

## CHAPTER 8. Real Property Transactions

### Overview

Chapter 30B applies to the purchase, sale, lease or rental of real property (including interests in real property). Chapter 30B establishes an advertised proposal process that you must follow in **acquiring** real property by purchase or rental with a **cost** greater than \$35,000, and in **disposing** of real property by sale or rental with a **value** greater than \$35,000.<sup>99</sup> Chapter 30B has additional requirements for the disposition of real property, regardless of its value.

Real property is defined as property consisting of land, buildings, crops, or other resources still attached to or within the land or improvements or fixtures permanently attached to the land or a structure on it. Interests in real property include leases, mortgages, preservation restrictions, easements and profits à prendre (such as the right to remove gravel or ledge from land).

The following real property transactions are *not* subject to Chapter 30B, either because they are specifically exempted or because the transactions are governed by other statutes:

**M.G.L. c. 7C, § 38, requires that a disclosure of beneficial interests be filed for each real property transaction regardless of the cost or value of the acquisition or disposition.** The person acquiring property from, or selling or leasing property to, a public agency must file the disclosure. No agreement, renewal or extension is valid until the disclosure is filed with the Division of Capital Asset Management and Maintenance. Also, a new disclosure must be filed within 30 days of a change in beneficial interests during the term of an agreement.

**Profits à prendre do not include the right to enter property to remove standing wood or timber.** Under Massachusetts case law, transactions involving the right to remove standing wood or timber are not considered to be interests in real property subject to Section 16 of Chapter 30B. Such transactions are subject to the rules governing the sale of surplus supplies contained in Section 15 of Chapter 30B.

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<sup>99</sup> M.G.L. c. 30B, § 16.

- eminent domain takings;<sup>100</sup>
- rental of residential property to qualified tenants by a housing authority or a community development authority;<sup>101</sup>
- a contract to sell, lease or acquire residential, institutional, industrial or commercial real property by a public or quasi-public economic development agency or urban renewal agency engaged in the development and disposition of said real property in accordance with a plan approved by the appropriate authorizing authority;<sup>102</sup>
- a redemption or auction of tax title property authorized under the provisions of M.G.L. c. 60<sup>103</sup>
- an acquisition from the Commonwealth;<sup>104</sup>
- an agreement between agencies, boards, commissions, authorities, departments or public instrumentalities of one city or town;<sup>105</sup>
- the exercise of an option to purchase forest, agriculture or recreation land for conservation purposes under M.G.L. c. 61, c. 61A, or c. 61B;
- an acquisition of real property or an interest therein by a community preservation committee under M.G.L. c. 44B, § 5(f); and
- licenses or permits for limited use of real property.

**Licenses or permits to use real property are not subject to Chapter 30B.** A license is a revocable permit to enter the property of another for a particular activity. The use of an auditorium for a performance and the use of ball fields for baseball games are typical examples of licenses to use property: the use is temporary and the user does not actually control the property. Such licenses do not convey an interest in the property. However, any transaction that does involve the transfer of an interest is not exempted simply by incorrectly labeling it a license or permit. For example, agreements to install cellular phone towers on public land are sometimes labeled licenses: however, these agreements are leases that must be awarded following the competitive procedures summarized in this chapter.

<sup>100</sup> See M.G.L. c. 79 for eminent domain procedures.

<sup>101</sup> M.G.L. c. 30B, § 16(h).

<sup>102</sup> M.G.L. c. 30B, § 1(b)(25).

<sup>103</sup> However, any sale of tax title property, including sale after foreclosure, other than by an auction pursuant to M.G.L. c. 60 is subject to Chapter 30B. Procedures for tax title takings are set forth in M.G.L. c. 60, §§ 37-60. Procedures for tax title sale after foreclosure are set forth in M.G.L. c. 60, § 77B.

<sup>104</sup> M.G.L. c. 30B, § 1(b)(4).

<sup>105</sup> M.G.L. c. 30B, § 1(b)(7).

In addition, it is our Office's opinion that Chapter 30B does not apply a private party's exercise of a unilateral option, granted prior to the enactment of Chapter 30B, to renew or extend a lease for real property if the right to exercise that option, and all the terms and conditions that govern the option, were spelled out in the original lease. A typical example would be a lease, executed by your local jurisdiction prior to the effective date of Chapter 30B in May 1990, that gives the lessee one or more unilateral option(s) to extend or renew the lease. However, Chapter 30B would apply to any change to the lease outside of the original terms.

Chapter 30B allows you to shorten the period for advertising for proposals or dispense with advertising altogether in only two special circumstances: (1) in an emergency, if you determine that the time required would endanger the health or safety of people or property; or (2) for an acquisition, if you determine that advertising for proposals would not benefit your local jurisdiction because of the unique quality or location of the property you need. Additional information on these circumstances is presented at the end of this chapter's section on real property acquisitions.

Under Chapter 30B you must conduct an open and fair competition that places all proposers on common footing, solicit

information that will allow manageable and meaningful comparisons of offers and base your decisions solely on the information you solicited.

