Case & Statute Comments

Public Contracting – Lease or Building Construction? The Applicability of Construction Bidding Statutes to Procurement of Finished Building Space

Brasi Development Corp. v. Attorney General, 456 Mass. 684 (2010)

I. Introduction

Massachusetts imposes separate statutory requirements upon public agencies proposing to lease real estate, or to construct or reconstruct a building. Section 16 of General Laws chapter 30B, the Uniform Procurement Act, governs leases of real property, while chapter 149 of the General Laws establishes the rules for building construction.[1] For construction projects with an estimated cost exceeding $100,000, procurement of the architectural or engineering services required for design of the building must also adhere to the procedures set out in the so-called designer selection law if the design fee is estimated to be $10,000 or more.[2] If the estimated construction cost is at least $1.5 million, the public agency must utilize a "qualifications based selection process" to procure, prior to its selection of a designer, the services of an "owner's project manager."[3] For building projects of even modest size, then, public agencies must conduct three solicitations, each requiring its own advertising, documentation and contracting steps.

For reasons of cost, time, long term planning or a combination of all three, governmental bodies may wish to avoid, if possible, the requirements governing a public construction program. The leasing of finished building space by means of a request for proposals ("RFP") issued under the Uniform Procurement Act[4] may be seen as an alternative to the construction of a new facility, or the renovation of existing structures. However, it is not simply a matter of swapping three solicitations for one RFP. In *Brasi Development Corp. v. Attorney General*, the Supreme Judicial Court confirmed that labeling as "leases" agreements that are "intended clearly to create buildings for long-term use by public agencies defeats the purposes of the competitive bidding statute."[5] Accordingly, there may be circumstances in which a "contract for a long-term lease" will be subject to the public construction bidding process.[6]

At issue in *Brasi* was whether an agreement for the "development, maintenance, and long-term lease of dormitory facilities" by the University of Massachusetts, Lowell was not a lease, but a contract for construction governed by chapter 149.[7] The court therefore described its task as defining "those circumstances" in which a contract for a lease should be treated as a contract for a construction project.[8] Determining that a "totality of the circumstances" test was "the best approach,"[9] the court concluded that the university's lease agreement was not a lease for purposes of procurement law compliance, but a construction contract.[10]

II. The Dormitory RFP Process

In February and March of 2008, the university issued a request for proposals for the lease of a dormitory in Lowell to house 120 to 400 students.[11] The RFP specified a five-year lease, with the option for two additional five-year terms.[12] The university would be responsible only for lease payments, and no payment would be required until the dormitory was ready for use.[13] Of seven respondents to the RFP, Brasi Development Corp. (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."[14] The RFP did not specify new construction, but it did include "detailed requirements" for the dormitory.[15]

Brasi had been formed three years earlier for the specific purpose

1. "A governmental body shall solicit proposals prior to: (1) acquiring by purchase or rental real property or an interest therein from any person at a cost exceeding twenty-five thousand dollars; or (2) disposing of, by sale or rental to any person, real property or any interest therein, determined … to exceed twenty-five thousand dollars in value." Mass. Gen. Laws ch. 30B, §16(c) (2010). Subsections 44A(2)(A) – (D) of Mass. Gen. Laws ch. 149 (2010) set out, according to the estimated cost, solicitation and bidding procedures for: "[e]very contract or procurement for the construction, reconstruction, installation, demolition, maintenance or repair of a building by a public agency … ." Mass. Gen. Laws ch. 149, §44A(2)(A) (2010).
2. Mass. Gen. Laws ch. 7, §§38A1/2 – 38O (2010).
3. Mass. Gen. Laws ch. 149, §44A1/2 (2010) ("For the purposes of this subsection, the term 'owner's project manager' shall mean an individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity engaged in the practice of providing project management services for the construction and supervision of construction of buildings.").
4. Mass. Gen. Laws ch. 30B (2010).
5. 456 Mass. 684, 696 (2010).
6. *Id*. at 695-96.
7. *Id*. at 685.
8. *Id*. at 696.
9. *Id*. at 697.
10. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 707 (2010).
11. *Id*. at 685.
12. *Id*. at 685-86.
13. *Id*. at 686.
14. *Id*. at 687.
15. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 686 (2010).
16. *Id*. at 687 n.8.

