

Developing Affordable Housing on Public Land

A Guide for Massachusetts Communities



Massachusetts Housing Partnership
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ON PUBLIC LAND
A GUIDE FOR
MASSACHUSETTS COMMUNITIES
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About MHP

The Massachusetts Housing Partnership (MHP) is a public agency financed by the banking industry. MHP supports affordable housing and neighborhood revitalization across the Commonwealth. MHP assists municipalities, community groups, local housing committees, and nonprofit and for-profit developers with information, technical assistance, and below-market financing to create affordable rental housing and homeownership opportunities.

Supporting local housing partnerships throughout Massachusetts is important to MHP. Over the years, the agency has worked with scores of local partnerships to determine the housing needs in their communities and to develop programs targeted to meeting those local needs. Economic, demographic, and market conditions are always changing, making it essential that communities identify those changes and understand how they effect housing need.

Information is available about MHP and MHP programs on the MHP website, www.mhp.net. For additional assistance or questions with the *Developing Affordable Housing on Public Land: A Guide for Massachusetts Communities*, contact the MHP Community Assistance Program staff at: MHP, 2 Oliver St., Boston, MA 02109, 617-338-7868.

Table of Contents

Introduction	1
Assessing the Site	3
Setting Project Goals	7
Preparing the RFP	9
Sample Request for Proposal (RFP)	17
Tips for Perfecting a Request for Proposal (RFP)	21
Frequently Asked Questions	23
Long-term Leasing	25
DHCD Guidance on Long-term Leasing	29
Appendices	33
The MHP “Development Primer”	33
Using Public Land	35
General Recommendations for Municipal Real Estate Dispositions	38
Contacts	43

Introduction

Introduction

In January 2004, the Massachusetts Department of Housing and Community Development (DHCD) conducted a survey of municipal planners and officials to identify the topics for which they needed assistance. The overwhelming first choice was using municipally owned land for affordable housing development. In response DHCD and the Massachusetts Housing Partnership (MHP) sponsored three regional workshops on this topic in fall of 2004. The high demand for the workshops demonstrated that there is a need for further assistance and this publication is the result. It contains information presented at the workshops along with additional materials that have been developed on the topic of using municipal land for affordable housing.

There are many reasons a community would want to use its own land to produce affordable housing. In some cities or towns this may be the only land available that can accommodate housing. Municipal land may be a contribution that makes a proposed project financially feasible and may return some revenue to the community. Additionally, development on municipal land can be more responsive to the needs and interests of the community while protecting the long-term affordability of the housing.

MHP and DHCD both support the use of municipal land as an effective strategy to add to a community's affordable housing stock. It is a challenging process, however, and this publication is a primer on the many considerations that need to be addressed in order to complete an affordable housing development project.

This guidebook is intended to help local officials, members of local housing partnerships,

housing advocates, and others interested in advancing affordable housing in their community. Information is provided that will help a community step through the housing development process in a sequential manner, a process summarized in the Development Primer Appendix. Areas to be considered include whether to sell or lease the land, what type of housing should be built, how to put together a successful Request for Proposal, and more. *Developing Affordable Housing Using Public Land* will assist local governments in understanding and answering these questions.

For additional information on affordable housing and for updates to these materials visit the Massachusetts Housing Partnership web site at www.mhp.net.

Assessing the Site

Site Feasibility Assessment

A thorough analysis of the physical and regulatory characteristics of a site before development begins is essential to the development process. The information obtained about the proposed site will inform every stage of the venture. These guidelines are most relevant to new construction developments, although some of the site information is also relevant to sites with existing buildings.

The site analysis is important for the following reasons:

- It guides the determination of project size, or density (usually calculated in units per acre).
- It will determine the best area of the site to locate the buildings, and a course of action to protect natural resources and mitigate any negative environmental impacts.
- A basic physical site assessment will look at the site's capacity to "carry" the type and number of proposed dwelling units, the availability of utilities (water, sewer, electricity, gas, roads), and the suitability of the site for an on-site septic system if one is necessary.
- A site analysis reviews the regulatory and legal limitations to development, such as local zoning or deed restrictions.
- Thorough information about the site will assist bidders in preparing accurate project schedules and development budgets.

Site conditions commonly identified and analyzed are: streams and water bodies, wetlands, slopes, soils, surrounding area, vegetation, and habitat. A wetlands consultant may need to be hired to flag, or delineate the wetlands for some sites. Similarly, if there is historical information or physical evidence of possible site contamination, an environmental assessment is required.

There are local and state land use regulations that need to be considered as part of a determination of site feasibility. These include local zoning regulations that outline land use, environmental protection requirements such as the Wetlands Protection Act and the Rivers Protection Act, and social protections such as Fair Housing law requirements. In some instances, M.G.L. c. 40B may make it possible to get exemptions from local zoning and other land use regulation, however a developer/owner still must comply with state requirements (example: Massachusetts Wetland Protection Act).

Outlined below are some of the questions that you should be able to answer about the site, along with some potential sources of information. There may be a great deal of site-related information available to you as public information at no charge or minimal photocopying charges. Consultants may be hired to prepare a site feasibility report to answer these questions, depending on your own technical capacity and time availability.

Title and Deed Restrictions

Sources: County registry of deeds, tax assessor, legal counsel

- Get a copy of the title and deed from the Registry of Deeds.
- Are there any easements, covenants, or other restrictions on the use of the land recorded with the deed?
- Does the property have clear insurable title? Are there any municipal liens on the property? (Check with assessor.) Are there other liens, such as mechanic liens, on the property? (These would be recorded at the Registry of Deeds).

Property Value

Sources: Assessor, appraiser

- What is the fair market value of the property? Generally the assessor's value will be sufficient, but an appraisal can be commissioned to determine the fair market value, if needed.
- For publicly owned land, if the property has a value of more than \$25,000, the disposition of the property is subject to the provisions of Chapter 30B of the Massachusetts General Laws, the Uniform Procurement Act. This manual is designed to comply with the requirements of Chapter 30B. If the property is valued below \$25,000, the RFP process described here is not required, and you should consult your procurement officer.

Physical Characteristics

Sources: Municipal departments and/or boards (planning, assessors, engineering, public works, board of health, conservation services, inspection services department), local historical society

- What is the size and shape of the property? (See assessor for tax map and approximate acreage, the zoning or building department for plot plan.)
- Are there any existing structures on the site? If so, are they suitable for rehabilitation? If not, what is the anticipated cost of demolition? (See building department, inspectional services; a consultant may need to be hired for a rehabilitation inspection and cost estimate.)
- What are the prior uses of the site: residential, commercial, or agricultural? Are there known historically significant features to the site (e.g., Native American burial grounds). (See local historic commission, assessor, and inspectional services department.)

- Is there potential for buried debris, old utilities, underground storage tanks, or other forms of potential environmental contamination? (See fire department, building department, and inspectional services department for information or permit issued.)
- Are you aware of any topographic, drainage, or subsoil problems? (See public works, town/city engineer building department, conservation commission, or public health department; also ask municipal offices for any environmental or geotechnical studies of the site — these are public documents, however, you may need to pay copying fees.)
- Is there easy access to a public way? (See highway or public works department or town/city engineer; also planning departments may have traffic studies that have been conducted in the area.) Will state approval be necessary for a curb cut onto a state road? How much frontage is there? (See assessor's records.)
- What are the uses on adjoining properties? (See planning department or assessor's records.) Once you have established a development scheme, evaluate whether the proposed development fits within this neighborhood or part of town by evaluating surrounding uses, scale of project, and massing of buildings.

Wetlands/Conservation Restrictions

Sources: Conservation department or commission, planning department or board

- Obtain a US Geological Survey map of the area, available from www.topozone.com or from local camping and hiking supply stores.
- Is any part of the property in a flood zone? Identify the type, boundaries, and level.

The presence of a flood plain does not necessarily make the site unusable, however particular regulations may apply in this district. The Planning Department may have copies of the Federal Flood Zone maps.

- Are there any wetlands, sub-surface water, streams, or other bodies of water (permanent or intermittent) on or near the project site? Are there any other sensitive or unique natural resources on the site? All wetlands and their surrounding buffer zone are under the jurisdiction of the local Conservation Commission. If possible, find out what the buffer zone and “no-build” set-back requirements are for your community.
- Are there any conservation, farmland protection, or other restrictions on the parcel?

Water and Sewer

Sources: Public works/municipal engineer, water and/or sewer commission, board of health

- What public water and sewer facilities are available at the site? Are utilities adequate to serve the proposed housing development?
- Are there existing or potential problems with — or restrictions on — septic or wastewater systems in the immediate area of the development?
- Are there existing or potential water supply problems or restrictions? Are there any moratoriums in place that restrict tying into existing public systems?
- If wells and/or septic system(s) will be required, what is the maximum development capacity according to local/state board of health regulations (measured by units/bedrooms)? This

determination will generally require analysis by an environmental engineer. The Massachusetts Department of Environmental Protection Title V regulations and local Board of Health regulations govern septic issues.

Utilities

Sources: Local utility companies

- Obtain utility maps, if possible.
- What utilities are available at the site: telephone, natural gas, electricity?
- If utilities are not immediately available, what is the approximate distance and potential cost of connecting to existing utilities?

Zoning Requirements

Sources: Building department, zoning enforcement officer (building inspector often assumes this role), planning department, zoning board of appeals

- Obtain zoning bylaw and zoning map.
- What uses are allowed? Is the proposed use allowed “by right” or does it require a special permit or other zoning relief? What are the dimensional regulations and what density is allowed in that zoning district?

Fair Housing Regulations

Source: <http://www.mass.gov/legis/laws/mgl/151B-4>. HTM

- A significant site feasibility issue under the fair housing laws is a requirement that housing restricted to persons 55 years or older must either be funded under a federal or state program designed specifically for senior housing (currently only the Federal Housing and Urban Development (HUD) Section 202 housing meets this requirement) or it must be located on a site of five or more acres.