Chapter 30B gives you flexibility in fashioning a proposal solicitation process (solicitation) for real property transactions. You may structure your solicitation to resemble a bid, through which you will select the proposer that meets your quality requirements and offers the best price, or to resemble an RFP for supplies or services, through which you will also consider the relative merits of the proposals submitted. It is important to note that even though Section 16 of Chapter 30B requires you to solicit

**Chapter 30B places no restrictions on who within your jurisdiction may undertake or approve a real property transaction.** Consult with your legal counsel if you have questions about who is authorized by your local charter, bylaws, ordinances, or other local rules to conduct real property transactions.

proposals, you do not solicit and evaluate these proposals using the RFP process for supplies and services discussed in Chapter 5.<sup>106</sup>

The following sections of this chapter summarize the required procedures and recommended practices for acquiring and disposing of real property under Chapter 30B.<sup>107</sup> Although the requirements of Chapter 30B in this area are flexible, they do require adherence to the general principles of open, transparent and fair competition.

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<sup>106</sup> M.G.L. c. 30B, § 6.

<sup>107</sup> M.G.L. c. 30B, § 16.

### Real Property Acquisitions

You must solicit proposals to acquire real property by lease or purchase at a *cost* of more than \$35,000. The *value* of the property is irrelevant to determining whether Chapter 30B applies. For example, you may lease a valuable piece of property for ten years for \$1.00 per year without issuing a solicitation because the cost to your jurisdiction is less than \$35,000, even if the value of the property is higher.

If you are leasing space, you determine the value of the acquisition by calculating the lease price over the entire contract term. For example, if a three-year lease with a monthly rent of \$1,000 has an entire contract cost of \$36,000, it must be procured by an advertised solicitation.

#### **Step 1: Determine what you need to acquire**

As a practical matter, before you acquire any property you must determine what you need. The initial cut at determining your needs may be simple: for example, you need land for a public works yard, a parking lot or office space. However, you should consider the details. For example:

- Do you want to purchase the property or lease it?
- How much land or office space is needed? Are you interested in acquiring a set amount, or are you willing to consider offers for more than your minimum needs?
- What level of finish do you want for office space?
- What are your location requirements? Is any area in your local jurisdiction acceptable?
- How much parking is needed? Is there access to public transportation?
- Is the space accessible to persons with disabilities?
- Are there any environmental issues relevant to the site?
- Do you have any special utility requirements?

Once you have identified what you need, check to see whether your local government already owns a suitable property. If you have a real property inventory, consult it. Also, consult with department heads and other officials concerning the current and future availability of property that meets your needs.

Determining what you need is not the same as identifying the particular parcel or building you want. Although your research may identify one parcel or building that is suitable, you will not know before advertising whether you have found the only property that meets your needs. If you suspect there may only be one suitable parcel or building, consider whether your definition of your needs is unnecessarily restrictive.

### **Step 2: Develop the solicitation**

Your solicitation provides property owners with the information necessary to prepare and submit a responsive proposal. Chapter 30B offers the flexibility of drafting your real property solicitation as an IFB that you will use to select the proposer who meets your quality requirements and offers the lowest price. Your solicitation may also be structured as a traditional RFP, similar to the process required by Chapter 30B for procuring supplies and services, which will allow you to compare the relative merits of the proposals you receive in addition to price. Regardless of the structure you choose, the major components of a solicitation are as follows:

- description of the property and interest required;
- evaluation criteria;
- rule for award;
- proposal submission requirements; and
- contract terms and conditions.

**Property description.** Your solicitation should describe what type of property you need and whether you want to acquire the property by purchase or lease. You should, at a minimum, identify the following:

- the type and amount of property you need (for example, “20,000 square feet of land”);

**You may not use Chapter 30B to contract for building construction services.** A contract to lease or purchase a building that will be constructed to your specifications may be a public building contract subject to the designer selection and construction bid laws. Chapter 9 briefly reviews information about these laws. If you are unsure about whether or not your lease or purchase is subject to these laws, we recommend that you seek guidance from the Office of the Attorney General, which enforces the designer selection and construction bid laws.

- the purpose for which the property is to be used (for example, “a public works yard”);
- any special requirements (for example, “the property may not be adjacent to wetlands or over an aquifer”);
- the method of acquisition, such as a lease or purchase; and
- the planned occupancy date and, if you plan to lease the property, the lease term.

You may append other documents (for example, a study of your need for a public works yard) or describe them and indicate how they may be obtained.

**Evaluation criteria.** Indicate how you will select a proposal from among the competing proposals. The process is similar to developing evaluation criteria for supplies or services (described in Chapters 4 and 5). You should establish:

- criteria to evaluate responsiveness (whether the proposer agrees to provide property that meets your specifications and whether the proposal contains all the required documents and forms, properly completed) and responsibility (whether the proposer has the capability, reliability and integrity to perform under the contract);
- comparative criteria, if you decide that you want to look at the relative merits of the property proposals rather than 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. However, you are not required to do so.

The box on the next page illustrates two alternate methods of using evaluation criteria in real property acquisitions. The first is, in effect, a bid process through which you will acquire property by selecting the lowest-priced proposal meeting your defined requirements. The second is a proposal process through which you may select a higher-priced proposal because of advantages the higher-priced property offers.

### Real Property Acquisitions: Examples of Evaluation Criteria

**Example 1: Parking lot.** Your local jurisdiction has a shortage of public parking in the central business district. You have decided to purchase land to accommodate between 100 and 150 standard-sized parking spaces. You have obtained an engineering estimate for the cost of paving, painting and installing meters. Your criteria for a suitable site are: minimum square footage, suitable grade and drainage, and located within a one-half mile radius of a particular governmental office.

All of your criteria are stated as quality requirements, so you can evaluate all of the proposals that meet your criteria on the basis of price per parking space. If you want to consider proposals for paved and unpaved sites, you will add the cost of paving to any proposal offering an unpaved site when you compare prices.

