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Massachusetts Court Invalidates Build-to-Suit Lease Under Construction Bid Laws

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Massachusetts' highest court recently ruled that a long-term lease of a build-to-suit dormitory facility to the University of Massachusetts, Lowell (UMass Lowell), violated the Commonwealth's public construction bid laws, limiting the ability of public authorities and private developers to use creative financing and delivery methods to solve budget shortfalls currently limiting many capital development projects. In *Brasi Development Corp. v. Attorney General, et al.*¹, UMass Lowell's attempt to secure residence space for students without engaging in the cumbersome statutory process of procuring and constructing a capital project was rejected due to the degree of supervision and control the university maintained over the design and construction process, the potential length of the lease, and the fact that use of the new building was dependent on access to university property. All of these factors rendered the lease more consistent with a public construction project than a true commercial real-estate transaction, according to the court, whose decision will restrict efforts by public authorities to "privatize" certain capital projects. While the decision signifies a triumph for those interests who benefit from the heavily regulated public-construction procurement process in Massachusetts and stays true to the real concerns that originally drove the complex laws, the decision may end any serious effort in Massachusetts to use public/private partnerships (PPP) or other creative finance and delivery methods to meet increasing—and often increasingly expensive—public infrastructure needs.

In Massachusetts and elsewhere, growing budgetary problems have spurred efforts to privatize certain infrastructure projects. Toll roads and bridges are the most common sorts of projects turned over to the private sector due to the revenue streams available. However, PPP development is not exclusive to them. Non-toll roads, mixed-use projects, stadia, and even public schools have been delivered in this way, seemingly at a benefit to both the public and private interests.

In the European Union and elsewhere beyond the United States, PPP is an encouraged form of public infrastructure development. Particularly in times where government at all levels is faced with doing much more with much less, PPP appears to be an attractive alternative to more traditional, publically funded construction, which can be perceived as hidebound, slow and unnecessarily expensive due to regulatory and legal constraints that do not affect private development. Many states, including Florida and Texas, permit PPP development. But many, such as Massachusetts, have yet to do so and, in fact, have strict public construction laws with which PPP cannot easily co-exist. In such states, government and the private sector have employed creative devices to avoid the regulatory schemes. In Massachusetts, at least, the *Brasi* decision may hinder those efforts.

Case History

Brasi arose from the university's efforts to obtain dormitory space through what was ostensibly a commercial leasing transaction. The university published a request for proposal (RFP) seeking proposals to lease residence space for a five-year term, with the possibility of two additional five-year extensions. The RFP did not require the space to be newly constructed, but did provide detailed design requirements for a dormitory, especially concerning security. The university was to be responsible only for lease payments, with all maintenance upkeep to be performed by the developer/landlord. The RFP

contained a sample lease, which was, in all respects, a standard commercial lease. The RFP stated that price was not the only factor to be considered in making an award.

Seven companies responded to the RFP, including Brasi, which proposed to construct a new building on land adjacent to the university. Brasi was selected as lessor and entered into a lease, the terms of which differed from the sample lease in the RFP in numerous respects. One unsuccessful bidder and a construction trade association filed bid protests, contending that the RFP was in fact a proposal to construct a public building and thus subject to Massachusetts' complex competitive-bidding laws governing public construction. The Attorney General of Massachusetts, who is empowered to investigate and rule on alleged violations of the bidding laws, ruled that the UMass Lowell–Brasi lease was entered into contrary to the bidding laws, because the dormitory RFP was in fact a proposal to construct a public building. Brasi sued to overturn the Attorney General's decision, and the trial court agreed with Brasi that the RFP was for a commercial lease and complied with the legal requirements controlling such transactions. The Attorney General appealed to Massachusetts' highest court.

High Court's Ruling

Massachusetts' Supreme Judicial Court began its analysis with reference to several prior decisions in which it ruled that various long-term property and equipment leases were the equivalent of contracts to purchase, and thus subject to public procurement law—and noted that a blanket exemption of building leases from construction procurement regulations would defeat the purpose of the construction bid laws. The court then engaged in a lengthy analysis of factors that it held would determine whether a "build-to-lease" agreement would be subject to public competitive-bidding law. It is important to note that the court did not limit its review to the RFP, but examined the contract that was ultimately entered between UMass Lowell and Brasi, which as noted by the court, was different in several key respects: the lease term was tripled; the university retained significant control over the design and construction process; and the use of the dormitories became dependent on the use of other university property.

Although many of the factors considered indicated that the contract was akin to a traditional commercial lease, the court ruled that these differing points, the length of the lease (30 years); the degree of control over design and construction exercised by the public authority; and that the use of the building was dependent on access to and continuing use of university property (for parking) all mitigated against a conclusion that it was a commercial lease and in favor of a conclusion that it was a contract for construction of a public building—and therefore should have been procured under the low-bid, competitive-bidding statutes.

Analysis

The noted changes in the lease from the sample version that had been included in the RFP were substantial in the court's analysis, which initially seems to indicate that similar projects might pass muster as long as the lease agreements in question do not come overly close to the UMass Lowell–Brasi lease. However, the financial and practical concerns that come into play with short-term, generic leases are likely to render many types of capital projects untenable for this type of delivery.

The significance of the *Brasi* decision to Massachusetts public authorities seeking to avoid the cumbersome and expensive public bidding laws is hard to overstate. In light of this case, it will be much more difficult in Massachusetts, absent special legislative permission, to deliver a public building or public work under PPP, build-operate-transfer (BOT) or a similar creative finance and delivery method. Public authorities in Massachusetts may want to be aware of the result in *Brasi* relative to any leasing transaction, or in any effort to deliver infrastructure outside the confines of the competitive construction bidding statutes. *Brasi* may have little or no effect outside Massachusetts, as the decision is specific to its facts and to

Massachusetts law. However, proponents of PPP delivery may understandably hope that it does not reflect a trend against private involvement in public projects.

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Note

1. *Brasi Development Corp. v. Attorney General, et al.*, 456 Mass. 694 (2010).