



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108-1598

THOMAS F. REILLY
ATTORNEY GENERAL

(617) 727-2200
www.ago.state.ma.us

August 13, 2004

In re:)	
)	ATTORNEY GENERAL
Wahconah Park Project,)	
CITY OF PITTSFIELD,)	
)	BUSINESS & LABOR
Protestor:)	PROTECTION BUREAU
)	
NEW ENGLAND COUNCIL OF)	
<u>CARPENTERS</u>)	BID PROTEST DECISION

INVESTIGATION SUMMARY

This protest concerns a license (the license) granted by the City of Pittsfield (the City) to Wahconah Park, Inc. (the Club) for use of the baseball facility known as Wahconah Park (the Park). The New England Regional Council of Carpenters (NERC) claims that construction to be performed by the Club pursuant to the license is subject to M.G.L. c. 149, §§ 44A-J, (c.149), and M.G.L. c. 30, § 39M (c.30), the competitive bidding statutes for public construction in connection with a building and a public work (collectively, the competitive bidding statutes). The undersigned investigated this matter pursuant to M.G.L. c. 149, § 44H, and held a hearing on August 2, 2004. Representatives of the City, the Club, and NERC attended the hearing and presented documentary evidence and testimony. After investigation, we have identified evidence that the City has retained control over the construction, which raises concerns about whether it is subject to the competitive bidding laws. Accordingly, we remand the matter for action consistent with this opinion.



FACTS

The Park is an existing baseball stadium facility in the City which consists of a stadium, a ball field, locker rooms, and concession stands. The Park was built in 1892 and in 1919, the City purchased it from a private owner. The City has never operated the Park itself and has hired a succession of private entities to operate it. Historically, the Park has been used for baseball games, and the organizations operating the Park have been responsible for finding, funding, and managing the teams brought in to play. The City traditionally has used the Park for no more than 12 high school football games that take place in the outfield and for which the City brings in separate, temporary bleachers.

The Club is a company formed and owned by Jim Bouton, the President and Director, Chip Elitzer, the Vice President and Director, and Dr. Eric Margenau, also a Director. The Club is a private for-profit corporation established for the purpose of rehabilitating and expanding the Park. It planned to acquire a minor league baseball team franchise in an independent professional baseball league and sponsor baseball games and other related events in the Park. None of the three founding shareholders, directors and employees, Bouton, Elitzer, and Margenau, have ever been employed by, or held public office for the City.

In 2001, the City sought proposals to renovate and use the Park, or to build an entirely new park. The City reviewed 3 proposals, including one from the Club and one from Flyball, LLC (Flyball). The City chose Flyball's proposal, and the parties executed a two-year license agreement in November, 2001. The license terms dictated that Flyball pay an annual license fee of \$75,000, and become responsible for maintenance of the playing field and general Park upkeep until the end of the license term. If Flyball's facility expenses exceeded the \$75,000

license fee for any year, the license required that the amount of the excess be applied to the license fee for the next year. If the expenses were less than the license fee, the license required that Flyball pay the difference to the City on or before October 20 of that year. The City granted an exclusive license to Flyball to use the concession facilities, and Flyball was responsible for maintaining the concession stands at its own expense. Any alterations or changes which became fixtures to the concessions were subject to the City's approval and became the City's property at the end of the license. Flyball received all revenue from ticket sales for league games and any other activities that Flyball organized and ran at the Park. At the end of October, 2003, Flyball informed the City that it would not renew the license, leaving the park without a tenant, and the City without a baseball team for the 2004 season.

During the preceding decade, several minor league baseball teams came and went, leaving community and City leaders uncertain about future use of the park and concerned about the negative economic effect, and impact on civic pride caused by the lack of a long term baseball franchise. The City endeavored to create conditions under which it could retain a baseball team in the City without saddling taxpayers with the exorbitant costs often associated with building and financing a modern stadium to attract a privately managed team.