This solicitation process resembles a bidding process in which you will select the lowest-priced responsive and responsible proposal. This method of evaluating proposals is the simplest and most straightforward. You must be sure, however, to include all of your quality requirements in your solicitation.

**Example 2: Office space.** You need to acquire office space and have decided that a five-year lease would best meet your immediate needs and preserve your long-term options. You prepare a solicitation that incorporates all of your requirements for space needs, accessibility, improvements and amenities. You establish the following quality requirements for location:

- within your local jurisdiction in an area zoned for commercial use; and
- within four blocks of public transportation.

You also establish comparative criteria to identify the features that you prefer but do not require. You decide to give a higher rating to any proposal that meets one or both of the following comparative criteria:

- within one-half mile of town hall; and
- within two blocks of public transportation.

Using this evaluation scheme, you can select the lowest-priced proposal that meets only your quality requirements, or choose a higher-priced proposal that meets your quality requirements and offers a preferred location, if you determine that the added convenience justifies the price.

You should also require a proposal deposit to ensure that only serious proposers participate; a successful proposer that fails to close on the deal would forfeit the deposit.

Whatever process you use, you should inform proposers how you will determine the best price. For example, in a multi-year lease, will you accept proposals for level monthly payments over the term or will proposers be allowed to 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 your solicitation.

Similarly, if you plan to accept price proposals for a lease that includes utilities and for a lease that does not, you should include in the solicitation the method you will use to determine the value of the utilities. To simplify price comparisons in a lease acquisition, it is helpful to provide a standard price form for all proposers to complete.

**Rule for award.** Your solicitation should contain a clear rule for award stating how the winning offer will be selected. For example, if you plan to select the lowest-priced offer of leased space meeting your evaluation criteria, your rule for award might be stated as follows:

*The lowest-priced offer from a responsive and responsible proposer will be selected.*

If you plan to weigh offers from responsive and responsible proposers, your rule for award might be stated as follows:

The most advantageous offer from a responsive and responsible proposer, taking into consideration all evaluation criteria and price, will be selected.

**Submission requirements.** Your solicitation 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 to the Division of Capital Asset Management and

**You may solicit prices for two different lease terms if you state a rule for how you will decide which term to select.**

This can be useful if you want to compare, say, a five-year lease to a ten-year lease. Be careful to establish a clear decision rule up front and follow it to avoid the appearance of favoritism.

**Price and non-price proposals need not be submitted separately.**

Unlike the Chapter 30B RFP requirements for supplies and services, the Chapter 30B requirements for real property transactions do not require separate submissions of price and non-price proposals. Moreover, real property proposals, including price proposals, are not confidential after they are opened.

Maintenance (DCAMM), as required by M.G.L. c. 7C, § 38. It is good practice to include any standard forms proposers must submit. You should also state the proposal opening date and time, as well as the contract award schedule.

**Contract terms and conditions.** Any terms and conditions you will require in the agreement must be specified in the solicitation and in the contract, including the terms of any renewal, extension or purchase options. For some leases, it may be in your local jurisdiction's interest to specify that any renewals will be exercisable at your local jurisdiction's sole discretion.

It is important to note that Chapter 30B does not limit the length of real property contracts. (The Chapter 30B majority vote requirement for supply and service contracts exceeding three years<sup>108</sup> does not apply to Chapter 30B real property contracts.) However, there may be other statutory or local restrictions that apply to your real property contracts. For example, M.G.L. c. 40, § 3, limits the term of public building leases by towns to 30 years, and the term of leases of school houses in use to 25 years. A Massachusetts Appeals Court decision affirmed a Superior Court ruling that held that an automatic renewal clause beyond the term violated M.G.L. c. 40, § 3.<sup>109</sup> Consult your legal counsel regarding restrictions that may apply to your local jurisdiction's real property transactions.

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<sup>108</sup> M.G.L. c. 30B, § 12(b).

<sup>109</sup> *Comets Community Youth Center, Inc. v. Town of Natick*, 56 Mass. App. Ct. 1109 (2002).

The box below contains information about contract terms and conditions for real property acquisitions.

### **Real Property Acquisitions: Contract Terms and Conditions**

**Purchases.** If you are purchasing real property, have your attorney draft any required terms into the purchase and sale agreement. Include any mandatory purchase terms in the solicitation. Require a certification of tax compliance from the seller (M.G.L. c. 62C, § 49A) and a disclosure of beneficial interests (M.G.L. c. 7C, § 38).

**Leases.** If you are acquiring property by lease, spell out mandatory lease terms in the solicitation. A typical lease should:

- Name the parties to the lease and the responsible parties to receive any notices under the lease.
- Incorporate by reference the proposal chosen, including a detailed description of the leased property.
- Specify the duration of the lease, including any renewal, extension or other options. If the lease will include a renewal option, you must specify how the rent will be determined for the renewal period.
- Identify the payment terms, including when payments are due.
- Spell out all of the responsibilities and obligations of the parties for maintenance, cleaning, utilities, rubbish disposal, snow removal, liability and casualty insurance, etc.
- Specify that lease amendments must be in writing and signed by individuals authorized to contract on behalf of your local government.
- Specify what constitutes cause to terminate the lease, what notice must be provided prior to termination and what opportunity must be granted to correct any problem.
- Prohibit any activity that would constitute a violation of the conflict of interest law (M.G.L. c. 268A).
- Specify that the lease constitutes the entire agreement and that there are no agreements other than those incorporated therein.
- Require a certification of tax compliance by the lessor (M.G.L. c. 62C, § 49A) and a disclosure of beneficial interests (M.G.L. c. 7C, § 38).