Neighborhood Context and Amenities

Sources: Planning department, realtor

- Describe the surrounding land uses, including type, scale, and style of any developments.
- Describe access to transportation, including public transportation and roads. Are roads town or state roads?
- Describe proximity to schools, shopping, and recreation.

Setting Project Goals

Setting Goals and Establishing Guidelines in the Development Process

Setting the goals for housing to be developed using public land or buildings is the most important aspect of planning a community-initiated affordable housing development. Depending on the community, the task of defining goals for a specific, locally initiated housing development will typically be assigned to the appropriate town board or committee. In communities with established housing partnerships, the partnership is typically given the lead role. A well thought-out process for community involvement in the early stages of the project is an important way to gain valuable input and establish community support.

The goal-setting process needs to occur before a Request for Proposal (RFP) is issued or a developer selected for the proposed housing. The goal-setting process should be given careful attention, with adequate time allotted to identify areas of concern, to seek additional information when needed, and to make clear decisions that create the framework for the type of development that will ultimately be constructed.

Once an appropriate site is identified and site control is achieved, the goal-setting process can get under way. Site control can be obtained through outright ownership, a legal option from the seller, or the designation by a municipality as the designated developer for municipal property.

Typically the process would proceed in the following order: identify the site; set the preliminary goals for the development of the site; evaluate community needs; evaluate the site and funding opportunities; and then refine the goals according to the information obtained.

Here are some key considerations that can assist you in creating project goals and guidelines to direct a local affordable housing development.

Target Population

- What population do you want to serve at this site (e.g., family, elderly, special needs)? Does the community have a current housing needs assessment? The MHP Housing Needs Workbook is a tool for evaluating local housing needs, and is available at <http://www.mhp.net/termsheets/MHPHousingNeeds.pdf>
- What type of tenure, rental or ownership, fits your community's goal? How did you arrive at this preference? What information sources were used regarding the market for rental and owner-occupied housing in the community?
- What level of affordability is best? How many households should be served at 50%, 60% or 80% of area median income? Should the development include market-rate units and what's the ideal mix of market-rate and rent- or price-restricted units?

Note: Affordability levels are often set by the funding sources being used, so be prepared to be flexible on this aspect of the project.

The availability of public subsidies are often limited and it may be useful to talk with key funding agencies, such as DHCD, about the availability of critical subsidy resources.

Design Guidelines

- Is there a minimum or maximum number of units for this site? Is there a range that is

acceptable? Does an evaluation of the site help define the range of units the site can support?

- Is there a preferred unit mix (e.g., number of one-bedroom, two-bedroom, three-bedroom units)?
- What are the site design guidelines? Are there areas of the site or site features that should be preserved or protected?
- What are the required or preferred amenities (e.g., recreational facilities, community space)?
- Are there architectural or construction guidelines that are required or preferred (e.g., building size, siding materials, energy conservation standards)? A useful resource is the HUD Design Advisor, www.designadvisor.org.

Price Guidelines

- Is promoting a public purpose by providing affordable housing the priority? How important is a monetary return on the property? Affordability restrictions are often imposed in exchange for donated or below-market priced land. Reduced land cost is often necessary to attract developers or to make the project financially feasible.
- If a monetary return is important, the method for calculating the amount and the timing of payments needs to be set. Is there a preference for a single payment at time of sale or transfer, or are lease payments over the life of the project acceptable? Will payments be fixed or variable depending on achievement of certain goals or performance measures?

Type of Disposition

- Will the land be sold to the selected developer/owner? Or will a long-term lease be used for the disposition of the property? *Note: each of these methods of disposition have advantages and disadvantages. The*

community will need to inform itself of the option that best fits with the community's vision for the project and the specifics of the situation. Work with your legal counsel to stay in compliance with the various state requirements that apply to the disposition of public property. See Attorney General's opinion in Long-term Leasing in this publication.

Implementation Guidelines

- Is there a required or preferred date for the acquisition of the property? For project completion?
Note: Affordable housing development typically takes two to four years to complete for occupancy after the land is acquired, therefore take care not to impose unrealistic deadlines, but focus on progress being made toward completion.
- When will the property be transferred to the developer/owner? Will the transfer occur once all financing and permits have been obtained or at an earlier point?
Note: This decision is usually based on weighing the risk of the project not getting developed with the ongoing cost of insurance and other carrying costs and risks. A common point of transfer is at construction loan closing, at which point most development issues have been identified and resolved.
- Goals and guidelines can be drafted by a committee or individuals assigned to this task. However, the goals for the development should be presented in an open public meeting to allow for public review and discussion before being finalized. Having completed the public process appropriate to the community, goals and guidelines can be used in seeking development proposals for public land or buildings.

Preparing the RFP

MHP Guidelines for Preparing a Request for Proposals (RFP) for Public Land Disposition

The rules governing disposition of real property by municipal entities are complex and subject to change. MHP has made every reasonable effort to ensure that the information contained in this Guide and the Model Request for Proposals is correct as of the date of this publication. However, as in all complex matters of this sort, specific legal advice should be sought before using the Model Request for Proposals for a particular property disposition.

The Massachusetts Housing Partnership (MHP) has developed these guidelines to assist cities and towns, housing authorities, and other public entities in preparing RFPs for the disposition of property for use as affordable housing.

An RFP provides a formal process for soliciting information from prospective developers/owners to allow manageable and meaningful comparisons of all offers. In a property disposition, an RFP details the property to be disposed of and describes any reuse requirements. The following outlines the major components of an RFP, including provisions required by M.G.L. Chapter 30B. It is important to have an attorney review the final RFP for compliance with all applicable regulations, including Chapter 30B.

The Inspector General's Office produces a very thorough manual for 30B procurement, *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property*. In their 30B manual, Chapter 8, Real Property Transactions gives detailed information about using the RFP process for property disposition (<http://www.mass.gov/ig/publ/30bmanl.pdf>).

Appendix A of these guidelines provides important contact information for relevant state agencies. [Please note that only Chapter 30B requirements are covered in these guidelines; Massachusetts Department of Housing and Community Development (DHCD) or federal requirements are not covered.]

Parts of the Request for Proposals

Invitation to Bid

The invitation to bid introduces the RFP and provides a brief overview of key information. Ideally, this information will be conveyed in a way that sparks interest from prospective developer/owners. Specifically, the invitation to bid should provide the following:

Outline of offering:

- Name the entity issuing the RFP.
- Identify and briefly describe the property concerned.
- Describe the disposition method (i.e., ground lease or sale) and identify key terms of the disposition.
- Highlight the goals for the disposition. Some suggestions:
 - Summarize submission requirements, including number of copies needed; date, time, and place for submission; and how the proposal should be marked. Typically there is a six- to eight-week response period from the time of issuance of the RFP. The response time should be gauged

according to the complexity of the information and the level of information you are seeking.

- ▶ State that responses must be complete and signed and that late submissions will not be accepted. Reserve the right to reject any or all proposals or to cancel the RFP, if it is in the best interests of the issuing entity.
- ▶ Make a disclaimer against any information provided in the RFP. Note that the disposition is subject to the Uniform Procurement Act, M.G.L. Chapter 30B.
- ▶ Identify the contact person for inquiries and questions. Include name, phone and fax numbers, and e-mail address, if available. Request that all inquiries be made in writing no later than a given date. Indicate that if questions arise at any time prior to the due date for the proposals, all answers will be in writing and the questions and answers will be shared with everyone who has requested a copy of the RFP.

Pre-bid Site Tour and Briefing

It is strongly recommended that you conduct an on-site briefing session or property walk-through. If one is planned, designate a time, place, and contact person for more information about this session. The site tour should be scheduled relatively soon after the issuance of the RFP to allow prospective developers/owners time to view the site before finalizing their submission. Often, bidders are required to register 24 hours in advance if they plan to attend a briefing to prevent holding a briefing with no participants. It is recommended that there be at least one week between the time of notification and the date of the tour, so potential bidders have a chance to schedule the tour.

Property Description and Housing Need

Provide as much information on the subject property as possible; thorough and detailed information ensures higher-quality proposals. Detailed information about the property might come from the tax collector, the assessor, the municipal planning department, the city or town clerk, the conservation commission, the municipal building/engineering department, the regional planning agency, and local realtors.

It is also recommended that the community process used to gain public awareness and participation be described to the prospective developer. Describe the expectations you have for the developer's activities related to public participation and community involvement.

If studies have been undertaken for this site (e.g., water and sewer, access, soil conditions, contamination, conceptual site plan), results should be included with the RFP. These studies provide valuable information for prospective developer/owners. In the case of very long reports, copies can be made available at a specific office rather than including them in the body of the RFP.

The property description should provide as much of the following information as is available:

Location and Site Information. Provide street address, map, and parcel reference if available, deed description or survey if available (or if a survey has not been done, describe location with enough specificity to identify the property). A copy of an assessor's map is helpful. Attach any available studies or blueprints as appendices, or identify where they can be found and make them generally available.

Buildings and Improvements (if applicable). Description of any buildings

and structures, including size, age, construction type, condition, occupancy, use history, etc.

Site plans. Drawings, plot plans (if available).

Zoning. Zoning maps and references to applicable sections of the zoning regulations. State if there is an expected zoning path (e.g., special permit; Chapter 40B comprehensive permit).

Deed Restrictions, Easements, or Covenants. Identify any existing restrictions and/or any restrictions that will be imposed on the property by the municipal entity, such as affordability covenants or utility easements.

Regulatory Constraints. Identify all regulatory constraints, such as historic district restrictions, watershed protection areas, etc.

Utilities and Infrastructure. Identify what utilities are available at the site or within a reasonable distance, including water, sewer, gas, and electric. Identify utility providers.

Bidder's Responsibility for Due Diligence. State that bidders are responsible for their own review and analysis related to all aspects of the project.

