

SENATE COMMITTEE ON GOVERNMENT OVERSIGHT

Executive Summary 2007 Legislative Session

Rhode Island's Purchasing Policies

After the Separation of Powers Amendment in 2004, all Senators, Representatives and their designees were removed from the boards and committees of State departments and quasi-public agencies, leaving the Legislature with the challenge of finding another way to exercise the checks and balances required by our Constitution. To implement separation of powers, the Senate formed the Committee on Government Oversight. In addition to legislative duties, the Committee is charged with the authority and responsibility to review the function and operation of State agencies and other areas of State government. During the 2007 legislative session, the Committee exercised its oversight authority by commencing a review of State purchasing practices, primarily centralized within the Department of Administration. The Committee held eight public hearings and received sworn testimony from numerous witnesses, with many witnesses testifying at more than one hearing. The Committee appreciates the time and effort of the Purchasing Division and other witnesses in responding to the many requests and in providing sworn testimony at the often lengthy hearings.

Oversight is an essential function of government. It guarantees statutory compliance and ensures that current laws and policies are achieving the intended results. This report is a summary of the findings of the Senate Committee on Government Oversight from the 2007 Legislative session: it also identifies actions to be taken in future sessions. This summary serves to inform the Senate and the general public, and to memorialize the findings of the Committee, providing a framework for future reforms and a map for future reviews of State practices.

Often, the checks-and-balances work of oversight focuses on problems or mistakes made and overlooks the improvements of a department. Likewise, during the 2007 Legislative session, the bulk of the hearings focused on flaws in the purchasing process. However, before turning to the analysis of concerns raised during the session, the Committee would like to highlight some of the positive changes implemented by the Division of Purchasing over the last few years to improve the internal process.

The Division of Purchasing has utilized best practices to make the purchasing process more efficient. In the last few years, the Division has focused on promoting cutting edge practices and has put in place an in-service training program for purchasing employees. Other new practices involve the purchase of office supplies and furniture through a statewide contract, including

municipalities and school departments; and the implementation of a reverse auction process for procuring State vehicles. By using real-time on-line bidding, the State is able to improve competition between vendors to drive down the price. The Division has also promoted minority and women-owned businesses by merging the Minority Compliance Office into the Purchasing Division and allowing this office to get more involved in the bidding process.

SUMMARY OF FINDINGS:

The clearly enumerated purposes of the purchasing statute are to promote public confidence, ensure the fair and equitable treatment of all persons, promote effective competition, and provide safeguards for quality, integrity and the highest ethical standards. Based on the documentation and witness testimony from the 2007 Legislative Session, the Senate Committee on Government Oversight makes the following findings.

FINDING #1 **The Committee finds that the Executive Branch inhibited the progress of the Senate Committee on Government Oversight and violated the spirit of the Access to Public Records Act, thereby undermining transparency, accountability and public confidence, by not providing the prompt production of requested documents or consistent, responsive testimony.**

The Governor responded to the Senate's legitimate oversight by holding a press conference and publicly accusing the Committee of "verbally berating," "manhandling," and "harassing" top-level Department of Administration officials; however, when asked by the press for specific examples of the abuse, the Governor told the press to watch the tape of the hearing. The press responded to this challenge by reviewing the tape and found it "a little on the dull side of average."¹ Meanwhile, the Administration continued to inhibit the progress of the Committee by not producing requested documents and instructing other State agencies not to respond to the Senate's requests for information until instructed to do so by the Governor's Office. As of January 2, 2008, the Committee has not received a username and password for the accounting system that was promised, a list of emergency vendors, or a State fleet maintenance plan, to name a few of the documents DOA has yet to provide. Furthermore, the Administration provided inconsistent or unresponsive testimony to the Committee. For example, on several occasions the Committee received conflicting testimony as to how many companies were contacted concerning the emergency procurement of temporary employee services. This contravention by key Administration personnel bogged down the progress of the Committee and squelched the tenets of transparency and accountability codified in statute and espoused through public policy.