In January, 2004, the City invited the Club to begin negotiations based upon the proposal that the Club had first submitted and the City rejected in 2001. The Club again made its proposal to the City, which was ultimately accepted. The City intended for the Park to be used by a private entity with a locally owned team providing baseball games and activities to the City at no cost to taxpayers. On March 8, 2004, the parties signed a license agreement, the initial term of which runs from that date until October 31, 2005. The license is renewable annually as long

as the Club provides a professional baseball team and maintains the Park at the Club's expense.

The parties set forth provisions to ensure that the Park is used for baseball games and related events. The Club must use the Park to play regularly scheduled games for two consecutive seasons or else default. (license Sec. 7). The license will not be renewed if the Club does not provide a professional baseball team that plays its home games at the Park (license Sec. 4.2.1).

Under the license provisions concerning financing, the Club pays the City a license fee of \$1 for each term. (license Sec. 4.3). To renew the license, the Club must provide professional baseball games at the Park, and meet a formula regarding investments in capital improvements and facility expenses.¹ (license Sec. 4.2.2). This formula requires that the Club invest an amount equal to the number of preceding years of the license term multiplied by \$100,000 plus \$100,000, and that for the purpose of the calculation the original term is 2 years. (Id.) The Club must either invest \$1.5 million in capital improvements and facility expenses by May 2005, or invest \$1 million in such improvements and expenses and place \$.5 million in escrow. (license Sec. 3). The License is null and void if the Club does not meet this initial investment requirement. (Id.) Should the Park initially invest \$1.5 million, it will satisfy its cumulative financial obligation for multiple years, thus securing a license for a longer time period.

As consideration, the Club receives certain revenues received from its use of the Park. It

¹Pursuant to section six of the license, the Club is "responsible for maintenance of the Park," and expenses incurred in performing its responsibilities under section six are considered "facility expenses." (license Sec. 6.7). These responsibilities include facility and field maintenance needed after May 15, 2005 and due to the club's use of the park, (license Sec. 6.5 and 6.6), and "all necessary structural repairs." (license Sec. 6.3).
The license does not define the term "capital improvement."

is entitled to all revenue generated from ticket sales, advertising, broadcast rights, and concessions for activities organized and run by the Club. (license Sec. 5). As with the previous license issued to Flyball, “any alterations or changes which become fixtures to the concession stands are subject to the City’s approval.” (license Sec. 5.5.3). The license provides that where approval by a party is required, such “approval shall not be unreasonably withheld.” (license Sec. 12.5). Only with the Club’s approval may the City use the Park for family and community activities on dates when the Club has not scheduled an event. (license Sec. 2.3).

The license’s indemnification and insurance coverage provisions indicate that after May 15, 2005, the Club indemnifies and holds the City harmless from and against all liability for injuries to persons or damage to property arising out of the Club’s maintenance, operation, and use of the Park during activities organized and operated by the Club. The City’s own negligence or failure to comply with the law are excepted. (license Sec. 10).² Also, after May 15, 2005, the Club must maintain comprehensive general liability insurance and liquor liability insurance with limits of at least \$2 million and \$500,000 respectively, at the Club’s sole expense. The City is to be designated as an additional insured. (license Sec. 11.1). The City must maintain comprehensive liability insurance and automobile liability insurance as well as insurance covering the replacement cost of all structures and property on the Park. (license 11.2).

Once the License was executed, the Club hired a construction manager, Allegrone Construction Co., Inc. (Allegrone). The Club chose Clark & Green, Inc. to be the project architect.

² If the City must defend against any action or threatened action arising from the above instances, the Club must pay all costs and reasonable attorney’s fees if the plaintiff prevails. (license Sec. 10).