### **Step 3: Advertise for proposals**

You must advertise for proposals in a newspaper with a circulation sufficient to inform the people in the affected locality.<sup>110</sup> The advertisement must be published at least once a week for two consecutive weeks before the day you selected for opening

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<sup>110</sup> M.G.L. c. 30B, § 16(d).

proposals. The last publication must occur at least eight days before the proposal opening. You may, of course, also advertise on a website, in more newspapers, in newspapers outside your area and more frequently. The advertisement must specify the geographical area in which you are looking for property, the terms and conditions of the proposed lease or purchase, the time and place for submission of proposals, and where and when prospective proposers may obtain a copy of the solicitation.

**You may contract with an agent to assist you in finding property that meets your needs.** The agent's task will be to find suitable property and encourage owners to submit proposals in response to your solicitation. Your contract with the agent will be subject to Chapter 30B.

You may inform potential proposers, including brokers and developers, of the availability of the solicitation. Be careful to avoid favoritism or the appearance of favoritism.

If the proposed acquisition involves more than 2,500 square feet, an advertisement must also be published at least 30 days before the opening of proposals in the *Central Register*, which is published by the Secretary of the Commonwealth.<sup>111</sup>

#### **Step 4: Distribute the solicitation**

You must make the solicitation documents available on an equal basis to all who request a copy. If you charge a fee to cover your costs for copying the solicitation, make sure you charge everyone the same fee.

Keep a record of the names, email addresses, telephone numbers and fax numbers of everyone who received the solicitation. If you later issue an addendum to the solicitation, send the addendum to everyone who has received the original solicitation. To avoid misunderstandings or protests, include a requirement in the solicitation that proposers acknowledge in writing their receipt of any addenda and submit a written acknowledgement with their sealed proposals. If proposers are likely to require additional time to respond to the addendum, extend the proposal due date.

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<sup>111</sup> M.G.L. c. 30B, § 16(d). Appendix B provides the website address for the online submission form for this advertisement, and Appendix D contains contact information for the Secretary of the Commonwealth.

**Step 5: Open and evaluate proposals**

Proposals must be opened in public at the time and place specified in the solicitation. You should record the name of each proposer, the location of the property each proposer is offering and each proposal price. The proposals become public information when they are opened. All documents should be submitted in one sealed envelope.

You must evaluate the proposals using only the criteria you identified in the solicitation. If your solicitation states that you will make an award to the responsive and responsible proposer that offers the best price (in essence, a bid process), you may simply identify the lowest-priced proposal and then evaluate that proposal to determine whether it meets the requirements stated in the solicitation. If the proposal does not meet the requirements, reject it and proceed to evaluate the next lowest-priced proposal.

If your solicitation states that you will evaluate proposals using comparative evaluation criteria, it will usually be most efficient to first look at the responsiveness and responsibility of the proposals and reject any that you deem nonresponsive or not responsible. Then evaluate all the remaining proposals on the basis of your comparative criteria and price, prepare written evaluations and decide which proposal best meets the needs of your local jurisdiction, considering the evaluation criteria and price.

If you determine that it is not in the best interest of your local jurisdiction to award the contract, you may choose to cancel the proposal process.<sup>112</sup> You may do so before or after you open and evaluate proposals. However, after you have executed a contract, you will not be able to cancel the transaction.

**Step 6: Submit disclosures**

You must submit the name of the selected proposer and the amount of the transaction to the *Central Register*, which is published by the Secretary of the Commonwealth.<sup>113</sup>

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<sup>112</sup> See *Mangano v. Town of Wilmington*, 51 Mass. App. Ct. 857 (2001).

<sup>113</sup> Appendix B provides the website address for the online submission form for this notice, and Appendix D provides contact information for the Secretary of the Commonwealth.

Also, M.G.L. c. 7C, § 38, requires disclosure of all beneficial interests in real property acquired or disposed of by a public agency. The selected proposer must file a disclosure of beneficial interests with DCAMM. No contract to lease or sell property, and no renewal or extension of such an agreement, is valid until the seller or lessor files this form with DCAMM.<sup>114</sup> An updated disclosure form must be filed within 30 days of any change in beneficial interests during a lease term.

**Step 7: Execute the contract**

If you are purchasing real property, have your legal counsel ensure that any mandatory terms required by the solicitation are incorporated into the purchase and sale agreement. If you are acquiring property by lease, execute a lease that incorporates all of the terms and conditions required by the solicitation.

**Step 8: Retain records**

You must maintain a file of all written documents required by Chapter 30B for a period of six years from the date of final payment under the contract. These include:

- the solicitation documents and any amendments;
- the public advertisement;
- all *Central Register* notices;
- all proposals received;
- evaluation materials;
- a copy of the disclosure of beneficial interests; and
- the signed purchase and sale agreement or lease.

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<sup>114</sup> Appendix B contains the website address for a DCAMM real estate transaction disclosure form, and Appendix D provides contact information for DCAMM.

## **Real Property Acquisitions: Unique Property Acquisitions and Emergencies**

### **Unique Acquisitions**

Chapter 30B does not require you to solicit proposals to acquire property if your local jurisdiction has determined that it needs a particular piece of property because of its unique qualities or location.<sup>115</sup> For example, you may use this Chapter 30B provision to acquire open land abutting an existing park or a particular parcel of wooded land for conservation purposes. You may not, however, use this provision to acquire property simply because you are not aware of any other property that will meet your requirements. For example, if you need space for an office in a particular area, you may be aware of only one available location, but you still must advertise for proposals to test the market.