of buying and developing land adjacent to the university's campus.[16] It acquired the parcel in 2006 and, in 2007, obtained approval from the Lowell planning board to develop the parcel for student housing.[17]

The university selected Brasi as the successful proposer.[18] Two bid protests were then 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, subject to the competitive bidding statute for buildings (chapter 149), rather than the real estate procedures of chapter 30B.[19] Despite the bid protests, the university proceeded to sign a "lease agreement" with Brasi before the attorney general had issued a decision.[20] The lease agreement, however, included various provisions that had not been part of the RFP.[21]

While the RFP proposed a five-year term with an option for two five-year extensions, the ultimate agreement was for a lease of a maximum of thirty years (a five-year term, with automatic renewal for two more five-year periods, and an option to renew for three more five-year periods).[22] In addition, the contract ultimately negotiated by the parties called for construction of an entirely new structure.[23] It also expanded university involvement in the construction process from simply approving the architectural design and construction materials, to providing for "significantly greater control and approval over the construction process," including participation in weekly construction meetings and approval of the phases of work.[24]

III. Trial Court Action

After the contract was executed, 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.[25] The university then attempted to terminate its agreement with Brasi.[26] In response, Brasi filed a complaint in the Superior Court seeking a declaratory judgment confirming the validity of the RFP process.[27]

The Superior Court granted the university's motion to dismiss on the grounds that Brasi was not seeking any relief from the university.[28] Brasi and the attorney general then filed cross motions for summary judgment.[29] Finding that the contract between Brasi and the university was a lease for a completed dormitory, and not an agreement for construction of a building, the Superior Court judge awarded summary judgment to Brasi.[30] The attorney general sought direct appellate review in the Supreme Judicial Court, and the court granted the request.[31]

IV. Determination of the Nature of the Agreement

To place the dispute in context, the court first recited the purposes of chapter 149, the so-called competitive bidding statute: "to eliminate favoritism and corruption; to ensure an open and honest bidding process and an equal playing field for all bidders; and to ensure that qualified contractors build public buildings that are suitable for the uses for which they are intended."[32] When an agreement is subject to the statute, "and the statutory requirements are not met, the agreement is invalid and unenforceable."[33]

The court then summarized the factors upon which the attorney general relied in determining that the project was for the construction, rather than the lease, of a building: inclusion in the RFP of "extraordinarily detailed" and "very specialized" design requirements that required "a new, special-purpose building;" the degree of supervision and control the university retained over the construction process; and the potential for a thirty-year agreement.[34] The attorney general also asserted that the short time period between the date of proposal acceptance and the required occupancy date (fifteen months) gave Brasi an unfair advantage because it had previously secured zoning approval to construct a dormitory.[35]

Brasi contended that the university was seeking a true lease.[36] It asserted that it owned the land, assumed all construction risks, and would own and be responsible to maintain the new building.[37] In addition, Brasi argued, it was obliged under the agreement to pay taxes, utility fees and other costs, and assumed the risk of damage to the building; any damage to the building not remedied within 150 days was grounds for the university to cancel the lease.[38]

Beginning its own analysis, the Supreme Judicial Court observed that the legislature had not provided any guidance for "distinguishing a lease by a public agency from a construction contract subject to the competitive bidding statute."[39] The court therefore looked to decisions construing other statutes requiring public bidding.[40] It noted that it had previously found that statutes requiring competitive bidding "may be broad enough to encompass long-term leases."[41] As a prelude to later discussion, it also cited the case of *Andrews v.*