FINDING #2 **The Committee finds that, as required by RIGL §42-35-2 of the Administrative Procedures Act, the State Properties Committee has**

¹ "We haven't seen the last of latest Statehouse spat," *The Pawtucket Times*, Jim Baron, Editorial, May 6, 2007. See also, "Senators: Staffing probe will continue," *The Providence Journal*, Katherine Gregg, May 5, 2007.

failed to issue regulations for: 1) the acquisition of State property, 2) the disposition of State property, and 3) the granting of permission to use State property.

State law requires the State Properties Committee (SPC) to issue regulations setting forth the nature and requirements of all its formal and informal procedures, including a description of all forms and instructions. Testimony before the Committee clearly establishes that the SPC has procedures for the acquisition and disposition of State property and for licenses to use State property, none of which are included in their regulations. Current regulations of the SPC are inadequate, addressing only general provisions, committee meetings, public documents, and procedures for acquiring space by lease. *The Committee notes that the State Properties Committee has begun the process of updating its rules and regulations, as indicated on its January 22, 2008 meeting agenda.*

FINDING #3

The Committee finds that the current rules and regulations for the State Properties Committee are outdated.

The State Properties Committee filed its current rules and regulations on June 17, 1994. These regulations have not been revised in more than thirteen (13) years. The 1994 regulations were re-filed without amendment by the SPC on December 31, 2001 and January 5, 2004. *The Committee notes that the State Properties Committee has begun the process of updating its rules and regulations, as indicated on its January 22, 2008 meeting agenda.*

FINDING #4

The Committee finds that the Chief Purchasing Officer has neither an active nor supervisory role in regard to the State Properties Committee and is, therefore, in violation of RIGL §37-2-45 and §37-2-54(g) and (h).

State law mandates that in order to sell, or otherwise dispose of, State property which is not needed, has become unsuitable for public use, or would be more suitable for some other use, a written determination must be made by the Chief Purchasing Officer (CPO). The Committee finds that the SPC does not seek, nor does the CPO provide, any written determinations regarding the disposition of property. In fact, both the former and current chairmen of the SPC testified that the CPO does not actively participate or supervise the SPC in any manner. Additionally, State law requires that all State property be sold either by sealed bid or by public auction, unless the CPO determines that it is in the best interests of the State to dispose of property in another manner. The Committee finds that the SPC is making this determination and not the CPO. The Committee further finds that the CPO does not participate in the decision to purchase State property, in violation of the law.

FINDING #5

The Committee finds that, in violation of RIGL §37-6-1.2, the Department of Administration has failed to prepare and disseminate relevant training materials to members of the State Properties Committee; and furthermore, the State Properties Committee has failed to develop and adopt a training course for its new members.

The law requires the completion of training materials and a training course for new members of the State Properties Committee by October 5, 2007. Neither training requirement has been met as of January 2, 2008.

FINDING #6

The Committee finds that the State Purchase Card Program may lack controls to ensure purchases are in compliance with the Master Price Agreement and fairly distributed among vendors.

The Controller's Office conducts periodic audits of purchase card transactions. These audits are limited to ensuring that submitted documentation supports the authorized transaction. The Controller's Office relies on the supervisors of the individual agencies to ensure that purchase card transactions comply with the State Procurement Regulations concerning the use of the Master Price Agreement. The Controller's Office does not review transactions to ensure a fair distribution of purchases among vendors. The Committee, at this time, has some concerns with the present oversight of purchase card transactions. Do the supervisors of State departments and agencies follow the same review procedures? If not, this could lead to inconsistent use of the cards throughout State government. What is the nature of the review and what documentation is required to ensure that purchased items are on the Master Price Agreement? With respect to small purchase authority, is there an attempt to fairly apportion purchases, as required by law?

FINDING #7

The Committee finds that the Division of Purchasing violated the requirements of the Administrative Procedures Act and the State purchasing statutes when attempting to amend its small purchase regulations by memorandum.