The Chapter 30B rules for acquiring unique property require you to make a written determination that advertising will not benefit your local jurisdiction because of the unique qualities or location of the property needed. The determination must specify how the property proposed for acquisition satisfies the unique requirements of your local jurisdiction.

Although such an acquisition of real property is exempt from the advertised solicitation

**Chapter 30B does not authorize “swaps” of real property between a local government and a private party.** You can acquire a property without competition if it meets the requirements for a unique acquisition, but there is no basis for disposing of property without an advertised competition. Acquisitions and dispositions of real property must be carried out as separate processes under the statute.

**You may execute a separate option contract to purchase unique property before publishing a public notice, as long as the contract does not require you to purchase the property.** After you have identified property that meets the standard for waiving the advertised solicitation process, you may secure an option for the property obliging the owner to sell it to you for an agreed-upon price. You can then publish the required 30-day notice in the *Central Register*.

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<sup>115</sup> M.G.L. c. 30B, § 16(e)(2).

process, you must publish a notice in the *Central Register* at least 30 days prior to executing a binding agreement to acquire the property.<sup>116</sup>

The notice must include:

- the written determination of uniqueness and the reasons for the determination;
- the names of the parties with a beneficial interest in the property;
- the location and size of the property; and
- the proposed purchase price or rental terms.<sup>117</sup>

M.G.L. c. 7C, § 38, requires disclosure of all beneficial interests in real property acquired or disposed of by a public agency. Therefore, in a unique property acquisition, the seller or lessor must file the disclosure of beneficial interests with DCAMM. No contract to lease or sell property, and no renewal or extension of such an agreement, is valid until the seller or lessor files this form with DCAMM.<sup>118</sup> An updated disclosure form must be filed within 30 days of any change in beneficial interests during a lease term.

### **Emergencies**

If an emergency arises and the time required to advertise for real property proposals would endanger the health or safety of people or their property, you may shorten the advertising period or waive it completely. Simple administrative inconvenience will not suffice as a justification for invoking the emergency provisions of Chapter 30B; a genuine emergency must exist. If you have reason to know in advance that additional leased space or a property purchase will be needed, and you fail to act until the need has become critical, you will have difficulty justifying the use of emergency procedures.

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<sup>116</sup> M.G.L. c. 30B, § 16(e)(2).

<sup>117</sup> Appendix B provides the website address for the online submission form for this notice, and Appendix D provides contact information for the Secretary of the Commonwealth.

<sup>118</sup> Appendix B contains the website address for DCAMM's real estate transaction disclosure form for this purpose, and Appendix D provides contact information for DCAMM.



If you invoke this provision, you must publish a notice in the *Central Register* at the earliest opportunity stating the reason for declaring the emergency.<sup>119</sup>

M.G.L. c. 7C, § 38, requires disclosure of all beneficial interests in real property acquired or disposed of by a public agency. The selected proposer must file the disclosure of beneficial interests with DCAMM. No contract to lease or sell property, and no renewal or extension of such an agreement, is valid until the seller or lessor files this form with DCAMM.<sup>120</sup> An updated disclosure form must be filed within 30 days of any change in beneficial interests during a lease term.

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<sup>119</sup> Appendix B provides the website address for the online submission form for this notice, and Appendix D provides contact information for the Secretary of the Commonwealth.

<sup>120</sup> Appendix B contains the website address for DCAMM's real estate transaction disclosure form for this purpose, and Appendix D provides contact information for DCAMM.

### Real Property Dispositions

For any disposition of real property, regardless of value, you are required to declare the property available for disposition and determine the value of the property. Also, if you dispose of the property for less than the value determined, you must post a notice in the *Central Register* explaining the reasons for your decision and disclosing the difference between the value and the price to be received.<sup>121</sup> If the value of the property exceeds \$35,000, you must solicit proposals to dispose of the property. The requirement for competition is triggered by the *value* of the property, not the price your local jurisdiction expects to receive for the property.

If you are leasing space, you determine the value of the disposition by calculating the fair market value of the lease over the entire contract term. For example, if you are leasing out a portion of a municipal building for five years with a market value of \$1,000 per month, the entire contract is valued at \$60,000. Therefore, it must be awarded using an advertised solicitation process.

In assessing whether and how to dispose of surplus property, consider both current and possible future needs. It is best to be systematic. Develop an inventory of your local jurisdiction's property, survey department heads and invite public comment. If you find that your local jurisdiction might need the property in the future, be sure to structure a lease term so that the property is available for use when needed.

#### ***Step 1: Declare property available for disposition and identify reuse restrictions***

Before you can sell or lease property, regardless of its value, it must be declared available for disposition by the individual or body with the authority to make such a determination for your local jurisdiction. If your local jurisdiction wishes to impose any restrictions on the use of the property, these restrictions must be specified as part of the declaration that the property is available for disposition. For example, if you are selling or leasing a surplus school building, you may not care how the new owner or lessee will use the building, as long as the building use is legal and conforms to local zoning

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<sup>121</sup> Appendix B provides the website address for the online submission form for this notice, and Appendix D provides contact information for the Secretary of the Commonwealth.

requirements. In that case, you would not specify a use restriction. However, if you were leasing only part of a school building, M.G.L. c. 40, § 3, would require you to specify that the use be compatible with the functioning of the school.