A description of the community's need for affordable housing and the most recent census information containing relevant data should be included. If you have any information available either from the census or from studies or anecdotal sources concerning the need for the type of housing that you are proposing, it should be included here. Sources for anecdotal information could include your local planning department or local realtors.

Objectives and Guidelines

In this section of the RFP you should state the project's goals and guidelines under the following recommended headings:

Programmatic Objectives. Include target population, type of housing (e.g., rental or homeownership), and level(s) of affordability.

Design Guidelines. Be as specific as possible about aspects of the project design that are important to the municipal entity. This might include the type of construction, preferred unit configuration, site and building design, and desired amenities.

Role After Disposition. State what, if any, role the municipal entity expects to play after transfer of the property.

Price and Financial Guidelines. If price is a factor in the decision, this should be stated here.

Note: municipalities should have completed some level of feasibility analysis to determine if the price requested is feasible.

Lease Terms (if disposing of property through a long term lease). Outline the required lease provisions (attach a sample lease if available). This includes but is not limited to the following:

- Lease term
- Affordability
- Payment terms
- Lease termination
- Tax compliance
- Lease amendments
- Assignment of the lease

Implementation Guidelines. Detail what the process will be once the winning bidder has been selected. This should include the timeframe for execution of a developer agreement (if applicable) and other requirements and documentation that will be needed prior to the signing of the lease or purchase and sales agreement.

Other Resources. If you can provide additional assistance to the successful bidder beyond the land, list it in this section. Examples of such resources include assistance with project permitting, local funding through the Community Preservation Act, and providing Section 8 project-based rental assistance.

Criteria for Evaluating Prospective Developer/Owners

The fundamental purpose of the RFP process is to establish a fair and objective method for selecting a developer/owner for the property. It is strongly recommended that this evaluation occur in two or three stages. Establish a set of minimum criteria that all proposals must meet. Any proposal that fails to meet these criteria should be rejected. Second, if applicable, you need to evaluate whether the proposal meets the minimum price criteria set forth in the RFP. Third, proposals must meet a set of comparative criteria that provide a relative measure of the strengths of each proposal.

It is important that submission requirements match all of the items outlined in these evaluation criteria. Both the submission requirements and the selection criteria should be as detailed as possible to ensure that 1) you get a complete picture of the bidder, the development team, and the proposed development, and 2) the bidders understand what is required of them and how this information will be evaluated.

Setting the Evaluation Criteria for reviewing proposals is multi-step process.

STEP ONE

Develop Minimum Threshold Criteria

List criteria that establish the basic eligibility of the proposal for further review. Ideally, these should be “yes-or-no” standards that

you will apply to every proposal. Any bidder with a “no” should be eliminated from further consideration (see *IG Procurement Manual*, Chapter 5, Supply and Service Contracts, Evaluation Criteria).

Some examples of minimum threshold criteria are:

Conformance with Submission

Requirements. Did the bidder include all of the required items outlined in the submission requirements? If not, you may need to reject the application.

Development Experience. This is one of the most important criteria to consider. Development is often a complex and risky undertaking. Your criteria should specify the minimum level of experience necessary to carry out the requirements of the RFP. This might be expressed in years or types of experience (e.g., five years of affordable housing development, or successful completion of two affordable elderly-housing developments of at least 20 units each).

In defining relevant experience, it is important to consider the characteristics of the proposed project. For example, a developer/owner might need experience developing special-needs or service-enriched housing or using a specific type of funding (e.g., HUD 202 funding or Low Income Housing Tax Credits). Similarly, a project that will require a comprehensive permit would benefit from a developer/owner with experience related to Chapter 40B permitted projects. A homeownership project benefits from a developer with experience in building and marketing ownership units.

Current taxes. Request certification of current payment of all state and local taxes (or an acceptable explanation of why tax payments are not current).

Bidder Availability. Are there any time constraints on the project? If so, you should request start-date commitment and a proposed staffing plan, including a description of existing time commitments for each member of the development team. For a list of specific documents to request, see Section C below.

Affordability. Specify the minimum affordability criteria required by both number (or percentage) of units and level of affordability (generally stated in relation to median income as defined by HUD). It may be helpful to test these goals with a feasibility analysis that evaluates the income necessary to support project costs. Unrealistic goals will discourage good developer/owners from submitting proposals.

Bidder Financial Resources. The more complex and expensive a project, the more important the developer/owner's financial capacity becomes. A bidder must demonstrate strong financial capacity including sufficient net worth and access to financing. The ability to secure predevelopment funding or be able to carry the project through the predevelopment stage until construction financing is available is very important. In addition, you need to evaluate whether the developer/owner has sufficient resources to meet any required equity contribution.

STEP TWO

Develop Price Criteria

If price is a consideration, evaluate which bidder has made the best offer for the property. If price is not a consideration, skip to step three.

Examples of Price Criteria

Terms of Purchase or Lease. It is important to specify price or lease-payment terms for comparison purposes.

Price Requirements. In most cases, maximizing the public purpose will be more important than securing the highest price for the property. (In some cases payment might not even be expected from the bidder.)

STEP THREE

Comparative Evaluation Criteria

Consider giving additional weight to proposals that exceed the minimum criteria. Use comparative criteria to look at the relative merits of the proposals, rather than just selecting the responsive and responsible proposal that offers the best price. The Inspector General recommends that the measurement of comparative criteria not be a point-based system, which can be “deceptive, creating the illusion that qualitative judgments can be compared with mathematical accuracy.” (See *IG Procurement Manual*, Chapter 5, Supply and Service Contracts, Evaluation Criteria.) The examples below employ the measurement of “Highly Advantageous,” “Advantageous,” “Not Advantageous,” and “Not Acceptable” that is required for service and supply RFPs under Chapter 30B. However, any system that can be clearly defined and applied to all proposals is acceptable.

Examples of Comparative Criteria

The following are some examples of criteria that you might use to judge the competitiveness of a bidder's proposal if public purpose is the objective. We recommend that you give weight to these criteria according to the relative level of importance to the issuer of the RFP.

Affordability. Determine whether it is more important to serve people with lower

incomes (deeper affordability targets) or to serve more people at the prescribed “affordable” level (more affordable units).

Examples of measures are:

Highly Advantageous: 80% or more of the units are affordable to families earning less than ___ % of median income

Advantageous: More than 50% but less than 80% of the units are affordable to families earning less than ___% of median income

Not Advantageous: Between 25% and 50% of the units are affordable to families earning less than ___ % of median income.

Not Acceptable: Fewer than 25% of the units are affordable to families earning less than ___% of median income

Development Experience. A development team’s track record with comparable projects is one of the best measures of its ability to complete the project as proposed. Funders and lenders consider this key when awarding competitive funding and making loans. The amount and type of experience a developer/owner needs varies with the complexity of the project. Experience can be measured by number of years, number of projects completed, and role in the development process. Examples of measures are:

Highly Advantageous: Majority of development team has more than five years experience in affordable housing development; combined team has had a significant role in at least 10 affordable housing developments.

Advantageous: Less than half the development team has more than five years experience in affordable housing development; combined team has had a significant role in at least five affordable housing developments.

Not Advantageous: More than one member but less than half the team has more than five years’ experience in affordable housing development; combined team has had a significant role in at least five affordable housing developments.

Not Acceptable: Only one or two members of the development team have any experience in affordable housing development; combined team had only minimal role in affordable housing developments.

Developer/Owner’s Financial Capacity. Typically, RFPs call for submission of three years’ worth of audited financial statements (corporations) or personal financial statements (individuals), lender references, a description of other real estate owned — including information about any history of delinquency, default, litigation, or outstanding liens or judgments on property listed — and a credit release.

Highly Advantageous: Developer has a “clean” credit history, including no bankruptcy within the past seven years and no pending litigation. Developer has the financial resources to see the project through to completion.

Advantageous: Developer has an acceptable credit history, including no bankruptcy within the past seven years, and no pending litigation that would impact his/her ability to complete this project. Developer has the financial resources to see the project through to completion.

Not Advantageous: Developer has a questionable past credit history but appears to have the resources to see the project through to completion.

Not Acceptable: Developer does not have an acceptable credit history and does not have the financial resources to see the project through to completion.

Feasibility of Development Plan. The ability of the development team to understand the complexities of affordable housing development and the challenges posed by your particular site is key to the success of the project. At the heart of the competitive criteria is an evaluation of whether the project, as proposed, is feasible. Examples of measures are:

Highly Advantageous: Clear and comprehensive development plan, including reasonable development and operating budgets and a thorough understanding of physical constraints as well as regulatory issues.

Advantageous: Clear plan with generally acceptable development and operating budgets, some understanding of physical constraints as well as regulatory issues.

Not Advantageous: Clear plan with questionable understanding of development financing and regulatory issues.

Not Acceptable: Unclear plan with no understanding of development and operating budgets and/or physical constraints and regulatory issues.

Ability to Secure Financing. The ability to secure financing can be demonstrated either by a strong track record with similar developments or by documented financing commitments for the proposed project. Examples of measures are:

Highly Advantageous: Strong letters of interest from both construction and permanent lenders.

Advantageous: At least two letters of interest in providing either construction or permanent financing.

Not Advantageous: At least one letter of interest in providing either construction or permanent financing.

Not Acceptable: No letters of interest in providing either construction or permanent financing.

Proposed Design. At the RFP stage, designs are generally at the very preliminary schematic stage, reflecting approach rather than detail. Still, there are questions you can consider when reviewing proposals such as whether the site and unit designs appropriate for the parcel and the target population?

Examples of measures are:

Highly Advantageous: Design conforms to guidelines set forth in the RFP, and is appropriate for the parcel and the target population.

Advantageous: Design conforms to a majority of the guidelines set forth in the RFP and is appropriate for the parcel and the target population.

Not Advantageous: Design conforms to some of the guidelines set forth in the RFP.

