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ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

MEMORANDUM

To: Jim Drawe, WiredWest

From: Diedre T. Lawrence, Esq.

Re: Questions Regarding Cooperatives

Date: January 22, 2017

You have asked us, on behalf of WiredWest, to answer three questions regarding municipal light plant cooperatives, and our responses appear below.

1. Are MLPs and MLP coops exempt from 30b for all purchases of goods and services?

***Answer**: Generally municipal light plants are exempt from the provisions of M.G.L. c. 30B, regarding the purchase of goods and services, by virtue of the explicit language of that statute. M.G.L. c. 30B, § 1(b)(14) provides, in relevant part that its terms are not applicable to:*

> *…any contracts or agreements entered into by a municipal gas or electric department governed by a municipal light board, as defined by section fifty-five of chapter one hundred and sixty-four or by a municipal light commission, as defined by section fifty-six A of said chapter one hundred and sixty-four; provided, however, that any such board or commission may accept the provisions of this chapter by a majority vote of its members….*

If a municipal light department does not have a board or commission, it is unclear whether M.G.L. c. 30B would apply. It should also be noted that municipal light plants are required to follow certain requirements before awarding contracts for the purchase of supplies (but not services) exceeding $25,000 or more (and it should be noted that this

*statute does **not** require an award to the lowest bidder), but that statute does not apply to cooperatives. M.G.L. c. 164, § 56D. It is unclear how a municipal light plant would manage to comply with both M.G.L. c. 30B and M.G.L. c. 164, § 56D (for instance if a municipal light plant did not have a board or commission, since c. 30B refers to contracts of municipal gas or electric departments governed by light boards or commissions). However, if a Board of Selectmen ("BOS") is acting in the capacity of a municipal light board or commission, or appoints one, then it would appear by the clear language of c. 30B that it would not apply to contracts entered into on behalf of the municipal light plant by the BOS in that capacity. In our experience, very few existing municipal light plants have voted to accept the provisions of c. 30B because it is difficult to use low bid services when running a complex and specialized business of an electric/gas/cable/telecommunications utility.*

By its terms, M.G.L. c. 30B does not apply to municipal light plant cooperatives, and nothing in M.G.L. c. 164, § 47C makes M.G.L. c. 30B applicable to cooperatives. M.G.L. c. 30B, applies to a "governmental body'' which is defined as "a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county." A "municipal lighting plant cooperative" established pursuant to Section 47C is "a body politic and corporate and is constituted a public instrumentality..." but it is not an instrumentality of a "town" or an instrumentality of anything for that matter. Further, when the Legislature has wanted to make a law that applies to municipalities and governmental bodies, also apply to municipal light plant cooperatives, it has specifically made mention of it in Section 47C. See e.g., M.G.L. c. 164, § 47C(g) (provisions of M.G.L. c. 258, the Tort Claims Act, applies to cooperatives); § 47(k) (open meeting and public records laws apply to cooperatives). The fact that the Legislature has not stated that c. 30B applies to municipal lighting plant cooperatives in Section 47C is therefore evidence of its intent to exclude them from its coverage (arguably a form of "expression unius est exclusion alterius" see e.g., Aquino v. Civil Service Comm'n., 34 Mass.App.Ct 538, 541 (1993)).

2. Several towns passed the following article at their town meeting *"To see if the Town will vote to appropriate a sum of money for the Town's share of the costs of the construction, installation and start-up of a regional broadband network, including the payment of all costs incidental or related thereto, such project to be carried out by the Town's Municipal Light Plant **acting as a member of a cooperative of such Plants formed under Chapter 164, Section 47C of the General Laws**; to determine whether this appropriation shall be raised by borrowing or otherwise; or to take any other action relative thereto. provided, however, that this vote shall not take effect unless and until the voters of the Town agree by vote to exempt from the limitation on total taxes imposed by G.L. c.59, §21C (Proposition 2½) amounts required to pay the principal of and interest on the borrowing authorized by this vote"* If the network is constructed

a. How limiting is the phrase ***acting as a member of a cooperative of such Plants formed under Chapter 164, Section 47C of the General Laws***

b. If the town is simply a member of a cooperative can they spend the authorized money to build a network on their own.

***Answer**: The language of the article seems limiting. The article clearly states that the project for which the appropriation is made is "to be carried out by the Town's Municipal Light Plant acting as a member of a cooperative of such Plants formed under Chapter 164, Section 47C...."*

A town cannot simply re-direct borrowings for specific purposes to another purpose. See e.g., M.G.L. c 40, § 53, the "ten taxpayer suit" statute which provides, in part that: "If a town…or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town…for any purpose or object or in any manner other than that for and in which such town… has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon petition of not less than ten taxable inhabitants of the town…determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power." The expenditure of funds raised from this warrant article for the construction of a broadband network by the Town, not in connection with the project carried out by the Town's light plant acting as a member of a cooperative, could be without legal authority in light of the language contained in the warrant article and arguably could be subject to a ten taxpayer lawsuit.

Re-directing funds for another type of project, not undertaken by the Town acting as a member of a cooperative, may not be lawful, but we cannot find a case directly on point on this issue. The laws regarding borrowing for, and construction of telecommunications and/or cable systems are fairly specific. We note that borrowings for light plant purposes are made pursuant to the specific provisions of M.G.L. c. 44, § 8(8); the Town may only raise money for those purposes by following that statute. Income from the investment or deposit of bond proceeds issued for light plant purposes can only be appropriated for light plant purposes. M.G.L. c. 164, § 56D. These statutes underscore that bonding for light plant purposes follows specific laws.

