



The Commonwealth of Massachusetts
Office of the Inspector General

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Dear Mr. Anderson,

I am writing to recommend that you immediately close a little-known loophole in the state procurement handbook that is being used to hand hefty contracts to favored vendors.

The loophole, described as “A Deal Too Good To Pass Up” procurement in the Operational Services Division’s handbook, allows state agencies to bypass competitive procurement rules when they are “presented with a great ‘deal.’”

There does not appear to be any legal authorization to use the Deal Too Good To Pass Up process to bypass competitive procurement rules. The law says that the state’s procurement rules, which govern the Operational Services Division (OSD), must require bid advertisements that encourage “the stimulation of competition.” The law only waives the requirement of an advertised competitive process in very limited circumstances, including emergencies.

The term Deal Too Good To Pass Up does not appear in either the Operational Services Division’s authorizing legislation or its regulations. In other words, it seems to have been invented by the authors of the procurement handbook.

Your own agency’s legal counsel could not give us a definitive explanation of why OSD created Deal Too Good To Pass Up procurements.

As I’m sure you know, OSD’s Deal Too Good To Pass Up policy requires departments to “conduct adequate research to determine if the deal is legitimate” and to “publicize the potential contract” either on Comm-PASS, the state’s procurement website, or in a newspaper “to determine if there are any other interested bidders willing and able to offer a comparable deal” before signing a contract.

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A review by my office has determined that these limited Deal Too Good To Pass Up advertisements are inadequate to foster the competition necessary to ensure value and protect against favoritism in contract awards. If an offer is truly a great deal for the commonwealth it will survive the rigors of a competitive process.

The Information Technology Division (ITD) published four Deal Too Good To Pass Up notices for contracts worth a total of \$1.2 million in 14 months, my office found. ITD awarded two of the contracts, spending \$460,000 while bypassing the competitive process. The department halted two other contracts – one worth \$600,000, another worth \$100,000 – when my office began inquiring about the Deal Too Good To Pass Up loophole.

“The fact that you’re concerned makes me concerned,” ITD’s general counsel said, explaining the cancellations.

One of the Deal Too Good To Pass Up procurements that ITD halted was a \$100,000 contract with a favored management training vendor. A former ITD employee was set to shepherd the contract through the state system for a \$1,950 “processing and handing fee,” records provided to my office show.

AKAMAI

ITD is not a rogue agency stretching a small loophole to meet its needs. Before ITD did its first Deal Too Good To Pass Up posting, the agency’s general counsel consulted with OSD. In fact, e-mails provided to my office show that OSD’s general counsel offered written advice to ITD on how to tailor a Deal Too Good To Pass Up posting to make it impossible for any other vendor to meet the terms of the deal.

“ITD is looking at the possibility of using streaming video on a regular basis on the Mass.gov porta[[]],” ITD’s general counsel e-mailed OSD’s general counsel on May 29, 2003. “The market for streaming video providers is dominated by Akamai Technologies; it holds 85% of the market share in this area and its competitors do not offer the stability and reliability that one would want for a government web site. How can we use Akamai’s services without having to go through a competitive procurement? Such a procurement would basically be a waste of time. How can we get a waiver? . . . This is a rush request from the Governor’s office. Thanks.”

An hour or so later, an OSD staffer e-mailed back saying, “the procurement regulations do not allow for waivers” and suggesting several options for quick procurements, including A Deal Too Good to Pass Up posting.

Several minutes after that, OSD’s general counsel weighed in, writing that using A Deal Too Good To Pass Up posting “you can establish a mandatory minimal criteria which anyone interested in potentially bidding must meet. This criteria could be, for example, that any other interested bidder must have at least 50 percent of the marketplace.”

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Since Akamai holds 85 percent of the market share, it is the ONLY company that could meet the 50 percent market share requirement.

OSD's general counsel told my office that he didn't mean to suggest that ITD should tailor the posting so that only Akamai qualified. He acknowledged that such tailoring would appear to be a violation of state procurement law.

"What I meant was you want to make sure you have a solid market player," he said in an interview. He said that he had clarified his advice verbally but had never put the clarification in writing.