Not Acceptable: Design does not conform to the guidelines set forth in the RFP and is not appropriate for the parcel and the target population.

Submission Requirements

It is recommended that the RFP include standard forms to ensure consistency in the bidders' submissions. You might want to consider the use of standard forms that are included in the One-Stop application, www.onestopapp.com. The introduction should restate the date and time where sealed proposals must be delivered

and describe how proposal packages should be marked. You should also describe how bidders might correct, modify, or withdraw proposals. We recommend that you request the information in Section C, Submission Requirements in the Sample RFP that follows this section of the guidebook.

Items 1-2. Background information on the proposal.

Items 2-11. Detailed project information which will allow assessment of feasibility.

Items 12-18. Information on the development team which will allow you to understand the developer's experience and qualifications to undertake this project.

Financial information from private individuals must be treated as private, confidential information with access limited to essential individuals in accordance with the Fair Information Practices Act ("FIPA"), M.G.L. c. 66A. You may want to designate a sub-group of the evaluation team to review and analyze all financial information included in proposals. This sub-group should include a least one person with strong financial background and the ability to analyze financial statements. The entire sub-group should be trained in standards of confidentiality, security, and requirements of FIPA.

Items 19-20. Certifications that are required as per M.G.L. Chapter 30B.

Selection Process

Describe the process that will follow the disposition of the property. Include how and when the proposals will be reviewed.

- State that all packages submitted by the deadline will be opened in public and logged in. Identify the party responsible

for reviewing the submissions, and state that all information contained in the proposals is public (except for the financials as described in the previous section).

- State how and when the winning bidder will be notified.
- Give a description of the process for conveying the property.

Contract Terms and Conditions

Outline any terms or conditions that will be incorporated into the purchase and sale or disposition agreement. Consult with your attorney regarding any local laws relating to real property transactions.

- List all terms and conditions that will be required in the agreement (e.g., reuse restrictions; certification of tax compliance).
- Explain that all contract amendments must be in writing and approved and signed by an authorized official.
- If the property is being offered for lease, spell out mandatory lease terms. If you have a draft lease, include it as an Appendix to the RFP.

SAMPLE Request for Proposal (RFP)

_____ *name (name of municipal entity)*

1. Invitation to Bid

The _____ *name* is seeking proposals for the long-term lease/purchase of _____ *property description (For example: Three acres of vacant land at 123 Great Road, Town, MA)*.

The _____ *name* intends to convey the property for _____ *intended use (For example: The development of 20-30 units of rental family housing.)*.

The purpose of this RFP is to select a developer/owner who will _____

(For example: Maximize the number of units affordable to households at or below 80% of median income; include number of affordable units and income level targets; bedroom mix, site amenities, etc).

The _____ *(municipal entity)* seeks proposals designed to reflect the architecture and scale of the local area. A history of strong property management is a high priority for the selected developer/owner.

Applicants should submit an original and _____ *number* copies on or before _____ *time* p.m. on _____ *date* to:

_____ *Name of municipal entity*

Attention: _____ *Name of contact person*

_____ *Address of municipal entity*

Bids will be opened and recorded at this time. No proposals submitted after this time will be accepted.

Proposals should be labeled _____ *(use project name)*. Responses to the Request for Proposals must include all required documents, completed and signed per the instructions and attached forms included in this bid package. The _____ reserves the right to reject any or all proposals or to cancel this Request for Proposals, if it is in the authority's best interest.

The _____ *(use municipal name)* makes no representations or warranties, express or implied, as to the accuracy and/or completeness of the information provided in this RFP. This RFP (including all attachments and supplements) is made subject to errors; omissions; prior sale, lease or financing; withdrawal without prior notice; and changes to, additions to, and different interpretations of laws and regulations.

The _____ *(use municipal name)* has determined that the award of this contract is subject to the Uniform Procurement Act, M.G.L. Chapter 30B. Therefore, the provisions of M.G.L. Chapter 30B are incorporated here by reference.

The rules governing disposition of real property by municipal entities are complex and subject to change. MHP has made every reasonable effort to ensure that the information contained in the guidelines and the model request for proposals is correct as of the date of this publication. However, as in all complex matters of this sort, specific legal advice should be sought before using the model request for proposals for a particular property disposition.

All inquiries should be in writing and directed, no later than _____, to:
date

Name of municipal entity

Attention: _____
Name of contact person

Address of municipal entity

Phone and fax numbers

e-mail address

2. Site Tour and Briefing

Interested developers are encouraged to attend an on-site briefing session on _____ at _____.
date time

Registration to attend the briefing is required no later than the close of business on _____.
date and time

To register, or for additional information, _____

contact person, phone, and e-mail address

3. Property Description

Location and Site Information: This RFP involves the sale/lease of the listed parcel(s) of _____ municipally-owned (vacant) land, located at _____. The site is approximately _____ square feet/_____ acres. (For the current owner's title, see the deed recorded with the _____ County Registry of Deeds, book _____, pages ____ - ____.) A copy of the assessor's map/survey/deed/plot plan and property description is attached.

Buildings and Improvements: There are _____ buildings or improvements on the site.
(Briefly describe the age, construction type, condition, and occupancy history. Attach or identify any studies of buildings.)

Site Plans (if available): Conceptual site plan is attached.

Zoning: The property is currently zoned _____, which allows _____ uses by right.
(It is assumed that the selected developer/owner will/will not require a zoning change or Comprehensive Permit pursuant to M.G.L. c. 40B.)

Deed Restrictions, Easements, or Covenants: Describe the proposed deed restrictions.
(For example: The sale will be conditioned by deed restrictions requiring certain level of affordability to be maintained over ____ period of years.)

Regulatory Constraints: Identify any regulatory constraints
(For example: The site falls within the Watershed Protection District, requiring...summarize restrictions)

Utilities and Infrastructure: Public utilities available at the site include _____.
(Also mention distance to utilities not available at the site and any plans to make them available. Provide any information available about septic capacity (if applicable), etc.)

Bidder's Responsibility for Due Diligence: Prospective developer/owner should undertake an independent review and analysis concerning physical conditions, environmental conditions, applicable zoning, required permits and approvals, and other development and legal considerations.

4. Objectives and Guidelines

The guidelines included in this section have been developed by the _____
(use municipal name)
and must be addressed and met in the proposal for this property.

A. Program and Use Guidelines: The proposed project should offer, but should not be limited to _____.
(For example: Maximum level of affordability, family housing, elderly housing, various services, etc.)

B. Design Guidelines: The proposed project should include _____.
(For example: Preferred bedroom configuration, common space needs/preferences, laundry facilities and other amenities, site design preferences.)

C. Role of Municipal Entity. The _____ intends to _____.
(use municipal name)

D. Price Guidelines: The minimum price that will be accepted by the _____ is \$ _____.
(Provide a figure, if price is a factor in selection.) (use municipal name)

E. Lease Terms (if applicable): the mandatory lease terms include the following:

- Term of lease
- Payment terms
- Lease amendments
- Affordability
- Lease termination
- Assignment of lease
- Role of municipal entity
- Tax compliance

F. Implementation Guidelines:

- The proposed development should be completed in a reasonable timeframe.
- The _____ will transfer the property when the developer has secured all
(use municipal name)
necessary financing and permits.
- The developer will be required to execute applicable documents.
(For example: Developer's agreement; purchase and sale agreement, lease)

G. Other Resources:

- The _____ is available to assist with project permitting.
(use municipal name)
- The _____ will make _____ project-based Section 8 Rental Subsidies available.
(use municipal name) (number)

5. Criteria for Evaluating Prospective Developers

All projects must meet the following minimum threshold criteria:

Minimum Threshold Criteria

- Complete conformance with all submission requirements
- A minimum of ____ years' experience in the development of affordable housing
- Certification of compliance for all state and local taxes
- Availability to commence work within _____ of selection
(time period)
- Ability to ensure that at least ____% of the units will be made affordable to households earning less than ____ of median income
- Demonstration that the bidder has the financial capacity to carry out the project as proposed

Price Criteria (if applicable)

- Adequate offer for property

Projects meeting the minimum threshold criteria and price criteria will also be judged on the following:

Competitive Evaluation Criteria

- *Affordability:* Extent to which the project exceeds the minimum affordability requirements as stated above.

- *Development Experience*: Extent to which the developer's experience exceeds the minimum criteria; the developer's prior track record in the construction of housing and the experience of the development team with regard to affordable housing development should be described in detail.
- *Developer financial capacity*: Equity contribution by the developer, review of all other real estate owned and any bankruptcy within the past 10 years by any member of the development team; ability to secure financing as evidenced by letter(s) from prospective lender(s).
- *Feasibility of Proposed Project; Analysis of Development Budget*: Environmental, permitting issues, construction estimates, soft costs; analysis of operating budget (for rental projects only): whether appropriate for target population, reasonableness of management, administrative costs, maintenance, and utility costs.
- *Financing*: Demonstration of ability to secure financing.
- *Site and Unit Design*: Appropriateness for parcel and target population

6. Submission Requirements

All proposals must include the following materials:

- Letter of interest signed by the principal(s) of the bidder
- Narrative description of proposed development
- Development budget sources and uses (*form*)
- 20-year operating pro forma and rent schedule (*form*) (rental only)
- Proposed sales prices, analysis of affordability, absorption schedule (sales only)
- Preliminary site plan and elevations
- Preliminary specifications
- Proposed unit configuration
- Preliminary identification of permitting and regulatory relief
- Project schedule
- Letter(s) of interest from lender(s)
- Description of development team
- Previous experience of members of team and references
- Developer financials
- Description of other real estate owned, including information related to any legal or administrative actions
- Role of owner/developer/consultant
- Prior development experience
- Developer contacts
- Disclosure of beneficial interests (M.G.L. c. 7, 40J)
- Certification of tax compliance (M.G.L. c. 62C, 49A)

Note: Items A–T may have sample forms available as part of the state's One Stop Funding Application at www.onestop.com.