**Step 2: Determine the value of the property**

You must determine the value of the property before you can dispose of it. Chapter 30B requires that you determine the property's value by using procedures customarily accepted as valid by the appraising profession. You may hire an appraiser, although you are not required to do so. You may also rely on the municipal assessment of a property's value if it is current, if the municipality is assessed at 100 percent, and if the assessment is determined through valid procedures. The value of most parcels of property will likely exceed the \$35,000 threshold for advertised competition. For a lease, you may use market rent data, or even advertised rental rates, if the number of similar properties on the market is sufficient to determine the lease value.

**Step 3: Develop the solicitation**

If the value of the property exceeds \$35,000, you must solicit proposals. Your solicitation provides interested parties with the information they need to decide whether they want the property and to submit a responsive proposal. The major components of a real property disposition solicitation are as follows:

- a description of the property and interest in the property you plan to sell or lease (the "property description") and any use restrictions;
- evaluation criteria;
- rule for award;
- 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. Be sure to identify use restrictions established by your local jurisdiction. If the property is being offered for sale, include a reference to a deed or survey. Also identify in the property description the buildings and structures included in the disposition and any restrictions on their use, such as deed restrictions. Drawings, plot plans and other relevant documents should either be

appended to the specifications or be incorporated by reference.<sup>122</sup> The notice 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 whether they must be paid separately by the lessee.

**Evaluation criteria.** Indicate how you will select a proposal from among the competing proposals. The process is similar to developing evaluation criteria for supplies or services (described in Chapters 4 and 5). 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 criteria* if you decide that you want to weigh the relative merits of proposals rather than selecting the responsive and responsible proposal that offers the best price; and
- a method to evaluate *prices*.

Note that although Chapter 30B requires proposals, you have the discretion to structure your solicitation so that it is, in effect, an IFB. If your objective is simply to dispose of property that you do not need, you should sell the property to the proposer offering the highest price. In this instance, your solicitation 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 that fails to close on the deal would forfeit the deposit);
- evidence of the proposer's ability to obtain financing; and
- best price.

**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. However, you are not required to do so.

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<sup>122</sup> You can incorporate a document by reference in your specifications. Describe the document, and indicate where the document is located and how it can be obtained.

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 solicitation. To simplify lease price comparisons, it is helpful to provide a standard price form for all proposers to complete.

If you are 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. The box on the next page presents information on dispositions to promote public purposes.

**Rule for award.** Your solicitation should contain a clear rule for award stating how the winning offer will be selected. For example, if you plan to select the highest-priced offer meeting your evaluation criteria, your rule for award might be stated as follows:

*The highest-priced proposal from a responsive and responsible proposer will be selected.*

If you plan to weigh offers from responsive and responsible proposers, your rule for award might be stated as follows:

*The most advantageous proposal from a responsive and responsible proposer, taking into consideration price and all other evaluation criteria set forth in the solicitation, will be selected.*

If, when leasing surplus real property, your objective is to promote a public purpose, such as an affordable day care center, you may award a fixed-rent contract to the responsive and responsible proposer that meets your evaluation criteria. Thus, your rule for award would not include price as a selection factor; for example:

*The most advantageous proposal from a responsive and responsible proposer, taking into consideration all evaluation criteria set forth in the solicitation, will be selected.*

The box below contains additional information about real property dispositions to promote public purposes.

### Real Property Dispositions to Promote Public Purposes

Your local jurisdiction may want to offer property for lease or sale in order to promote a public purpose rather than to raise revenue. Based on long-standing interpretations of Massachusetts's constitution, if you intend to dispose of real property for less than its fair market value, you must define a valid public purpose to be achieved. Individuals or private organizations may realize incidental benefits from a disposition of public property, but the primary purpose must be to promote the public welfare. You must structure an open, fair and competitive disposition process to accomplish your public purpose.

If you dispose of the property for less than the fair market value, you must post a notice in the *Central Register* explaining the reasons for your decision and disclosing the difference between the property value and the price to be received. To be consistent with its purpose, this notice should be published prior to entering into a binding agreement to dispose of the property.

**Example 1: Affordable day care.** Your local jurisdiction has a shortage of affordable day care and you decide to lease available space to a day care provider. Since the primary objective of this disposition is not to obtain the maximum amount of rent, you set a fixed rent and specify the lease terms, such as those for insurance, utilities and maintenance. You require all proposers to meet requirements such as staff training and experience, staff-to-child ratio, number of children from low-income families to be served, parent participation on governing board, nutrition programs and hours of operation. You then develop evaluation criteria to choose the proposal that best meets your objective of providing high-quality, affordable day care. For example, you might require proposers to submit a sliding-fee scale based on family income, and select the responsive and responsible proposal offering the lowest fees to the maximum number of families in need of affordable day care.

**Example 2: Affordable housing.** You decide to create affordable housing by dividing surplus land into lots for sale to low-income or moderate-income purchasers. You specify qualifications for purchasers, including maximum income and asset limitations, and determine the methods you will use to verify these qualifications. You restrict the use of the property and the profit that can be realized by the resale of the property to ensure that the plan meets its objective of creating and preserving affordable housing and does not result in a windfall profit to any individual. You create a fair and accountable method for proposal selection. You could, for example, establish a set price for each lot, advertise for proposals from eligible families and individuals, and use a public lottery to select winners from among the responsive and responsible proposals.