The formal adoption procedures of the APA require public notice of changes and amendments to agency rules and regulations, and allow for public comment. The APA does not authorize the issuing or amending of regulations by memorandum. Failing to comply with the procedures of the APA denies the public the opportunity to comment upon proposed regulations, and prevents transparency and accountability in government, which erodes public confidence in the procedures of State purchasing. The Committee cannot comprehend the Division's total disregard for State law, particularly where the purchasing statutes expressly require compliance with the APA. Moreover, the Committee finds that on January 24, 2006, this Administration was put on notice that the Supreme

Court of Rhode Island was “troubled by the ineptitude exhibited by the state agencies” for failing to comply with the APA.²

FINDING #8 The Committee finds that the Division of Purchasing does not supervise agency use of small purchase authority.

Review of these purchases is of particular importance because small purchase authority is an exception to the general requirement of competitive sealed bidding. The Division requires agencies to document small purchases in excess of \$500 by using a “Delegated Authority Small Purchase Form”. The instructions on the form contradict current regulations. The Division requires State agencies to retain this form together with supporting documentation. Testimony before the Committee established that the Division has not reviewed a single form. In fact, the Division was unaware that agencies have been using an older form that does not require detailed information or documentation concerning the transaction. The Committee finds that the Division has not conducted any post-audit reviews of agency use of small purchase authority. The Committee further finds that this failure is irresponsible, unacceptable, and undermines accountability, transparency and public confidence in State procurement practices.

FINDING #9 The Committee finds that the Division has violated RIGL §42-35-2 of the Administrative Procedures Act by failing to issue regulations concerning all current formal and informal proceedings.

The Committee finds that the Division has failed to issue regulations for the Rhode Island Vendor Information Program (“RIVIP”). Enacted in 1994, RIVIP is an electronic system that allows all invitations for bids and requests for proposals to be posted on the Internet and accessed electronically by all potential vendors. The Committee finds that RIVIP is an integral part of the bid process and, therefore, it is crucial that the program is set forth in the regulations. It is inexcusable that the Division has failed to promulgate regulations. This statute was enacted over thirteen (13) years ago. Moreover, the Division characterized RIVIP as “a pillar of the way that we [the Division] get bid opportunities out to the vendors in the community-at-large.”³ The Committee further finds that the Division has failed to issue regulations concerning general terms and conditions that apply to every contract with the State, and procedures pertaining to the ORACLE system which computerized purchasing transactions. Finally, the Committee finds that the Division has failed to update the 1998 Buyers’ Handbook. In fact, the update in 1998 did not make any meaningful revisions but merely changed the effective date of the handbook.

² *Park v. Rizzo Ford, Inc.*, 893 A.2d 216, 217 (R.I. 2006).

³ Transcript of March 12, 2007 hearing, p. 50, lines 10-12.

FINDING #10 **The Committee finds that the current records retention system violates RIGL §37-2-6 by not including all contract documents such as written determinations and supporting detail in one contract file.**

The Committee finds the Division's records retention system violates the law by not containing all documentation in a single official contract file. The official file for noncompetitive contracts must contain the written determination explaining the reasons for deviating from competitive sealed bidding. The Committee further finds that the Division did not produce requested, written determinations in a reasonable amount of time, in violation of its own regulations. As a result, the Committee was unable to exercise its oversight function in this area and could not make decisions, recommendations or reach conclusions relative to the appropriateness of noncompetitive contracts.

FINDING #11 **The Committee finds that the Division did not produce written determinations concerning noncompetitive contracts in a reasonable period of time, in violation of its own regulations.**

The Committee was unable to exercise its oversight function in this area without the requested determinations, and could not make decisions, recommendations or reach conclusions relative to the appropriateness of noncompetitive contract awards. The current records retention system does not promote the underlying purposes and policies of the purchasing statutes. Public review of purchasing procedures and contract awards ensures transparency and accountability – two essential safeguards for the maintenance of a procurement system of quality, integrity and the highest ethical standards. Public review of contract awards also ensures that the Division adheres to the general policies and practices enumerated in the Procurement statutes.