7. Selection Process

All packages submitted by the deadline will be opened and logged in publicly. All information contained in the proposals (with the exception of financial information protected under the Fair Information Practices Act) will be made public. The _____ or its designee(s) will review and evaluate all proposals that have been received by the submission deadline. Evaluation of the proposals will be based on the information provided in the bidders' submission in accordance with the submission requirements of this RFP and any interviews, references, and additional information requested by the _____.

The _____ will notify all bidders in writing of its decision.

(use municipal name) (use municipal name)

TIPS for Perfecting a Request for Proposal (RFP)

The following are tips learned from many years of experience at MHP working with communities on affordable housing request for proposals and development disposition agreements.

Important Things to Remember When Disposing of a Property through an RFP

- First and foremost, familiarize yourself with Chapter 30B (Massachusetts procurement regulations governing municipalities); work with your municipality's procurement officer if you are fortunate enough to have one.
- Identify and use an attorney who is familiar with Chapter 30B to review your document.
- Call the Inspector General's (IG) office with questions; the IG's office has a Chapter 30B "hotline," 1-800-322-1323.
- Do your homework. For each of the components of the RFP, research your site, talk to other municipal boards, and preview the draft with all of the stakeholders.
- Read MHP Guidelines and template; gather sample RFPs from other communities that have done similar dispositions successfully.
- Identify members and assemble a review committee that has expertise in affordable housing and development. Hire outside help if needed (e.g., to evaluate financial feasibility).
- The RFP should be your guide when you go through the review process: don't change the rules once the RFP is issued.
- Keep the playing field level: entertain all questions in writing and distribute questions and answers to all prospective bidders (this means you need to keep track of who has the RFP). Don't "pre-qualify" a developer.

- The quality of the RFP has a direct impact on the quality of the responses.
- If at first you don't succeed, you can always re-issue your RFP!

Most Common Problems with RFPs and the Disposition Process

Poorly defined or unrealistic timetable for project completion: Could lead to challenges from other bidders if and when it takes the winning bidder more time to do project.

Hidden Agenda: You can't make up selection criteria during the selection process — every criterion you are going to use should be stated in the RFP.

Lack of Specificity in Your Objectives and Guidelines: Beware of the problem of leaving too much to the bidders' discretion which can lead to a later problem of comparing apples to oranges in reviewing proposals.

Misleading Information on Developer Qualifications: What you see is not always what you get. Suggestion: include requirements such as bonding or other performance guarantees that will provide some financial protection if things go wrong.

Premature Timing of Land Disposition: Be clear in the RFP. Disposing of land too soon into the development process can result in major problems.

Lack of Level Playing Field: Beware of favoritism and of individual information-sharing either prior to or during the RFP process. Beware of perceptions as well as reality of favoritism.

Lack of Clarity or Disclosure about Municipal Financial Incentives: Relates to prior caution. Be clear about what is and is not available, if any are anticipated or asked about; information should be shared with all bidders in RFP.

Failure to temper expectations in the RFP: The municipality can provide no guarantees that the proposed development will receive all necessary local approvals; do not make any representations as such.

Copying some other community's RFP: You may be repeating someone else's mistakes. Its best to start with a clean slate and use other RFPs only as a reference tool.

Frequently Asked Questions

Frequently Asked Questions

The following are questions that have arisen during public workshops about using public land for affordable housing.

#1 QUESTION: Our community wants to have the highest ratio of affordable housing units. How do we use that to evaluate proposals? Should we set a minimum affordability threshold, for example 35% of the units affordable to people below 70% of median income?

ANSWER: Before you set a minimum threshold of affordable units, you need to test the financial feasibility of your ideal development. In fact, the best RFPs test the feasibility of all criteria. Calculate rough numbers on how your criteria will impact the need for subsidies. Subsidy programs typically have a maximum award per unit, so you need to recognize that there may not be a program willing to cover the costs for such a high number of affordable units. If practical, consider waiving or reducing your standards on other criteria (e.g., design) in exchange for a higher level of affordability.

#2 QUESTION: Can we review RFP submissions for design?

ANSWER: The RFP can include design guidelines. If you don't already have design guidelines, look to other communities that have guidelines to see what they include and how they evaluate them. If you want absolute thresholds, be sure to include them in the design criterion of the RFP.

#3 QUESTION: Is it okay to include exact design details, for example, that a unit must be a minimum of 1,200 square feet and have three bedrooms?

ANSWER: It is okay to set expectations in your design guidelines, but you want to avoid being so specific that you appear to be engaging in a public construction project or you limit the developer's ability to be creative. This is true for financing (identifying a specific subsidy) as well as design.

#4 QUESTION: Can you include your local preference standards in the RFP?

ANSWER: If there is no comprehensive permit or special permit, local preference requirements should be included in the RFP and the disposition agreement. Note that the maximum allowable local preference is established by the subsidy program used, so the actual percentage dedicated to local residents might be less than what the community desires. For this reason, it is advisable to incorporate conditional language in the RFP (e.g., ___% for people who live or work in the town of _____, or the maximum allowed by law and regulation). Also be aware that local preferences must comply with federal and state fair housing laws.

If the project will require a comprehensive permit, you can include the local preference in the permit conditions, including developer responses for providing ongoing monitoring expenses. Conditions could include the requirement that the developer pre-pay for monitoring of the lottery. Local preference can also be included in the conditions of a special permit.

#5 QUESTION: Is it possible to suggest specific subsidy programs in the RFP even though there is no guarantee that an application would receive funding?

ANSWER: It is not advisable to target specific subsidies in the RFP, in the event they are not available to the developer. However, it can be useful to identify subsidies for the developer to consider or to state that the municipality is willing to apply for to appropriate subsidy program on the developer's behalf. Alternatively, if there are local funds the community is willing to use for the project, those can and should be identified (e.g., Community Preservation Act funding).

#6 QUESTION: What is the optimal size for the RFP review committee? Should you stick to using local residents and officials or should you include people from outside the community?

ANSWER: Review committees work best with five to seven people who have experience with real estate transactions, finance, development, and/or local permitting. If you need to get outside help, look for people who are familiar with the community and have expertise in development and finance.

7 QUESTION: When a town disposes of property are there ways to ensure that the final development serves the intent of the transaction?

ANSWER: There are a number of steps you can take to ensure that the development meets the basic criteria set forth in the RFP. You can include conditions in the disposition agreement, the developer

agreements or contracts, in a long-term lease agreement, and/or as deed restriction. Additionally, you may want to employ a monitoring entity to ensure the long-term compliance of the project.

Long-term Leasing

This is a copy of electronic correspondence sent to Assistant Attorney General Joseph Ruccio from DHCD Chief Counsel Alexander Whiteside. The response to this memo follows.

From: Whiteside, Alexander (OCD)
Sent: Monday, November 15, 2004 4:22 PM
To: 'Joseph.Ruccio@ago.state.ma.us'
Subject: Municipal Leasing for Affordable Housing

In recent months a number of municipalities have come to the Department of Housing and Community Development for advice with respect to the applicability of the bidding laws to municipal leases of land for affordable housing. DHCD is the state's housing agency (of which I am Chief Counsel) and is a prime proponent for creation of additional affordable housing. We recognize that there are cases where municipal leases of land (rather than outright transfer of the fee) are necessary if affordable housing is to be created on the land and that development of such housing would in most cases not be possible if private developers were required to comply with the bidding laws. However, we believe that with care these private developers can construct affordable housing on land leased from municipalities and not be subject to the bidding laws.

We have written the attached memorandum in an effort to provide guidance to municipalities and private developers on how to avoid the pitfalls when dealing with municipally leased land. As you will see we have used your letter of 10/17/03 as a starting point and added a fair amount of further elaboration. We should very much appreciate comments and suggestions from your office on the memorandum since these views are so important. We recognize that there are constraints on the advice which you can give but hope that you can advise us whether your office detects any flaws in our reasoning or in our conclusions or whether there are other areas which should be further developed.

We receive frequent questions about our views on this subject. We also attend a number of meetings where the matter comes up. We have offered opinions with the caution that the opinions are subject to being updated or modified. The sooner we know your views on our views, the better we will be able to give sound advice. Thanks in advance.



THE COMMONWEALTH OF MASSACHUSETTS
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February 17, 2005

Alexander Whiteside
Chief Counsel
Massachusetts Department of
Housing & Community Development
100 Cambridge Street, 3rd Floor
Boston, MA 02114

Re: Municipal Leasing for Affordable Housing

Dear Mr. Whiteside:

This is in response to your letter of November 17, 2004, in which you ask for comments on the memorandum accompanying your letter. The memorandum addresses the applicability of the bidding laws for public construction to municipal leases that contemplate the construction of affordable housing by a private developer on public land (affordable housing leases). In the memorandum, you conclude that such a lease will not implicate these laws so long as it contains certain terms. Based on our bid protest decision, New England Regional Council of Carpenters v. City of Pittsfield (August 13, 2004) (the Wahconah Park decision), we agree.¹

The Wahconah Park decision clarified the factors that we would consider, and the weight to be attributed to each, to determine whether the bidding laws for public construction apply to an affordable housing lease.² At issue there was a \$1 license agreement for a Park owned by the City of Pittsfield (the City), but the underlying issue was the same as that addressed in your memorandum. The license required the private licensee to "provide professional baseball games at the Park" and to perform yearly renovations to the Park pursuant to a "[financial] formula." Wahconah Park at 4.³

Before reaching the license agreement, we discussed Helmes v. Com., 406 Mass. 873 (1990), Town of Plymouth v. Snow, No. 90-0252-A (Mass. Super Jan. 14, 1993), and G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984). We cited Helmes

¹ This letter should not be construed as a legal opinion. Our ability to render legal opinions extends only to opinion requests by state officials, district attorneys, and committees of the Legislature. See M.G.L. c. 12 §§3, 6 and 9.

