



December 15, 2010

MEMORANDUM TO MUNICIPAL CLIENTS

**RECEIVED**

DEC 30 2010

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL,  
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY **BOARD OF SELECTMEN**

Re: Leasing/Procuring of Finished Building Space and the Applicability of the Public  
Construction Bid Laws

With the continuing strains on municipal finances, cities and towns must increasingly rely on alternative and innovative methods to meet their needs for supplies, equipment and even building space. Leasing of space can often be seen as a less expensive alternative to new construction or a renovation project. A recent decision of the Supreme Judicial Court ("SJC") highlights the care local governments must take when undertaking a lease process in order to avoid crossing into the realm of public construction, which will result in the obligation to comply with the Commonwealth's construction bid laws.

In Brasi Development Corp. v. Attorney General, 456 Mass. 684 (2010), the SJC considered the efforts of the University of Massachusetts Lowell to secure additional dormitory space. The university issued a request for lease proposals under the real estate provisions of the Uniform Procurement Act, G.L. c. 30B, §16, but the process was challenged on the grounds that it amounted to an arrangement for construction of a public building. After reviewing the RFP process and the terms of the agreement with the selected proposer, Brasi Development, the court concluded that the agreement provided for construction of a completely new building for the university and therefore violated the public construction bidding statutes.

The university had developed an RFP that did not dictate new construction space, but gave detailed requirements for a dormitory to house 120 to 400 students. It requested a five-year lease, with the option for two additional five-year terms. The university would be responsible only for lease payments, and no payment would be required until the dormitory was ready for use. Of seven respondents to the RFP, Brasi and two others proposed to construct new buildings; two respondents proposed renovation of existing structures and two offered the use of existing structures "as is." Following Brasi's selection as the successful proposer, two bid protests were filed with the Attorney General, one of which claimed that the requested dormitory arrangement was not a lease but a project for construction of a public building and was therefore subject to the competitive bidding statute for buildings, G.L. c. 149, rather than the real estate procedures of G.L. c. 30B. Despite the bid protests, the university signed a "lease agreement" with Brasi before the Attorney General had issued a decision on the protests. Thereafter, the Attorney General ruled that the RFP was a proposal to construct a public building and that the lease agreement violated the public construction bidding laws. The university then attempted to terminate the contract with Brasi. In response, Brasi filed a complaint in the Superior Court seeking a declaratory judgment confirming the validity of the RFP process.