Further, M.G.L. c. 164, § 47E provides, relevant part:

> *A municipal lighting plant or a cooperative public corporation and any municipal lighting plant member thereof, established pursuant to this chapter or any general or special law may construct, purchase or lease, and maintain such facilities as may be necessary for the distribution or the operation of a telecommunications system for municipal use or for the use of its customers. Such municipal lighting plant may incur debt for such facilities by a vote taken in the manner prescribed pursuant to section 8 of chapter 44. Such cooperative may incur debt for such facilities pursuant to the provisions of section 47C. Such facilities may include suitable land, structure, machinery, other apparatus and appliances for operating a telecommunications system.*

Therefore, under relevant law, it appears that only the municipal lighting plant or cooperative, or member thereof, may "construct, purchase or lease and maintain such facilities" and the statute above does not speak of the Town directly undertaking this itself. See M.G.L. c. 40, § 5 which provides: "A town may at any town meeting appropriate money for the exercise of any of its corporate powers; provided, however, that a town shall not appropriate or expend money for any purpose, on any terms, or under any conditions inconsistent with any applicable provision of any general or special law." Given the language of the warrant article, an appropriation for the Town acting on its own, even though it is still a member of a cooperative, to construct something other than a project undertaken by the cooperative, may be in violation of this statute.

We note that while we are not acting as bond counsel or in any capacity regarding financing by any of the Towns that may have passed the referenced article, the language does not appear to permit a Town, if not acting as a member of a municipal light plant cooperative, to spend money to build a network on its own. The article references only appropriating a sum of money for the Town's "share of the costs" of a "project to be carried out by the Town's Municipal Light Plant acting as a member" of a cooperative. Ultimately, whether and how bond funds raised pursuant to this warrant article may be used by a Town is a matter that should be reviewed by bond counsel and/or town counsel.

3. Are MLPs and MLP coops exempt from the prevailing wage laws.

***Answer**: Prevailing wages apply to "mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works" and "shall not be less than the rate or rates of wages to be determined by the commissioner as hereinafter provided." M.G.L. c. 149, § 26. The commissioner of the Department of Labor Standards prepares prevailing wage schedules "for the use of such public officials or public bodies whose duty it shall be to cause public works to be constructed, a list of the several jobs usually performed on various types of public works upon which mechanics and apprentices, teamsters, chauffeurs and laborers are employed…." M.G.L. c. 149, § 27. If a municipal light plant awards a contract for the construction of public works, it is required to inform its contractor that prevailing wages will need to be paid. Id. The obligation to pay the prevailing wages falls on the contractor but as a practical matter the costs of this are borne by the awarding authority in the contract costs. Id.*

*M.G.L. c. 149 does not actually define "public bodies" but it is clear the prevailing wage reporting requirements for payroll records apply to "[e]very contractor, subcontractor or public body engaged in said public works project by **an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth or county, or municipality or any subdivision thereof** to which sections twenty-seven and twenty-seven A apply…." M.G.L. c. 149, S 27B. A municipal light plant is a "department" (or depending on circumstances, a "board" or "commission") of a*

"municipality" for the purposes of advertising and notifying contractors to pay prevailing wages on publicly bid construction jobs. Over the years, various agencies (first, the Department of Labor and Industries, sometime in the early 1990s, and then, the Attorney General's Office, Fair Labor Practices Division) have interpreted the public works/ public building bid laws to be applicable to municipal light plants, and given the language of M.G.L. c. 149, § 27B, prevailing wages apply to contracts awarded pursuant to those laws. Therefore, contracts for a municipal light plant's projects are not "exempt" from the payment of prevailing wages.

There is nothing in the language of M.G.L. c. 164, § 47C that makes prevailing wage laws applicable to public works contracts undertaken by contractors on behalf of municipal light plant cooperatives, and a cooperative is not a "public body" as that term is used in M.G.L. c. 149, § 27 or 27B.

However, prevailing wage laws are inextricably tied to public construction projects. It is unclear whether the public works bidding laws would apply to a municipal lighting plant cooperative engaged in the construction of what would be considered typical "horizontal" construction projects such as a broadband network. However, we note that the provisions of G.L. c. 30, § 39M are applicable to "[e]very contract for the construction, reconstruction, alteration, remodeling or repair of any public work, or for the purchase of any material, as hereinafter defined, by the commonwealth, or political subdivision thereof, or by any county, city, town, district, or housing authority, and estimated by the awarding authority to cost more than ten thousand dollars…." A municipal lighting plant cooperative is not by its definition "the commonwealth or political subdivision thereof" and is not a "city, town, district or housing authority." See M.G.L. c. 164, § 47C. Therefore, although there is no case law on this question, it does not appear that the prevailing wage laws would apply to public works contracts undertaken by a municipal lighting plant cooperative. We note that if a municipal lighting plant cooperative were to voluntarily follow the provisions of G.L. c. 30, § 39M in making a contract award in connection with the construction of a broadband network, then it would appear to automatically obligate the contractor to follow prevailing wage classifications.

If, after reviewing the foregoing responses, you still have additional questions on these matters, please do not hesitate to contact us.