² With respect to such complex bidding issues, we generally do not form positions unless the issue or a similar issue has been the subject of a bid protest. The adversarial bid protest process ensures a thorough treatment of an imminent issue. When we hear a bid protest and render a decision, we are acting in our enforcement capacity. See M.G.L. c. 149, § 44H (charging the Attorney General with the responsibility for enforcing the bidding statutes for public works and building projects, and the designer selection law).

³ A copy of the decision is attached to this letter.

for the proposition that “where an agent enters into a construction contract on behalf of a public agency, the contract may be subject to the competitive bidding statutes [for public construction] nonetheless.” Wahconah Park at 8 (citing Helmes, 406 Mass. at 876).

To flesh out this concept of agency, we turned to the Snow decision.⁴ See Wahconah Park at 9-10. There, rather than comply with the construction bid laws, the Town of Plymouth (the Town) issued a Request for Proposals (RFP) to interested developers for the construction and operation of a garage on Town owned land. See Snow at 1-2. Proposals were to include construction qualifications and architectural plans, and the Town retained the right to reject a selected proposal after reviewing additional submissions. See id. at 3. The court held that the bidding laws for public construction applied because the lease was based on the lessee’s agreement to construct a garage according to guidelines in the RFP and because “at some point . . . the lease Town will assume ownership of the parking garage.” Id. at 6. The court noted that if the lease was not subject to these laws, a public agency could sidestep their safeguards and “merely lease public land to a favored contractor who would construct the desired building.” Id. at 7 and n.2.

Finally, we drew guidance from G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984), which involved renovations by a private lessee on a publicly owned restaurant and the applicability of an analogous law – the payment bond law for public construction – to these renovations. See Wahconah Park at 10-12. The court held that this law did not apply, largely because while the lease acknowledged the lessee’s right to make specified renovations, it “did not require” the lessee to undertake any renovations; they remained the “sole responsibility” of the lessee. See 18 Mass. App. 668-69 (Emphasis in original). The G.M. Builders court also distinguished a general right, reserved in a public lease, to ensure that renovations are “consistent with the public interest,” from a right giving more control over the exact construction to be performed. See id. at 669 and n.5.

When we turned to the Wahconah Park license agreement, we made the following observations:

In its current form, the license raises serious concerns about the applicability of the [construction] bidding statutes. However, this is a close case. During the hearing of this matter, it became apparent that the City did not consider the reasoning of the G.M. Builders case in entering the license agreement. Further, while both the City and the Club view the license as having a 15 year term, the language of the license provides [for an initial obligation of approximately 18 months]. Finally, based on testimony provided at the hearing, the parties to the license did not intend for the City to have the right to withhold approval for concession stand alterations except where there are violations of health, safety and welfare regulations.

⁴ A copy of this decision is also attached.

Alexander Whiteside
Page 3 of 3
2/17/2005

Wahconah Park at 13. It appeared that the City had unintentionally included the very clauses that raised concerns about whether or not the construction bid laws applied, or at least had yet to attempt to structure them in a way that avoided these concerns. We therefore remanded the matter to the City for further consideration.

The lease terms you propose in your memorandum would seem to avoid these concerns. After discussing a letter that addresses GM Builders, you advise that the term of the affordable housing lease should be "no less than what is computed to be the actual useful life of the housing." You further note that it "might also be useful for the lease to contain a provision that the lessee shall own the buildings so constructed or for the lease to provide that the lessee . . . may remove any improvements." You also state that, beyond restricting the housing to "income-eligible households," the municipality should not "manage the construction or thereafter operate the housing." With respect to the rent, you suggest that the municipality should "charge [the lessees] a reasonable amount for the affordable housing use."

We agree that an affordable housing lease containing these terms would not give a municipality the type of control over construction referenced in Helmes, Snow and GM Builders as that which would implicate the bidding laws for public construction.⁵ Such a lease would, however, seem to be subject to the bidding law for public leases.⁶ Please contact the Inspector General at (617) 727-9140 with any questions that you may have about compliance with this law.

Very Truly Yours,



Joseph E. Ruccio, III
Assistant Attorney General

⁵We also agree with your assertion that state and federal assistance for the construction of affordable housing, such as tax credits, grants or loans, is not enough in itself to subject an otherwise private project to the bidding laws for public construction. See Helmes, 406 Mass. at 876; Cf. Salem Bldg. Supply Co. v. J.B.L. Constr. Co., 10 Mass. App. Ct. 360, 362 (1980) (privately owned, but publicly financed, low income housing project not subject to G.L. c. 149, § 29, the payment bond law for public construction).

⁶ See M.G.L. c. 30B, § 16.

DHCD Guidance on Long-term Leasing



Commonwealth of Massachusetts DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

Mitt Romney, Governor • Kerry Healey, Lt. Governor • Jane Wallis Gumble, Director

Office of the Chief Counsel
100 Cambridge St., Suite 300
Boston, Massachusetts 02114
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There is a requirement in G.L. c. 149 § 44A (2) that “[e]very contract for the construction...of any building by a public agency estimated to cost more than twenty-five thousand dollars...shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provisions of section forty-four B to forty-four H inclusive...”

Various municipalities would like to lease certain land to private developers for the purpose of their providing affordable housing to low or moderate income households. Some question has arisen as to possible circumstances in which these private developers would be subject to the public bidding laws for the construction of such affordable housing.

In July 2003 the Barnstable town administrator wrote to the Attorney General’s Office and requested a determination whether construction of affordable housing on municipally leased land would be subject to the bidding laws (G.L. c. 7 §§ 38C to 38N, G.L. c. 30 § 39M and G.L. c. 149 §§ 44A et seq.) On October 17, 2003 Assistant Attorney General Ruccio replied that his office could not render a formal legal opinion to the Town. However, he pointed out that, when land is leased by a municipality to a developer with a requirement that the developer provide affordable housing to low or moderate income households, such a requirement constitutes a certain degree of control over the construction of the housing. He noted that the “amount of [such] control that a public agency exerts over a construction project during a public lease is a significant factor to be considered in determining whether the public bidding laws apply to the project.” He also indicated that another factor to be considered is the fact that the improvements to be constructed will at the end of the lease revert to the municipality and become public property.

In his letter AAG Ruccio referenced an earlier letter from his office to the Division of Capital Planning and Operations and to the Office of the Inspector General as to “whether or not any construction work performed pursuant to, or during, [a] building lease agreement would be subject to the statutory bidding laws...” In this earlier letter AAG Flaherty identified four areas of inquiry to help determine the intent of the parties in entering the lease. These four areas of inquiry focused on whether the substance of a transaction is such so that a lease should be treated the same as a public construction contract. They are:

- (1) Ownership. Does the public entity as owner receive benefit from construction required by the lease?
- (2) Control. Is the public entity in effective control of the construction?
- (3) Lease Terms. How long is the lease? Does it require that construction, which makes significant alterations to the building, be performed.
- (4) Use of Building. Is the building to have a public or private use during the lease term?

DHCD recognizes that in some cases a public entity could attempt to use a lease with a private developer as a means to circumvent the bidding laws on a construction project which the public entity would otherwise undertake itself. For example, the Attorney General's Bid Protest Unit in four separate decisions (*In re Sabis International Charter School* (9/17/97), *In re Sabis International Charter School* (2/1/00), *In re Enlace DeFamilias DeHolyoke/Holyoke Community Charter School* (7/15/02) and *In re Renovations to 160 Ashlane Avenue, Springfield, MA, New Leadership Charter School* (5/7/03)) has held that, although certain buildings were being constructed by private entities, the construction was subject to the bidding laws because the buildings would be used for a public purpose as charter schools and because the funding was public.

In the case of the affordable housing to be developed in Barnstable, there does not appear to be any intent to circumvent the bidding laws on a project which in usual circumstances the town or its housing authority would undertake. The state's public housing program (administered by DHCD) is not at present developing any significant amount of new public housing. Housing authorities are concentrating on rehabilitation and modernization of the existing public housing stock. There is reliance on private developers for production of most new affordable housing in the state. Barnstable's proposal for private development of new housing is consistent with current practice.

One possibly problematical part of a lease of municipal land to a private developer for affordable housing lies in the fact that at the end of the lease term the municipality will own the buildings constructed by the private developer. Although DHCD does not believe that in and of itself potential future municipal ownership would make the bidding laws applicable, if the lease term is short and the municipality would be receiving a valuable asset at the end of the short lease term, the circumstances would lend some support to a conclusion that the bidding laws are applicable. In order to avoid such receipt of a valuable asset it would be advisable for any municipal lease for affordable housing to have a term no less than what is computed to be the actual useful life of the housing. It might also be useful for the lease to contain a provision that the lessee shall own the buildings so constructed or for the lease to provide that the lessee may, at its option, remove any improvements.

Together with provisions assuring an adequately long lease term so that construction of the improvements will not substantially benefit the town at the end of the lease term, the town should avoid control of construction and of operation of the housing during the term of the lease. While it is fair for there to be provisions permitting the town to ensure that the housing is properly built and is thereafter restricted to income-eligible households, the municipality should not itself as a municipal enterprise manage the construction or thereafter operate the housing. The private developer should be in charge of construction. The developer may thereafter manage the property. In the event that the developer seeks outside management, if a municipal or other public entity such as the local housing authority is to be considered, there must be a selection process of a manager based on merit.

State and federal assistance is currently available to private developers for construction of affordable housing (for example the federal and state low-income housing tax credits). Receipt of such assistance does not subject the developers to the bidding laws. Although municipalities should avoid directly paying contractors for the cost of construction, assistance by means of loans or grants to private developers from sources, such as local affordable housing trusts or Community Preservation Act funds, will not cause the bidding laws to be applicable.