ITD did not follow the OSD general counsel's advice. Instead, ITD officials found another way to grease the skids for Akamai: they let the company write the Deal Too Good To Pass Up posting. After minor editing, documented in the e-mails ITD provided to my office, ITD posted the Akamai-authored specifications for video streaming and content caching of the governor's website without identifying Akamai as the source of the proposal.

ITD's general counsel first denied that Akamai wrote the specifications. When my staff reminded her that we possessed e-mails proving Akamai's authorship, she backtracked, saying that having the vendor write the posting was the only way to make the process transparent.

"To be fair to everybody else out there, you have to [include] as much as possible of the vendor's language," she said.

By publishing Akamai's proprietary specifications and hiding the company's identity, ITD helped guarantee that no one else would bid on the contract. In July 2004, ITD posted another Deal Too Good To Pass Up seeking to expand Akamai's \$28,500 contract for the governor's website to a \$600,000 contract for all of the commonwealth's Mass.gov website.

An Akamai competitor saw the posting and thought it looked like a business opportunity worth pursuing. The company downloaded the Deal Too Good To Pass Up, planning to make a counter offer, but when one of its employees looked at the document properties and saw that Akamai had authored the proposal, the competitor stopped in its tracks.

"It's obviously skewed," said the competitor's accounts manager. "I'm not going to chase rainbows."

He also explained his withdrawal in an e-mail to ITD. "We respectfully will withdraw from your upcoming [content delivery] proposal due to the authorship of Akam[a]i on the proposal. Good luck with your project," he wrote.

Exactly why ITD was determined to give Akamai the contract remains unclear. Perhaps the agency was simply in a rush to improve the governor's website. ITD's

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director of Mass.gov, who also serves as the governor's webmaster, said there was no deadline for the project nor any specific event that the governor wanted to highlight by streaming media on his website.

Perhaps agency officials were looking to please the secretary of administration and finance, an outspoken advocate of open source computer solutions. In a June 2004 proposal addressed to ITD, Akamai described its plan as a "Standards and Open Source Poster Child project [that] provides a foundation for open source application development and deployment."

ITD's general counsel said that ITD treats any request from the governor's office as a rush job.

"Anything they ask for we put ahead of anything else," she said.

Akamai representatives made a sales pitch to the ITD sometime in 2003, the director of Mass.gov said in an interview. In the pitch, Akamai described their EdgeSuite content caching system and their streaming media abilities. Content caching allows websites to quickly access a lot of information, making downloads faster and crashes less frequent. Media streaming offers a way to show videos with sound online.

The ITD staffer said the company sounded interesting and credible so a month later when the governor's office approached him looking to add streaming video to the governor's web page, he quickly thought of Akamai. He said Akamai's content caching product also promised to solve a problem he had encountered when the governor posted his budget online and Mass.gov couldn't keep up with demand for the document.

He said he research Akamai by calling a technical research firm ITD has on contract. He provided my office with undated notes from that conversation. The notes say "Akamai is well positioned" in the industry and recommend that the commonwealth pursue Akamai's "most aggressive pricing structure."

ITD offered no evidence in e-mails or interviews that it negotiated with Akamai over the price of the service. Rather, it appears that the commonwealth agreed to pay the price Akamai requested. There is no assurance from this method of procurement that the commonwealth will receive a good deal. Implementing an advertised, competitive procurement is the best way to ensure the commonwealth receives the best service for the best price.

ITD's general counsel said that posting a Deal Too Good To Pass Up notice more than fulfilled the agency's competitive obligations since the total contract cost the commonwealth less than \$50,000, the threshold for a full-blown Request For Response process.

"What we did was an excess of caution," she said.

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However, by only posting a Deal Too Good To Pass Up notice on Comm-PASS, ITD skirted OSD rules governing contracts worth less than \$50,000, which require a written solicitation distributed to at least three potential vendors.

ITD again turned to a Deal Too Good To Pass Up posting in the spring of 2004 after Akamai pitched the idea of expanding their services from the existing \$28,500 contract to a two-year \$600,000 contract to provide “content delivery, security, consulting and integration services” for the Mass.gov portal.