On or about April 15, 2004, the Club filed a Preliminary Offering Circular (IPO) with the United States Securities and Exchange Commission in connection with an anticipated public offering of company stock, and attached the license to the IPO. The IPO outlines the Club's overall plan for the Park included the following: almost doubling the seating capacity; more than quadrupling the public restroom facilities; at least quintupling concession stands; creating a Walkway Museum and Hall of Fame; and a new courtyard perimeter 90 feet behind the grandstand, with several dozen wooden sheds and space for open-air concessions, picnic tables, and a portable stage for pre-game performances. (IPO, p. 12). The IPO sets out goals to make the Park a successful, profitable, long term investment, including raising the initial minimum sum of \$2,805,605 as a result of the public offering of common and preferred stock scheduled for August of 2004. (IPO, p. 13). A breakdown of use of the total proceeds includes \$2 million dollars for capital improvements to the Park, and \$500,000 to purchase a team franchise. (*Id.*).

NERC filed a letter of protest with this Office on June 15, 2004, and supplemented that letter with details in a subsequent letter on July 9, 2004. NERC asserted that the license included public construction subject to the competitive bidding statutes. This office sought and received briefs, collected relevant documentary evidence, and conducted a bid protest hearing on August 2, 2004.

At the hearing, the City and the Club asserted that the construction contemplated by the license was not public construction because the City had very limited control of the Project and the Park. They argued that the approval right in the license regarding concession stand alterations was an unintended "holdover" from the previous license and urged us to interpret the provision as reinforcing the City's right to ensure the Club's conformance with health, safety and

welfare regulations. The Club contends that its planned initial investment demonstrates that it actually secures a license term of 15 years.

ANALYSIS

We begin by setting forth, in relevant part, the versions of Chapters 30 and 149 as they were in effect at the time the license was executed.³ Chapter 30 applied to “[e]very contract for the construction, reconstruction, alteration, remodeling or repair of any public work, or for the purchase of any material . . . by any . . . city . . . and estimated . . . to cost more than ten thousand dollars.” See c. 30, § 39M (a). Chapter 149 applied to “[e]very contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost more than twenty-five thousand dollars.” See c. 149, § 44A(2). It is undisputed that the amount of construction at issue here likely will exceed the monetary thresholds set forth in Chapters 30 and 149. Further, the expenditure of public funds is not a prerequisite for these statutes to apply. See Foundation for Fair Contracting of Massachusetts v. New Leadership Charter School, Attorney General Bid Protest Decision (May 7, 2003).

The decisive question raised by this bid protest is whether there is a current or imminent construction agreement “by a public agency,” or “by any . . . city.” See G.L. c. 149, § 44A(2), and c. 30, § 39M(a). There is no question that the construction manager contract with Allegrone, and subsequent construction contracts for Park improvements, are not literally construction contracts ‘by the city.’ However, the Supreme Judicial Court of Massachusetts (the SJC) has recognized that where an agent enters into a construction contract on behalf of a public

³The Massachusetts Legislature amended these statutes by enacting Chapter 193 of the Acts of 2004 on July 19, 2004. These amendments do not appear to change the relevant analysis in this case. All references herein are to the statutes effective prior to July 19, 2004.

agency, the contract may be subject to the competitive bidding statutes nonetheless. Helmes v. Com., 406 Mass. 873 (1990).

In Helmes, the United States Navy conveyed ownership of the U.S.S. Massachusetts to a private, non-profit committee. The committee agreed to establish the ship as a memorial in Massachusetts that was open to the public. Subsequently, the Massachusetts Legislature authorized the expenditure of \$6 million for the repair of the ship. The committee entered into a no-bid contract with a private contractor to perform preliminary repair work. At the time of the SJC's opinion, the Commonwealth had incurred about \$1.5 million worth of expenses pursuant to the contract. See id. at 874-875. The Court held that the plaintiffs failed to show that c. 30 applied because there was no basis, in the record, "to conclude that the committee was acting as an agent of the Commonwealth in entering into the contract with [the contractor]." Id. at 876. The Court noted that while it would be reluctant to conclude that c. 30 would never apply to work on a ship, the statute did not apply to the repair of a *privately owned* ship by a "charitable corporation." Id. (Emphasis added). Hence, the public bid laws may apply to private-public projects where a public authority maintains sufficient control to indicate that an agency relationship exists between it and the private entity.