**Proposal submission requirements.** Your solicitation 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. If the disposition is a lease, include any options to renew or extend the lease. State that the selected proposer will be required to submit a disclosure of beneficial interests to DCAMM, as required by M.G.L. c. 7C, § 38, and include any standard forms proposers must submit.

**Price and non-price proposals need not be submitted separately.** Unlike Chapter 30B's RFP requirements for supplies and services, Chapter 30B does not require separate submissions of price and non-price proposals for real property transactions. Moreover, real property proposals, including price proposals, are not confidential after they are opened.

**Contract terms and conditions.** Any terms and conditions you will require in the agreement must be specified in the solicitation and in the contract, including use restrictions and the terms of any renewal, extension or purchase options. It is important to note that Chapter 30B does not limit the length of real property contracts. That is, the Chapter 30B majority vote requirement for supply and service contracts exceeding three years<sup>123</sup> does not apply to Chapter 30B real property contracts. However, there may be other statutory or local restrictions that apply to your real property contracts. For example, M.G.L. c. 40, § 3, limits towns to public building leases of 30 years and leases of school houses in use as schools to 25 years. A Massachusetts Appeals Court decision affirmed a Superior Court ruling that held that an automatic renewal clause on the same terms that exceeded the limit violated M.G.L. c. 40, § 3.<sup>124</sup> Your legal counsel can advise you regarding restrictions that may apply to your local jurisdiction's real property transactions.

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<sup>123</sup> M.G.L. c. 30B, § 12(b).

<sup>124</sup> *Comets Community Youth Center, Inc. v. Town of Natick*, 56 Mass. App. Ct. 1109 (2002).

The box on below contains information about contract terms and conditions for real property dispositions.

### Real Property Dispositions: Contract Terms and Conditions

**Sales.** If you are selling real property, have your attorney draft any terms that you require into the purchase and sale agreement. Include any use restrictions and any mandatory purchase terms in the solicitation. Require a certification of tax compliance from the purchaser (M.G.L. c. 62C, § 49A) and a disclosure of beneficial interests (M.G.L. c. 7C, § 38).

**Leases.** If you are disposing of property by lease, mandatory lease terms must be spelled out in the solicitation. A typical lease should:

- Name the parties to the lease and the responsible parties to receive any notices under the lease and any use restrictions.
- Incorporate by reference the proposal chosen, including a detailed description of the leased property.
- Specify the duration of the lease, including any renewal, extension, or other options. If the lease will include a renewal option, you must specify how the rent will be determined for the renewal period.
- Identify the payment terms, including when payments are due.
- Spell out all of the responsibilities and obligations of the parties for maintenance, cleaning, utilities, rubbish disposal, snow removal, liability and casualty insurance, and other requirements.
- Specify that lease amendments must be in writing and signed by individuals authorized to contract on behalf of your local government.
- Prohibit assignment or subletting without written approval.
- Specify what constitutes cause to terminate the lease, what notice must be provided prior to termination, and what opportunity must be granted to correct any problem.
- Prohibit any activity that would constitute a violation of the conflict of interest law (M.G.L. c. 268A).
- Specify that the lease constitutes the entire agreement and that there are no agreements other than those incorporated therein.
- Require a certification of tax compliance by the lessee (M.G.L. c. 62C, § 49A) and a disclosure of beneficial interests (M.G.L. c. 7C, § 38).



**Step 4: Advertise for proposals**

You must advertise for proposals in a newspaper with a circulation sufficient to inform the people of the affected locality.<sup>125</sup>

The advertisement must be published at least once a week for two consecutive weeks before the day you select for opening the proposals. The last publication must occur at least eight days before the proposal opening. You may, of course, advertise in more newspapers, in newspapers outside your area, and more frequently.

The advertisement must specify the geographical area, the terms and conditions of the proposed transaction, and the time and place for the submission of proposals and awarding of the contract. It must also state where and when prospective proposers may obtain a copy of the solicitation.

**You can contract with a broker to help dispose of property.** The broker's job will be to show the property and encourage the submission of sealed proposals on the due date. Your contract with the broker is subject to Chapter 30B.

**Advertise where you will maximize exposure to potentially interested parties.** For example, if you are offering to lease office space, you will probably reach more potential lessees by advertising in the classified section under "office space" rather than advertising in the legal notices section.

If the proposed disposition involves more than 2,500 square feet, you must also publish an advertisement, at least 30 days before the opening of proposals, in the *Central Register*, which is published by the Secretary of the Commonwealth.<sup>126</sup>

You may inform potential proposers, including brokers and developers, of the availability of the solicitation. Be careful to avoid favoritism or the appearance of favoritism.

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<sup>125</sup> M.G.L. c. 30B, § 16(d).

<sup>126</sup> Appendix B provides the website address for the online submission form for this advertisement, and Appendix D contains contact information for the Secretary of the Commonwealth.

**Step 5: Distribute the solicitation**

The solicitation documents must be made available on an equal basis to all who request a copy. You may inform potential proposers, including brokers and developers, of the availability of the solicitation. Keep a record of the names, email addresses, telephone numbers and fax numbers of everyone who has received the documents. If you later issue an addendum to the solicitation, send the addendum to everyone who has received the solicitation. To avoid misunderstandings or protests, you may want to require proposers to acknowledge in writing their receipt of each addendum. Also, if proposers are likely to require additional time to respond to the addendum, extend the proposal due date and opening.

**Step 6: Open and evaluate proposals**

Proposals must be opened in public at the time and place specified in the solicitation. Chapter 30B affords no confidentiality to real property proposals. You should record the name of each proposer and the proposal price. The proposals become public information when they are opened.