ITD exploited the loophole despite its general counsel’s caution that the agency didn’t know enough to decide whether Akamai’s new proposal was a good deal for the commonwealth.

“I don’t know whether ITD knows enough about the market for the services that Akamai is offering to determine whether Akamai is the only entity capable of offering such services and, if Akamai is the unique vendor in this space, whether the price they are offering is close to market value,” the general counsel wrote in an April 5, 2004 e-mail to ITD’s director, the director of Mass.gov and three OSD employees. “I would not rely on Akamai’s sales force, by the way[,] to answer those questions. Meta or other industry analysis could be very helpful here.”

Despite this advice, the director of Mass.gov told us that he didn’t do any research on Akamai’s second proposal, relying on his experience with the first, smaller contract to form his judgment about the larger proposal.

“We knew them at this point,” he said in an interview.

ITD again turned to Akamai to draft the Deal Too Good To Pass Up posting. E-mails received by my office from ITD show that the agency was preparing to award the contract on the day they received a letter from my office requesting documents regarding Deal Too Good To Pass Up procurements. ITD halted the non-competitive procurement after it received our letter.

Six weeks later ITD began a full-blown competitive procurement process by posting a Request for Response on Comm-PASS seeking “a platform and professional services that will enhance existing content delivery, security, web disaster recovery, and integration services” in connection with the Mass.gov portal. The new posting is a watered down version of the Akamai draft that eliminates many Akamai-tailored requirements, including:

- A requirement that the vendor “identify personnel who can obtain Security Clearance with a past history of holding security clearance.” The Department of Defense is one of Akamai’s clients.
- A requirement that there be “0 minutes of total systematic down time across the vendor’s network.” ITD e-mails describe this standard as extremely hard to meet

and express staffers' amazement that Akamai had included that provision in the Deal Too Good To Pass Up posting.

The director of Mass.gov said the changes were made to make the Request for Response easier to read.

ITD got two responses to the bid, one from Akamai and another from a two-company combination. The company that complained about the original process being skewed did not bid the second time around, said Mass.gov's director.

ITD employees are currently evaluating the responses to the new bid.

MOBIUS

ITD also used A Deal Too Good To Pass Up procurement to expand a long-existing contract with Mobius Management Systems for software that helps run the state's Mass Management Accounting and Reporting System, commonly referred to as MMARS.

ITD's general counsel said she used A Deal Too Good To Pass Up posting for Mobius' new five-year \$440,400 contract as a way to check whether any other company sold the Mobius software the Office of the Comptroller needs to run its accounting system. She also described A Deal Too Good To Pass Up procurement as a way to sign a new contract with Mobius without forcing it to sign the commonwealth's standard terms and conditions.

Many software vendors, including Mobius, refuse to sign the commonwealth's contract terms and conditions, which include tough liability provisions for vendors and give the commonwealth ownership of any software the state pays for, a conflict with the licensing arrangements that are standard in the software industry.

Since Mobius' original contract predated the commonwealth's standard terms and conditions, the vendor had never been forced to sign them. ITD's general counsel said that the company had, in fact, refused to sign the state's terms and conditions as required under a standard competitive procurement process.

The five paragraphs describing A Deal Too Good To Pass Up procurement in OSD's handbook don't "say anything about signing" the terms and conditions, said ITD's general counsel. She interpreted that absence as meaning that contracts awarded following the Deal Too Good To Pass Up process aren't subject to the terms and conditions.

Both OSD's general counsel and the comptroller's deputy general counsel said Deal Too Good To Pass Up procurements should not be used to skirt the requirement that vendors sign the state's standard terms and conditions. The terms and conditions were designed to offer legal protection to the state.

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“The Deal Too Good To Pass Up has absolutely nothing to do with the [terms and conditions],” said the comptroller’s deputy general counsel.

However, she acknowledged that software vendors often balk at the state’s terms. She said there were several ways to get around such resistance:

- 1) Negotiating contract language that is acceptable to both sides;
- 2) Using certain purchasing categories – including subscriptions – that do not require the vendor to sign the commonwealth’s terms and conditions, and
- 3) “Grandfathering” long-term contractors who never signed the state’s terms and conditions allowing them continue to do business with the commonwealth.