The determination as to whether the bid laws apply to a joint public-private project on public land should be guided by the legislative purposes of the competitive bidding statutes. Chapters 30 and 149 share the same dual purposes. See, e.g., Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 396 (1994). Chapter 149's purpose is "ensur[ing] that the awarding authority obtain the lowest price among responsible contractors" and "establish[ing] an open and honest procedure for competition for public contracts." Modern

Cont. Constr. Co. v. Lowell, 391 Mass. 829, 840 (1984). Quoting an Act amending c. 149, St.1980, c. 579, § 55, the Modern Court noted that the c. 149 bidding process “reduces opportunities for corruption, favoritism, and political influence in the award and administration of public contracts.” Id. n .5. Chapter 30 “is designed to obtain the lowest price that competition among reasonable bidders can secure for contracts involving the actual physical ‘construction’ (including reconstruction, alteration, maintenance, remodeling or repair) of public buildings and improvements on land owned by the Commonwealth or one of its subdivisions.” Thorn Transit Systems Intern., Ltd. v. Massachusetts Bay Transp. Authority, Mass. App. Ct. 650, 653 (1996)(citations omitted).⁴

Drawing on these legislative purposes, the Superior Court held that the competitive bidding laws applied to construction on public land by a private entity. Town of Plymouth v. Snow, No. 90-0252-A (Mass. Super Jan. 14, 1993). In Snow, the Town of Plymouth (Plymouth) intended to lease land that it owned to a private developer for the construction and operation of a parking garage. Id. at 3. Instead of complying with the bidding process in c. 149, Plymouth issued a Request for Proposals (RFP). Id. at 1-2. Plymouth sought to provide additional parking, enhance views to the waterfront and gardens, compliment existing structures, and provide economic benefit to the Town. Id. at 2. The RFP contained general construction limitations due to the fact that the property was near wetlands and in a commercial revitalization district. Id. at 2. Additionally, the RFP set forth the following general design criteria: providing an attractive garage that fit with surrounding areas and providing optimum parking space without

⁴It should be noted that the record contains no allegations or evidence of corruption or favoritism in the present case. The Club’s first bid in 2001 was rejected and the license appears to have been the a result of an arms-length agreement between unrelated parties.

interfering with surrounding wildlife environments. Id. The court noted that if the lease was not subject to c. 149, a public agency could sidestep the safeguards in c. 149 and “merely lease public land to a favored contractor who would construct the desired building.” Id. at 7 and n.2. In the instant matter, the City maintains some control over park improvements by virtue of the fact that “fixtures to the concession stands are subject to the City’s approval.” (See license Sec. 5.5.3).

In G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984), the court addressed whether the security bond requirements in G.L. c. 149, § 29 (§ 29), applied to construction procured by a private entity as the lessee under a lease with the Town of Barnstable (Barnstable). The GM court’s reasoning may apply to the present matter. To begin with, the security bond requirements apply where “[o]fficers or *agents* contract[] in behalf . . . of any county, city [or] town” for construction work. See GM Builders, 18 Mass. App. at 667 (quoting § 29) (Emphasis added). Further, the court noted that the competitive bidding statutes might apply to the leasing arrangement.

In GM, the private entity, La Cipollina at the Airport, Inc. (La Cipollina), entered into a lease with Barnstable’s airport commission to operate a restaurant at Hyannis airport. The lease’s initial term was ten years, with an option to renew for ten additional years. The lease permitted La Cipollina to “expand the lobby and other non-restaurant areas and improve the restaurant’s premises and facilities,” and gave La Cipollina the right to recapture - primarily through specified rent deductions - the entire cost of these renovations during the first ten years of the lease. Id. at 665. Prior to execution of the lease, Barnstable reviewed La Cipollina’s plans and cost estimates and approved the renovations. Id. The plans and specifications for the renovations and an

unexecuted construction contract were appended to the lease. *Id.* at 666 and n.2. Additionally, the lease provided that La Cipollina “needed [Barnstable’s] approval for any renovations beyond those already approved.” *Id.* at n.7. La Cipollina contracted with GM Builders for the renovations. GM Builders commenced the renovations but La Cipollina encountered financial difficulties and sought bankruptcy protection. *Id.* at 667.

