**MEMORANDUM**

**TO:** Board of Directors, Massachusetts School Building Authority
**FROM:** James A. MacDonald, First Deputy Treasurer, Chief Executive Officer
John K. McCarthy, Executive Director, Deputy Chief Executive Officer
**DATE:** June 21, 2021
**RE:** Request from the City of Gloucester for a Waiver of Certain Regulatory Requirements for the East Gloucester Elementary School Project

## Background

On August 20, 2020, the Massachusetts School Building Authority (the "MSBA") approved a project to replace the existing East Gloucester Elementary School and Veterans Memorial School, both in the City of Gloucester (the "City"), with a new combined facility on the site of the existing Veterans Memorial School (the "Project"). The Board of Directors authorized the MSBA's Executive Director to enter into a Project Scope and Budget Agreement and a Project Funding Agreement with the City.

As reported to the Board of Directors at the February 2021 and April 2021 Board meetings, litigation related to the Project was filed on December 24, 2020, naming the MSBA, along with the City and the Massachusetts Executive Office of Energy and Environmental Affairs, as defendants (Superior Court Civil Action #2077CV01303B filed in Essex County Superior Court)[1].

Pursuant to MSBA policy, the City was notified that the MSBA would not enter into a Project Funding Agreement with the City when the Project is the subject of pending litigation. Moreover, in accordance with MSBA policy, the MSBA notified the City that it will not provide reimbursements for any Project costs beyond any eligible costs incurred during the Feasibility Study and Schematic Design phases of the Project without an executed Project Funding Agreement between the City and the MSBA.

The City is proceeding with the Project at its own risk pending the outcome of the litigation. The MSBA agreed to continue to monitor the Project on a limited basis, with the City's understanding that the MSBA will not enter into a Project Funding Agreement with the City until the pending litigation is fully resolved in a manner that permits the Project to proceed, including all appeals to any judgement related to the pending litigation.

On June 10, 2021, the MSBA received a letter from the Plaintiff's attorney explaining that the Plaintiffs plan to amend their action to enforce a particular provision of the MSBA's regulations, specifically the 14-day provision of 963 CMR 2.10 (11)(a).

[1] The MSBA, working with outside counsel, has served a motion for summary judgement and there is a hearing scheduled for July 15, 2021.

963 CMR 2.10 (11)(a) states:

> After the Eligible Applicant has acquired local approval in the format prescribed by the Authority, the Eligible Applicant and the Authority shall execute a Project Funding Agreement within 14 calendar days of said local approval. The Eligible Applicant shall document to the Authority the sources and amounts of local funding which will be committed for the Eligible Applicant's share of the Approved Project cost. If the Eligible Applicant does not sign the Project Funding Agreement within said 14 day time period, then the Board vote for approval of the Proposed Project shall be rescinded.

On June 18, 2021, the MSBA received a request from the City asking the MSBA to waive the provisions of 963 CMR 2.10 (11)(a) in accordance with the waiver provisions set forth in the MSBA's regulations (963 CMR § 2.20). The City's request is attached to this memorandum.

963 CMR § 2.20 states:

> The Authority may, upon written application in a format prescribed by the Authority and with the written recommendation of the Executive Director to the Board, grant a waiver of any of the requirements of 963 CMR 2.00.

MSBA staff is asking the MSBA Board of Directors to consider waiving retroactively the 14-day provision of 963 CMR 2.10 (11)(a) for the Project.

**Discussion**

The Project Funding Agreement for the Project was not executed in accordance with the timeframe set forth in 963 CMR 2.10 (11)(a) for several reasons. First, on November 13, 2020, the Plaintiff's counsel provided to the MSBA a copy of a notice of intent to sue that was sent to the City on October 28, 2020. Having been notified of pending litigation, the MSBA did not forward an execution copy of the Project Funding Agreement to the City. Further, the timeline set forth in 963 CMR 2.10 (11)(a) has uniformly not been enforced. This section of the regulations was promulgated when the MSBA's grant program was first created. Once the grant program was implemented, the timeline set forth in 963 CMR 2.10 (11)(a) has proved to be incompatible with how the grant program process works.[2]

This is an appropriate situation for a waiver. The Plaintiffs are seeking to enforce a procedural regulation that is not enforced for other grant program participants. It would not be equitable to enforce this provision for the City alone. A waiver does not affect the substantive merits of the City's grant application. Further, it is the hope of MSBA staff that waiving the provisions of 963 CMR 2.10 (11)(a) will prevent further delay for the Project and avoid protracted litigation.

[2] Incidentally, MSBA staff is in the process of revising the MSBA's regulations. One focus of the revisions is to change certain provisions to better align with the MSBA's grant program process now that the grant program has been in operation for many years. MSBA staff plans to change the provisions of 963 CMR 2.10 (11)(a).

**Recommendation**

That the Board of Directors of the MSBA vote to waive retroactively the 14-day provision of 963 CMR 2.10 (11)(a) for the project to replace the existing East Gloucester Elementary School and Veterans Memorial School with a new combined facility on the site of the existing Veterans Memorial School, and to authorize the Executive Director of the Authority to waive any other timing requirements of 963 CMR 2.10 relative to the Gloucester Project as he may determine, in his sole discretion, necessary for the orderly processing of the Gloucester Project application and in the best interests of the Authority.