After researching the issue, the comptroller’s deputy general counsel said in an e-mail that Mobius had been “grandfathered.”

MANAGEMENT METHODS

ITD’s proposed \$100,000 contract for management training represents the most egregious abuse of the Deal Too Good To Pass Up loophole.

ITD’s director told my office he asked Management Methods, Inc., to run problem-solving workshops for ITD employees because “these were the only folks I’d ever seen do this kind of work.” He said ITD needed the training to create a common approach to problem-solving throughout the agency.

Management Methods, which is not pre-approved to do business with the state, teamed with McInnis Consulting Services, a company that is pre-approved, to run a series of two-day training workshops, plus a “special ‘management briefing’ session” for \$97,500.

Under the original plan, McInnis Consulting Services, which is run by a former ITD employee, would receive \$1,950 as a “processing and handling fee,” bringing the total cost of the workshops to \$99,450.

As an approved vendor on the statewide contract for technology consulting, McInnis Consulting Services has signed the state’s terms and conditions. ITD’s general counsel described McInnis as a “headshop [that] places vendors.” She described McInnis as someone who ITD worked with a lot but did not offer that he was a former ITD employee.

ITD’s general counsel expressed her discomfort with the arrangement in an e-mail to the agency’s chief operating officer, writing, “[T]his wasn’t bid out so we don’t have any idea whether we are paying market rate for these services. Did we post a ‘deal too good to pass up’ on CommPass? I won’t raise this issue with [ITD’s director] because I think he has decided to go ahead with these folks anyway, but we should keep it in

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mind attempting to negotiate for freebies. . . Also, I won't make an issue of this with anyone, but I'm uncomfortable signing this – a six figure no bid contract with hourly rates of almost \$400 per hour. I don't think my not signing should be a problem."

After conferring privately with ITD's director, the general counsel said that in the e-mail "I was trying to separate my legal role from [the agency head's] decision making role."

"I'm the counselor. I'm not the decision-maker," she added.

The director said the fast-tracking of the workshops was a matter of misinterpreting his plans, lamenting that "sometimes people take everything I say literally."

He noted that after the general counsel's e-mail the contract was pulled off the McInnis fast track and posted as A Deal Too Good To Pass Up.

However, the management training Deal Too Good To Pass Up posting gave Management Methods a leg up by listing the cost as \$97,500, which excluded the \$1,950 "processing and handling fee." The Deal Too Good To Pass Up posting also required the trainers to be on either the state's technology consulting contract or go through a company, like McInnis, that is on the contract. Given the nature of the companies on the technology consulting contract and the type of training ITD was seeking, that specification limited competition.

ITD's general counsel said that requiring the trainers to go through the technology consulting contract "was probably a mistake on my part." She added that because OSD does all the paperwork on statewide contractors "we often end up asking someone to partner with someone on [the statewide technology consulting contract out of] laziness."

It appears that ITD was attempting to steer business to its former employee.

ITD halted that procurement the day my office began inquiring about their Deal Too Good To Pass Up contracts. Although top ITD officials said they planned to issue a competitive bid for the training services, three months later they have not posted a Request for Response on Comm-Pass, giving the appearance that they are not interested in pursuing a competitive procurement.

To solve these problems, I recommend that:

- 1) OSD close the Deal Too Good To Pass Up loophole and eliminate that section from its handbook;
- 2) OSD retrain its staff in the ethics of proper procurement practices;
- 3) The Office of the Comptroller develop special, mutually-agreeable, terms and conditions for software vendors that protect the commonwealth's interests;

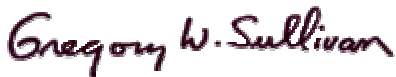
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- 4) The state comptroller enforce its requirement that all vendors sign some version of the commonwealth's terms and conditions, and
- 5) ITD re-examine its procurement practices and respect its legal obligation to implement competitive procurements.

If you have any questions about these recommendations please feel free to call me at 617-722-8800.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory Sullivan
Inspector General

cc: Martin Benison
Peter Schwarzenbach
Linda Hamel