With respect to rent, the municipality may decide to charge a reasonable amount for the affordable housing use. This would be much less than rent for a market-rate housing use. Rent for affordable housing use would be based on the value of the land as used for affordable housing. In this way a municipality could charge a fair market rent for the restricted affordable use and still charge much less than what would be charged for market housing. Although DHCD does not believe that charging a nominal rent would be a municipal involvement sufficient to implicate the bidding laws, it might be considered a factor. Such a result can be avoided by computing a low rent which is nevertheless appropriate for the affordable housing use.

DHCD recognizes that there is a variety of reasons why it may be impractical for a municipality to convey land outright to developers for affordable housing use. Such a municipality should have the ability to lease land in order to permit development of affordable housing. It is DHCD's view that development of such housing by a private developer on municipally leased land will result in an essentially private use and will not be subject to the bidding laws so long as proper precautions, as outlined in this letter, are taken.

Appendices

The MHP “Development Primer”

This Development Primer captures the different steps and stages in the housing development process in a very compact format and it can be a useful way of looking at the development process in its entirety. A note of caution – in reality the development process is not predictable, linear, or necessarily orderly. Items shown in one column might actually occur in a different order and each individual development project will unfold in its own unique way.

DEFINING THE PROJECT	SELECTING THE DEVELOPMENT SITE	ASSEMBLING THE TEAM	ASSESSING RISK AND FEASIBILITY	FINANCING THE PROJECT	LEGAL ISSUES	DESIGNING THE PROJECT	GETTING THE PROJECT BUILT	MARKETING THE PROJECT
Setting Goals	Identifying Potential Sites	Developer	Site Feasibility	Equity	Forming a Development Entity	Site Design	Contractor Duties	Sales
Assessing Needs	Land	Attorney	Physical Characteristics	LIHTC	Contract Negotiations	Design Phases	Construction Management	Marketing Channels
Target Population	Existing Structures	Tax Expert	Utilities and Infrastructure	Other Forms of Equity	Professionals	Conceptual Design	Hiring a Contractor	Selection Process
Eligibility Requirements	Town Property	Architect	Water	Construction Financing	Financing	Schematic	Construction Monitoring	Using a Realtor
Ownership	Assessing Risk and Feasibility	Landscape Architect	Sewer	Permanent Financing	Construction Contract	Design Development		Rentals
Rental	Gaining Site Control	Engineer	Roads	Rental Projects	Permitting	Working Drawings		Marketing Channel
Elderly	Negotiating for Purchase	Civil	Soils	Ownership Projects	40B	Working with Your Design Team		Selection Process
Special Needs	Property Survey	Structural	Assessment of Site Costs	Freddie Mac/ FannieMae	LIP	Engineering		
Evaluating Internal Capabilities	Appraisal	Mechanical	Environmental Feasibility	Special Financing	Closings			
Setting Project Parameters	Acquiring the Property	Environmental	Preliminary Assessment	Bridge Financing	Other			
Project Type	Go/No Go Decision Point	Financier/ Lender	Radon	Gap Financing	Covenants			
Project Location		Syndicator	Political Feasibility	Soft Second Financing	Easements			
Project Size		Contractor	Title and Deed Restrictions	Subsidies				
Income/Price Parameter		Other	Regulatory Analysis	HOME				
Go/No Go Decision Point		Appraiser	Zoning	CDBG				
		Market Analysis	Wetland/Conservation Restrictions	FHLB				
		Planner	Principles of Sustainable Development	Other				
		Inspector	Political Environment	Securing Financing Commitments				
		Accountant	Market Feasibility	Preparing a Proposal				
		Marketing Agent	Market Demand Assessment	Funding Rounds				
		Property Management	Financial Feasibility	Go/No Go Decision Point				
		Hiring the Team	Estimating Realistic Project Revenue					
		Preparing an RFP	Estimating Realistic Project Costs					
		Outreach and Selection Process	Pro Forma/ Budget					
		Evaluating Proposals	Determining Property Value					
		Go/No Go Decision Point	Existing Structures					
			Structural Analysis					
			Go/No Go Decision Point					

Using Public Land

From MHP's e-bulletin, an excerpted article titled
Using public land can kick-start local housing efforts

Are you looking for ways to produce more housing in your community? Are you trying to address your local housing needs in a manner that fits the character of your city or town?

If the answer to these questions is yes, then using public land or buildings is one of the most effective ways to produce more affordable housing effort in your community.

MHP has worked with a number of communities and local housing authorities in the identification and disposition of public property so that it can be developed into affordable housing.

In this e-bulletin, we will provide three examples of the successful use of public land, and provide information on the basic steps communities need to take so that land and properties they own can be used for affordable housing.

Community Stories

WESTFORD: Westford is like a lot of towns along Route 495, blessed with the curse of progress. The high tech boom brought jobs and wealth, and a nagging awareness that it was lacking in affordable housing.

In the past two years, the town has worked hard to achieve two successful dispositions of public land for affordable housing.

The first effort is known as Stony Brook. In this case, the town set aside seven acres of a 170-acre, town-owned parcel, transferring it to the town's housing authority. This land will be used for the construction of 15 rental units in duplexes and one triplex. The town has devel-

oped a middle school and athletic fields on the remaining 163 acres.

The second Westford development, Brookside Mill, is near completion. When finished, it will provide 35 condominium units, five of which will be affordable. Three of these units will be purchased by the Westford Housing Authority and rented to eligible tenants. The two others will be affordable homeownership units. Taken by the town for back taxes, the town positioned the mill for development by passing a bylaw encouraging mill reuse for housing. The town then sought proposals for development, chose developer Gerry Boucher, and sold him the property for a \$1.

MHP has worked with the town for the past few years on its affordable housing efforts. Chief among its contributions was helping the town create the model bylaw that encourages the development of old mill buildings as long as some of the property is used for affordable housing.

The Stony Brook effort is part of an MHP initiative called the Suburban Rental Pilot Production Program. Offered in conjunction with the state Department of Housing and Community Development (DHCD), Stony Brook will receive substantial guidance and assistance from MHP's affordable housing development staff, predevelopment financing and long-term financing from DHCD and MHP.

The town has four old mills that were once the economic cornerstones of the community. The bylaw MHP helped create paves the way for the

town's history to be saved while producing affordable units at the same time.

SPRINGFIELD: It would be an understatement to say that once upon a time, the Franklin and Belle Street part of Springfield's Lower Liberty neighborhood had seen better days. In the mid-1990s, it was estimated that 86% of the units in the Franklin-Belle block were abandoned or uninhabitable.

Faced with these numbers, neighborhood groups like the Lower Liberty Task Force and the city targeted Franklin and Belle streets for redevelopment. First, over a period of years, the city acquired properties through both tax foreclosures and direct purchase from owners.

MHP then assisted the effort, first with a financial feasibility study and architectural review. It also assisted the Lower Liberty Heights Community Action Team and the city in seeking proposals from developers (a process known as request for proposal or RFP). A developer was chosen to purchase these selected properties. This effort has resulted in over a hundred permanently affordable units.

GREAT BARRINGTON: This small town in Berkshire County (pop. 7,500) owns a three-acre piece of land on Hillside Avenue. A vote of town meeting authorized this parcel to be made available for the development of affordable housing.

With that OK, the town and selectmen worked with a consultant provided by MHP to prepare an RFP and select a developer to enter into a long-term lease. The developer will construct eight to 12 units of rental housing on this site. A local nonprofit development corporation has been selected and is currently in the process of site engineering and project design.

Using Public Land to Produce Housing

These three examples illustrate that municipally owned property can often kick-start a local strategy for adding to the supply of affordable housing.

However, most municipal governments are not interested in being housing developers. It falls outside the sphere of what it usually does. It's common practice for the community to find a developer to produce affordable housing, using municipal land as an impetus for the project. This is done through the sale of the land or buildings, or through a long-term lease.

Cities, towns, housing authorities, and other municipal entities often have surplus or vacant land. Land may have been acquired for a variety of reasons, including land that was acquired through tax foreclosure, or given to the city or town as a gift. Offering sites for no consideration or at a reduced price is a way to attract developers and can leverage the level of affordability that your community needs. Once created, the affordable units are kept affordable using long-term deed restrictions.

Land disposition by municipalities and housing authorities is regulated by the state under the auspices of the Inspector General whose office oversees Chapter 30B, the Uniform Procurement Act. This law governs the disposition of public assets.

To comply with Chapter 30B, land dispositions require the issuance of a request for proposal (RFP) according to specific guidelines for notification, proposal evaluation, and developer selection.

Local housing authorities have additional requirements they must follow. A future e-bulletin will cover disposition issues specific to housing authorities.

Moving Projects Forward

Creating an inventory of available land and land that may become available is a good first step. Simultaneously, local housing partnership members and other community housing supporters can work to build support for housing.

Writing a good RFP is the best guarantee for securing a good developer and creating a project that reflects your interests. The group responsible for development and drafting of the RFP needs to be clear and specific about its goals for the project.

Questions that need to be asked include:

- Is it rental, home ownership, or perhaps both?
- Is it important to have larger size units for families?
- How will affordability be evaluated? Is mixing incomes important?
- Will credit be given for reaching lower income groups?

Also, asking for information that will allow the proposal reviewers to assess the financial ability and experience of the developer is important. The Inspector General's Office produces a very thorough manual for 30B procurement. Chapter 8, entitled Real Property Transaction, gives detailed information about using the RFP process for property disposition.

Developing affordable housing is often a lengthy and often challenging process. Using public land or buildings to provide housing is often the spark communities use to increase their supply of affordable housing.

Future e-bulletins will describe the development process in more detail including site assessment, funding, permitting, and design issues.

Related Web Sites

Taking the Initiative: A Guidebook on Creating Local Affordable Housing Strategies

This link will take you to Chapter 5, which discusses in detail the reuse of vacant, obsolete, and surplus properties.

Setting goals in the development process

MHP has developed a succinct three-page guideline that lists some of the key considerations that can assist you in creating goals that lead toward local affordable housing development.