FINDING #12 **The Committee finds that the Division of Purchasing failed to produce statutorily mandated reports.**

The Division has failed to produce numerous reports required by law and requested by this Committee. The requested reports are clearly public documents. The Committee requested these reports at the March 12, 2007 hearing and again at the April 9, 2007 hearing. That the Division cannot provide statutorily mandated public reports as promised over ten (10) months ago is further evidence of the Division's failure to cooperate with this Committee.

FINDING #13 **The Committee finds that the expansion and changes in the original DataLogic contract resulted in a substantive change to the service being procured. Furthermore, the lack of documentation and absence of a new bidding process undermines the basic statutory tenets of competition, accountability and transparency.**

Within a few months of issuance, the DataLogic contract expanded from an initial value of between \$2 and \$3 million to between \$7 and \$11 million. Division officials testified that there was no written rationale or documentation as to how or why the expansion occurred. While the contract terms may have seemed like a good deal in the context of the services priced at \$2 to \$3 million, they may have been less favorable at the larger contract value. Furthermore, the change in the payment option also substantively changed the terms of the contract. When the original temporary employee contract went out bid in April of 2002 with a reimbursement payment clause, Adil Business Systems bid with a 30% mark-up rate. In July of 2007, with a contract valued at between \$7 and \$11 million and a pre-payment term, Adil Business Systems won the contract with an overhead mark up rate of 16.7%, even lower than the original DataLogic contract. The difference in these bids and the testimony received from several temporary employee service providers leads the Committee to find that the changes made to the terms of the contract between April 2002 and July 2007, substantively changed the nature of the contract, thereby impacting the competitive bids.

FINDING #14 **The Committee finds that the statutorily mandated, written determination is insufficient to explain why Smart Staffing was chosen over other vendors, in violation of RIGL §37-2-6.**

The conclusory statement memorialized in the letter of determination does not constitute written findings of fact, as required by law. The Committee finds that the determination does not satisfy the requirements of transparency and accountability enumerated in the purchasing statute. Without timely and detailed memorialization of the decision making process, the facts stand on their own and are open to interpretation. In the emergency procurement of temporary employee services from Smart Staffing, the facts illustrate that the process followed by the Division of Purchasing undermined public confidence in State purchasing.

FINDING #15 **The Committee finds that the failure to create a written record of oral negotiations, in the emergency procurement of temporary employee services from Smart Staffing, undermines the statutory requirements of transparency and accountability.**

While not specifically required by statute, a written record of the negotiations not only memorializes the decision-making process, it helps to ensure that all participants in negotiations are offered the same terms. Both of these benefits serve to promote public confidence, ensure the fair and equitable treatment of all persons, promote effective competition, and provide safeguards for quality, integrity and the highest ethical standards. In this case, the absence of a written record led to conflicting testimony as to how many firms were contacted, resulted in confusion as to who initiated the pre-payment option, and contributed to the appearance of

impropriety. Public policy and statutory goals dictate a memorialized process.

FINDING #16

The Committee finds that the Smart Staffing contract has a pre-payment term, not a cost reimbursement term, and there is no authorization under the law for the State to make interest-free loans to vendors.

The contract clearly states that the contractor “will be pre-paid by the State prior to the Contractor’s obligation to disburse payroll payments to the Contractor’s employees who have performed services to the State...”.⁴ Witnesses testified to the unique nature of this payment clause both in State purchasing practices and in the temporary employee industry. The Committee asked for, but has not received, any documentation for the basis of the authority that would allow the State to make what is effectively an interest-free loan to a vendor. Furthermore, the apparent uniqueness of the pre-payment clause should have served as a red flag to ramp up the safeguards for transparency and accountability. Given the mislabeling of the contract and the written determination justifying the use of a cost reimbursement agreement, the heightened level of scrutiny required by statute when diverging from a competitive sealed bidding process was ignored. The misrepresentation of a critical contract clause serves to undermine transparency and public confidence.

FINDING #17

The Committee finds that the Administration’s failure to offer the pre-payment term to other qualified vendors prevented the effective competition necessary to ensure the best price for the State.