You must evaluate the proposals using only the criteria you identified in the solicitation. If your solicitation states that you will make an award to the responsive and responsible proposer who offers the best price (in essence, a bid process), you may simply identify the highest-priced proposal, and then evaluate that proposal's responsiveness and responsibility against the quality requirements specified in the solicitation. If you determine that a proposal is not responsive or responsible, reject it and proceed to evaluate the next highest proposal.

If your solicitation states that you will evaluate proposals using comparative evaluation criteria, it will usually be most efficient to look first at the responsiveness and responsibility of the proposals and reject any you find to be not responsive or not responsible. Then evaluate all the remaining proposals on both your comparative criteria and price. Prepare written evaluations and then decide which proposal best meets the needs of your local jurisdiction, considering the comparative criteria and price.

If you determine that it is not in the best interest of your local jurisdiction to award the contract you may choose to cancel the proposal process.<sup>127</sup> You may do so before or after you open and evaluate proposals. However, once you have executed a contract, you will not be able to cancel the transaction.

### **Step 7: Submit disclosures**

You must submit the name of the selected proposer and the amount of the transaction to the *Central Register*, which is published by the Secretary of the Commonwealth.<sup>128</sup> If you intend to dispose of the property for less than the value determined in Step 2, your *Central Register* notice must explain the reasons for your decision and disclose the difference between the value and the price to be received.<sup>129</sup> To be consistent with its purpose, this notice should be published prior to entering into a binding agreement to dispose of the property.

Also, M.G.L. c. 7C, § 38, requires disclosure of all beneficial interests in real property acquired or disposed of by a public agency. The selected proposer's disclosure of beneficial interests must be filed with DCAMM. No contract to lease or sell property, and no renewal or extension of such an agreement, is valid until the seller or lessor files this form with DCAMM.<sup>130</sup> An updated disclosure form must be filed within 30 days of any change in beneficial interests during a lease term.

### **Step 8: Execute the contract**

If you are selling real property, have your legal counsel draft a purchase and sale agreement that incorporates all of the mandatory terms and conditions required by the solicitation. If you are disposing of the property by lease, execute a lease that incorporates all the terms and conditions stated in the solicitation.

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<sup>127</sup> See *Mangano v. Town of Wilmington*, 51 Mass. App. Ct. 857 (2001).

<sup>128</sup> M.G.L. c. 30B, § 16(f). Appendix B provides the website address for the online submission form for this disclosure, and Appendix D contains contact information for the Secretary of the Commonwealth.

<sup>129</sup> M.G.L. c. 30C, § 16(g).

<sup>130</sup> Appendix B contains the website address for DCAMM's real estate transaction disclosure form for this purpose, and Appendix D provides contact information for DCAMM.

**Step 9: Retain records**

You must maintain a file of all written documents required by Chapter 30B for six years from the date of the final payment under the contract. These documents include the following:

- the declaration that property is available for disposition;
- the solicitation documents and any amendments;
- the public advertisement;
- all *Central Register* notices;
- all proposals received;
- all evaluation materials;
- a copy of the disclosure of beneficial interests; and
- the signed purchase and sale agreement or lease.

**Emergencies**

If an emergency arises and the time required to advertise for the disposition of real property would endanger the health or safety of people or their property, you may shorten the advertising period or waive it completely. Simple administrative inconvenience will not suffice as a justification for invoking the emergency provisions of Chapter 30B; a genuine emergency must exist. If you have reason to know in advance that a tenant will be vacating a facility, and you fail to advertise in advance, you will not be able to justify using the emergency provisions. Note that the right to waive or shorten the required procedures in an emergency applies only to the advertising requirement; even in an emergency, all other requirements continue to apply.

If you invoke this provision, you must publish a notice in the *Central Register* at the earliest opportunity stating the reason for declaring the emergency.<sup>131</sup>

M.G.L. c. 7C, § 38, requires disclosure of all beneficial interests in real property acquired or disposed of by a public agency. The selected proposer must file the

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<sup>131</sup> Appendix B provides the website address for the online submission form for this notice, and Appendix D provides contact information for the Secretary of the Commonwealth.

disclosure of beneficial interests with DCAMM. No contract to lease or sell property, and no renewal or extension of such an agreement, is valid until the seller or lessor files this form with DCAMM.<sup>132</sup> An updated disclosure form must be filed within 30 days of any change in beneficial interests during a lease term.

### **Intragovernmental and Intergovernmental Dispositions**

Intragovernmental real property transactions, such as the transfer of use of a property from one department to another department within a single city or town, are not subject to Chapter 30B. However, intergovernmental real property transactions, such as the sale of land by one local government to another local government, are subject to some Chapter 30B requirements.<sup>133</sup> If you intend to dispose of real property to the federal government, the Commonwealth, another state, a county or another local jurisdiction, you must first declare the property available for disposition, identify use restrictions and determine the property's value. If you are going to dispose of the property for less than the determined value, you must publish a notice in the *Central Register* explaining the reasons for your decision and disclosing the difference between the value and the price to be received.<sup>134</sup>

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<sup>132</sup> Appendix B contains the website address for DCAMM's real estate transaction disclosure form for this purpose and Appendix D provides contact information for DCAMM.

<sup>133</sup> M.G.L. c. 30B, § 16(i).

<sup>134</sup> Appendix B provides the website address for the online submission form for this notice and Appendix D provides contact information for the Secretary of the Commonwealth.

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