a contract made in violation of such requirements generally will be held unenforceable.

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This leaves the Town in the unfortunate position of not being able to make a payment to a contractor that provided services to the Town. This also, in my opinion, further supports that all Town departments should utilize the centralized procurement office; the vast majority of contracts are already required to do so pursuant to the Chief Procurement Officer's directives.

If you have further questions in this regard, please feel free to contact me.

Very truly yours,



Brian W. Riley

BWR/bp

cc: Town Manager (by facsimile: (781)344-5048)  
Procurement Officer (by facsimile (781-344-5048))

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