According to testimony by the Chief Purchasing Officer and the chronology prepared on May 11, 2007, the primary basis for the decision to award the contract to Smart Staffing was that it was the least expensive vendor. Other vendors testified that the shift of the payment clause from a reimbursement to a pre-payment would significantly reduce the mark-up rate for the contract. Furthermore, the Purchasing Agent testified that the pre-payment term was not offered to any other vendors during the negotiation process. The Committee finds this omission in the negotiations prevented the effective competition necessary to ensure the best price for the State.

ACTION POINTS FOR FUTURE SESSIONS:

The following action points serve to memorialize areas that the Committee believes require further consideration and review.

⁴ See Terms and Conditions of payment in the Master Price Agreement Temporary Personnel Staffing Services, dated September 26, 2006, between Smart Staffing Services, Inc. and the State of Rhode Island, attached to the full Committee report as Exhibit G.

- ACTION POINT A** **The Committee believes that all written determinations should be considered public upon signature, and should be dated, time-stamped, and posted on the Purchasing Division’s website. Furthermore, the contract to which the determination applies should not be awarded for a reasonable period of time after the posting of the approved determination, in order to allow for public review of the decision.**
- The posting of determinations would encourage a more detailed explanation of the facts supporting the decision to diverge from the competitive sealed bidding process. Also, public review of decisions, such as making a single source procurement, would help to ensure that the facts upon which the decision is based are accurate, promote transparency, and provide more effective competition.
- ACTION POINT B** **The Committee recommends that all State agencies be required to conduct a meaningful review of their rules and regulations every five (5) years: the current practice of simply re-filing old rules and regulations is not sufficient.**
- ACTION POINT C** **The Committee may consider whether RIGL §37-2-19 should be amended to require a written record of competitive negotiation discussions in order to promote transparency, accountability and effective competition through the equitable treatment of all parties.**
- ACTION POINT D** **The Committee may consider whether the statutes governing the procurement of outside legal services and the services of an individual physician or dentist should be amended to *require* a public solicitation of requests, the use of negotiations, or a written determination memorializing a noncompetitive option.**
- ACTION POINT E** **The Committee may consider whether RIGL §37-6-30, which requires the State Properties Committee to maintain a registry of leases entered into by the State, should be amended to include leases entered into by quasi-public corporations.**
- ACTION POINT F** **The Committee may consider whether to draft legislation that would render invalid any regulation issued in violation of the requirements of the Administrative Procedures Act, RIGL §§42-35.**
- ACTION POINT G** **The Committee may consider whether to draft legislation that would require a contract to be re-bid if it substantially increases in value or its terms materially change from the original procurement.**

CONCLUSION:

At the end of the 2007 Legislative Session, the Senate Committee on Government Oversight was left with one overarching question: **AT WHAT POINT DO PERVASIVE ERRORS AND OMISSIONS OF STATE OFFICIALS CONSTITUTE INCOMPETENCE AND A BLATANT DISREGARD FOR THE STATUTORY PROCESS?**

At this time, the Committee cannot make a determination as to whether the incompetence was due to ignorance, or arrogant and willful violation of the law. However, the Committee is certain that the public deserves better. The purchasing statutes were designed to promote public confidence, ensure the fair and equitable treatment of all persons, promote effective competition, and provide safeguards for quality, integrity and the highest ethical standards. Through the comedy of errors in the procurement process followed by the Division of Purchasing, approved by the Director of Administration, and uncovered through the committee hearing process, the Department of Administration has squelched the tenets of transparency and accountability codified in statute and espoused through public policy.

The Governor must recognize that Senate Oversight is an ongoing process. Going forward the Committee will continue to place witnesses under oath, record sworn testimony in an official transcript, and request relevant documents. While the Committee understands the pressures of the moment, when a Legislative committee requests public records the Administration must be forthcoming. The Governor has an obligation to produce documents, respond to questions, and make witnesses available. The Committee will continue to exercise its oversight function in purchasing and other areas of government to ensure that current laws and policies are achieving the intended results and to promote transparency, accountability and public confidence in State government.