GM Builders sought to recover money from the town claiming that the town violated its duty under § 29 to obtain a payment bond for subcontractors involved in construction covered by that statute. *Id.* at 667-68. Before reaching GM Builders’ claim, the court noted that GM Builders had never questioned the validity of its construction contract, La Cipollina’s lease, or whether the arrangement violated the “laws governing the public bidding of public works projects.” *Id.* at 668; *see also* n.9 (“emphasiz[ing] again” that it was not expressing an opinion about “compliance with the public bidding laws.”) The court then determined that the public bonding law did not apply to the renovations, largely because the lease “did not *require* that La Cipollina undertake or complete any renovations.” *Id.* (emphasis in original); *see also* n.5 (stressing that La Cipollina was not obligated to complete the renovations). Further, the “renovations remained, at all times, the sole responsibility of La Cipollina and not the responsibility of [Barnstable].” *Id.* at 669. GM demonstrates that where a public entity exercises sufficient control over, and has responsibility for construction under the terms of a lease or similar agreement, the competitive bidding statutes may be implicated. In the instant case, the City has the right to approve alterations to concession stands; it may receive the value of construction improvements made by the Club in approximately 18 months; and it bears the responsibility and liability for construction mishaps during the likely period of construction,

since the Club's indemnification responsibilities under the license do not begin until May 2005.

The Club contends that the Wahconah Park license is not subject to the competitive bidding statutes, based on its analysis of the factors set forth by this office in Foundation for Fair Contracting of Massachusetts v. Enlace de Familias de Holyoke/Holyoke Community Charter School, Attorney General Bid Protest Decision at p. 9 (July 15, 2002). The Enlace decision addressed a project in which the public agency was the lessee, not the lessor. Here, there is not the commonality of identity between the public agency and the developer as in Enlace, where we found an agency relationship existed. Nevertheless, the City will exercise significant control over the Park, construction will be performed in lieu of license fees, and it will take place on publicly owned land, possibly reverting to the public agency for public use in less than two years. These are all relevant factors under the Enlace "test." Enlace at p. 13 (citing Affiliated Const. Trades Foundation v. University of West Virginia Bd. of Trustees, 210 W. Va. 456, 472 (2001) and the factor test therein).

The City suggests that the license contains what is effectively a 15 year initial term, since the Club must make substantial improvements which it cannot possibly recoup during the initial 18 month term. However, this is not what the language of the license necessarily requires. The license does not contain a 15 year term. We must analyze this matter accordingly.

A term of 18 months suggests that a license may have been structured to circumvent the bidding laws, since many similar construction projects take this long to complete. Under these circumstances, if we were to find that the construction contemplated by the license was not subject to either c. 30 or c.149, some could interpret this as an invitation to circumvent the

competitive bidding statutes where the legislature intended them to apply.⁵ By the terms of the license, certain construction is *required*. Cf. G.M. Builders, *supra*. Moreover, the construction is the “responsibility” of the City since the City is not indemnified if a construction accident occurs before May 15, 2005. Id.

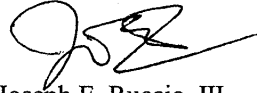
That the license gives the City relatively unrestricted authority to approve or reject additions to the concession areas also suggests public control of the project. The City and the Club contend that this provision is for the enforcement of health regulations, but there are provisions for adherence to these regulations elsewhere in the license.

In its current form, the license raises serious concerns about the applicability of the competitive 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 otherwise. 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.

Accordingly, we remand this matter to the City for further action in accordance with the foregoing opinion.

⁵See Office of the Inspector General v. Massachusetts Water Resources Authority, Department of Labor and Industries Bid Protest Decision at pp. 36-38 (June 29, 1989), for an example of a lease that set forth what was “virtually indistinguishable” from a “turnkey” construction contract.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JER', with a long horizontal flourish extending to the right.

Joseph E. Ruccio, III
Assistant Attorney General