renewal for two more five-year periods, and an option to renew for three more five-year periods). The court stated that the provision allowing university use for 30 years "supports a conclusion that the university intended to acquire the facility or at least to retain effective permanent control thereof." In addition, the contract called for construction of an entirely new structure and afforded the university "significantly greater control and approval over the construction process," including participation in weekly construction meetings and approval of the phases of work.

The duration and construction control provisions highlight the fact that the question raised by a long term lease of space specifying particular design and/or construction details will also apply to the proposed *purchase* of a building for which specific elements of construction are requested.

Another change from the RFP was that the lease allowed use of a university campus parking lot by the dormitory residents. Brasi's property was not large enough to accommodate a parking lot of the size required to meet city zoning requirements. Therefore, the SJC found that the lease "would have resulted in Brasi owning a building that was dependent on the indefinite use of university land in order to comply with the requirements of Brasi's building permit." Finally, to address apparent safety concerns, the university required Brasi to construct a climate controlled pedestrian bridge over commuter rail line tracks adjacent to Brasi's property and agreed to grant Brasi an easement over a portion of the university parking lot.

The SJC stated that the additional lease provisions "suggest that the university intends indefinite use of the proposed dormitory and eventually to incorporate the dormitory into the university campus." Thus, when considered as a whole, the particular circumstances of the proposed transaction compelled the conclusion that the lease agreement was actually an agreement for construction of a dormitory building, and therefore violated G.L. c. 149.

Although the Brasi decision does not establish a bright line for determining when a lease by a public agency is transformed into a construction project that must proceed in accordance with the public construction bidding laws, it does provide some specific guidance as to when the courts will ignore a "lease" label and find that a transaction is ultimately one for construction of a public building. Therefore, when considering a lease of space for municipal purposes it is important to engage in a planning process that thoroughly considers a project's goals and needs and whether they can be met by a lease arrangement that is consistent with the limitations the law imposes. When the planning process suggests that a lease within those limitations will not be possible, but a separate construction project does not appear to be practical or financially feasible, a third option to consider is a request to the Legislature for a special act authorizing a lease transaction, subject to modified restrictions. While such legislation can allow for local flexibility, it would also almost certainly require a competition based selection process. This is an important factor to weigh when deciding whether to pursue the special act option.

Very truly yours,

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