Guidelines for Preparing an RFP

MHP has developed guidelines to assist cities, towns, housing authorities, and other public entities in preparing RFPs for the disposition of property for the use of affordable housing.

Previous e-bulletins

Regional Workshop held in Duxbury

MHP held a regional workshop in Duxbury May 7 to discuss public land disposition. Connie Kruger, MHP Community Technical Assistance Manager, and Bob Smith, Town Counsel for Barnstable, presented information to an audience of about 30 attendees. Attendees included public officials, local housing partnership members, community preservation committee members, and others. There was a lot of interest in learning how best to dispose of public land for affordable housing. Atty. Smith described success using lone-term leases to allow affordable housing to be built in Barnstable.

Best Practices Series

The third session of the Best Practices Workshop Series sponsored by MHP and DHCD on Tuesday, June 8, at Holy Cross College, Worcester is *JHOP and UP: Keep the Old and Count the New!* To register send an e-mail to Ivette Ortiz at MHP.

General Recommendations for Municipal Real Estate Dispositions

An article from the Massachusetts Office of the Inspector General Procurement Bulletin, December 2003

Selling or leasing town-owned real estate has become a common solution for generating revenue and returning unused town-owned property to the tax rolls. Several questions arise during the real property disposition process, which are discussed below.

Do I need to conduct an appraisal before disposing of real property by sale or lease?

M.G.L. c. 30B, §16 requires that if a governmental body determines that it shall rent, convey, or otherwise dispose of real property, the governmental body shall declare the property available for disposition and shall specify the reuse restrictions on the property, if any.

The law further requires that the governmental body determine the value of the property through procedures customarily accepted by the appraising profession as valid. This does not mean that you have to obtain a formal appraisal of the property before its disposition, although you may choose to obtain a formal appraisal. You may also rely on the municipal assessment of a property's value if it is current, if the municipality is assessed at 100%, and if the assessment is determined through valid procedures. For a lease, you may use market rent data or even advertised rental rates, if there are a sufficient number of similar properties on the market to determine the lease value.

However, you may want to consider whether the assessed values are typically significantly less than the current fair market value of properties in your area. If you know the fair

market value to be higher than the assessed value, you should consider using a higher figure for purposes of establishing minimum acceptable bids and in evaluating the reasonableness of any proposals you receive.

The dollar threshold that triggers the request for proposals (RFP) requirement in M.G.L. c. 30B, §16 is a value of \$25,000. It is vital that cities and towns do not artificially underestimate the value of real estate to be sold or leased, even relatively small tracts of land, with the intention or effect of keeping the valuation below the \$25,000 threshold. This office has received many complaints regarding dispositions of "low dollar value" parcels which were disposed of without an open proposal process. In some instances, awarding authorities have placed an unduly low estimate on the value of property which has then been the subject of a private negotiated sale. In one instance a community assessed a parcel as being worth less than \$25,000 and yet ultimately negotiated a sale for \$28,000. At a minimum this type of transaction creates an appearance of favoritism and may represent a violation of the bidding laws. Even if a parcel of property is relatively small, is occupied by a dilapidated building, or is located in a somewhat blighted area, caution should be used in determining that it is of such limited value that no RFP is required for its disposition. The rapid escalation of real estate prices has arguably left relatively few parcels of property which should not be considered for disposition through an RFP process.

When must I follow an RFP process to dispose of real estate by sale or lease?

You must issue a request for proposals (RFP) to dispose of real property with a value of more than \$25,000. The procedures are triggered by the value of the property, not the price your local government will receive for the disposition.

If you are leasing space, you determine the value of the disposition by calculating the lease price over the entire contract term. For example, if you are leasing out a portion of a municipal building for three years with a monthly rent of \$1,000, the entire contract costs \$36,000 and therefore it must be disposed of using an advertised RFP.

What information needs to go in my advertisement?

M.G.L. c. 30B, §16 requires that your advertisement specify the geographical area, terms and requirements of the proposed transaction, and the time and place for the submission of proposals.

What are the advertising requirements?

You must advertise in a newspaper of general circulation at least once per week for two consecutive weeks. The last publication must occur at least eight days preceding the day for opening proposals. If the property you are disposing is more than 2,500 square feet, you must also place an advertisement in the Central Register, published by the Secretary of the Commonwealth, at least 30 days before your proposal opening date. See www.state.ma.us/sec/spr/sprinf/infocent.htm for the Central Register advertising form.

What information needs to go in my RFP?

This Office recommends that your RFP include material terms and conditions of the proposed sale or lease. For example, if you are leasing town-owned property, you should state the desired length of the lease.

Your RFP should provide interested parties with the information they need to decide whether they want the property you are selling or leasing and to submit a responsive proposal. The major components of a disposition RFP are: description of the property and interest in the property you plan to sell or lease (the “property description”) and any reuse restrictions, selection criteria, proposal submission requirements, and the contract terms and conditions.

Property Description

The property description must be detailed enough for interested parties to understand what you are offering. If the property is being offered for sale, include a reference to a deed or survey. Also identify any included building and structures in the property description and any restrictions on their use, such as deed restrictions. Drawings, plot plans, or other relevant documents should either be appended to the specifications or incorporated by reference.

The RFP must state the terms of the disposition, including whether it is a sale or lease. If it is a lease, state its duration and whether utilities will be included in the lease price or must be paid separately by the lessee.

Selection Criteria

You should indicate how you will select a proposal from among the competing proposals. The process is similar to developing evaluation criteria for supplies or services. You should establish criteria to evaluate responsiveness (whether the proposer agrees to meet your terms and the proposal contains all the required documents and forms properly completed) and responsibility (whether the proposer has the capability, integrity, and reliability to perform under the contract); comparative cri-

teria (if you decide that you want to look at the relative merits of the property proposals rather than just selecting the responsive and responsible proposal that offers the best price); and a method to evaluate prices.

You may establish any rating scheme that preserves open and fair competition, keeps proposers on a common footing, and allows manageable and meaningful comparisons. You have the option to use the same rating categories that are used in Chapter 30B RFPs for supplies and services: highly advantageous, advantageous, not advantageous, and unacceptable.

Although Chapter 30B requires proposals, you have the discretion to structure your RFP so that it is, in effect, an invitation for bids. If your objective is simply to dispose of property you do not need, you should sell the property to the proposer offering the highest price. In this instance, your RFP should set out simple criteria and award the contract to the qualified proposer offering the highest price for the property.

Your criteria might include:

- a proposal deposit requirement to ensure that only serious proposers participate (a successful proposer who fails to close on the deal would forfeit the deposit), and
- evidence of the proposer's ability to obtain financing.

You should inform proposers how you will determine the best price. For example, in a multi-year lease, specify whether proposers may propose level monthly payments over the term, or if they may propose escalating rents for each year of the lease. If rent escalators may be proposed, you should state how you will calculate the present value of the rental payments and include the formula in the RFP. To simplify lease price comparisons it is helpful to provide a standard price form for all proposers to complete.

Proposal submission requirements

Your RFP should state the rules for proposal submission. Specify when (date and time) and where sealed proposals must be delivered, how proposal packages should be marked, and how proposers may correct, modify, or withdraw proposals. State that the selected proposer will be required to submit a disclosure of beneficial interests as required by M.G.L. c. 7, §40J. Also include any standard forms proposers must submit.

Your local counsel can advise you regarding other laws applicable to your jurisdiction's real property transitions.

Contract terms and conditions

Any terms and conditions you will require in the agreement must be specified in the RFP and in the contract. Chapter 30B places no limitations on the duration of real property contracts, but other laws may apply in your jurisdiction.

Must I require the separation of price and non-price proposals?

No, unlike Chapter 30B RFPs for supplies and services, you need not require separate submissions of price and non-price proposals. Remember that real property proposals are not confidential after they are opened.

Does the M.G.L. c. 30B, §12 majority vote requirement for contracts over three years apply to real estate leases that will exceed three years?

No. The majority vote requirement only applies to contracts for supplies and services. However, there may be other local or statutory restrictions on the length of leases, such as M.G.L. c. 40, §3, which limits the length that public buildings may be leased by municipalities to 10 years.

May a municipality dispose of real estate to promote a public purpose, such as affordable housing?

Yes. If your municipality is interested in promoting a public purpose and price is less important, you will have to carefully think through what you want and how you will evaluate it. See page 85 of *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property*, which may be downloaded from www.mass.gov, for more information about real property dispositions to promote public purposes.

May I require proposers to perform rehabilitation of or construction on public land/buildings as part of a lease agreement, where the construction improvements will eventually be owned by the municipality?

Before undergoing such a project through a lease agreement, be sure to contact the Attorney General's Fair Labor and Business Practices Division at 617-727-2200, ext. 3266, for consultation on whether the construction project will fall under the construction bid laws. The lessor may be required to comply with M.G.L. c. 149, M.G.L. c. 30, §39M, and/or the prevailing wage law.

What procedures apply to disposal of real estate taken through the tax-title process?

M.G.L. c. 60 §§37 through 60 sets forth procedures for redemption or auction of tax title property. However, any sale of tax title property by other than an auction, including sale after foreclosure, is subject to Chapter 30B.

Where can I get information on the required procedures for real property dispositions?

You can find the procedures in the OIG manual, *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and Real Property*, which may be downloaded for free from www.state.ma.us/ig/igpubl.htm#dcmanual.

You may also want to peruse the recent OIG report, *Disposition of Hale Hospital and Glynn Memorial Nursing Home under M.G.L. c. 30B, s16*, which may be downloaded from www.mass.gov/ig.

This is my first time conducting an RFP for a real property transaction. Is there someone who can review my RFP before I advertise?

Yes. You may send your RFP to Beth Hayward at the Inspector General's Office, One Ashburton Place, Room 1311, Boston, MA 0210B for a review for compliance with M.G.L. c. 30B. It is also a good idea to have your town counselor city solicitor review your RFP.

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