17. *Id*. Brasi had previously contacted the university regarding construction on the parcel of a dormitory of a different type from the one at issue here, but no agreement had been reached. *Id*.
18. *Id*. at 687.
19. *Id*. at 687-88. The challenge to the contracting method was filed by the Foundation for Fair Contracting of Massachusetts. The other protest was filed by an unsuccessful proposer, who claimed that there had been unfair collusion between Brasi and the university, and that Brasi had an unfair advantage because it had earlier received zoning approval to construct a university dormitory. *Id*. at 687.
20. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 688 (2010).
21. *Id*. at 699.
22. *Id*. at 701, 704.
23. *Id*. at 704.
24. *Id*. at 705.
25. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 688 (2010).
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*.
30. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 688 (2010).
31. *Id*.
32. *Id*. at 690.
33. *Id*. at 691.
34. *Id*. at 692.
35. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 693 (2010).
36. *Id*.
37. *Id*.
38. *Id*. The Superior Court judge had agreed that the agreement between Brasi and the university was not "the functional equivalent of a construction contract" because Brasi retained ownership of the property, assumed the risks of construction, and was responsible for the costs of ownership of the completed building. *Id*. at 694.
39. *Id*. at 695.
40. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 695 (2010).
41. *Id*.
42. *Id*. at 695-96 (citing Andrews v. Springfield, 75 Mass. App. Ct. 678, 683-85 (2009)).
43. *Brasi*, 456 Mass. at 696 (quoting Mass. Gen. Laws ch. 149, §44A(2)(D) (2010)). It observed that in "the context of other [Massachusetts] public bidding

Springfield, in which, a year earlier, the Appeals Court had ruled that an agreement termed a long-term lease for an animal control center was "in essence a contract for construction of a public building" subject to chapter 149.[42]

Next, the court plainly stated that the determination of "whether a project [constitutes] construction 'of any building by a public agency' is fact specific and cannot be based on any single factor."[43] Returning to *Andrews v. Springfield*, it listed the significant factors upon which the Appeals Court relied in determining that an agreement termed a lease was, in truth, an agreement for construction of a building by a state agency: the length of the lease (twenty-five years); the city's detailed design and construction requirements; the degree of city control over the construction; and that the lease payments exceeded the costs of construction.[44] It counted as "[p]rimary factors" in the Appeals Court's analysis the city's intention to acquire a facility for long-term use and its retention of an option to purchase the animal shelter for one dollar at the end of the lease, "thereby obtaining the facility through lease payments using public funds."[45]

Having surveyed the existing case law on the issue before it, the court stated its agreement with the Appeals Court's analysis in *Andrews v. Springfield*, and with the factors it considered.[46] It then announced its conclusion that "no specific set of factors will be sufficient for every situation, and that a totality of the circumstances test, which examines the circumstances in each case in detail, is the best approach for determining whether 'build to lease' agreements are subject to the competitive bidding statute."[47] Factors that it determined "may be helpful, but not dispositive" included: the extent of control retained by the agency during development and construction; the length of the proposed lease, including any proposed extensions (a longer term tilting the scale to the construction project side); whether public funds will be used; whether lease payments essentially cover the costs of construction; whether there is an option to purchase for a nominal sum at the end of the lease, or whether the building is to be automatically transferred to the agency at the end of the lease; whether the agency initially owned the land and transferred it to the private party, or whether the agency had the building constructed for lease; and whether the building is a specialized facility that would make it unsuitable for another commercial use without significant renovation.[48]

The court then applied the multifactor analysis to the university's agreement with Brasi, beginning by noting that chapter 149 "does not distinguish between buildings that a public agency will own and buildings that a public agency will lease," but instead "focuses on the creation of a project by the agency for the agency's use in carrying out its public purposes."[49] Although the court found various provisions of the RFP did not compel the determination that the university was undertaking a construction project subject to chapter 149, it was moved to the contrary conclusion upon consideration of the facts that the project involved "creation of a new building, adjacent to the university's campus and dependent on the use of the university's parking lot, which the university had the right to occupy for thirty years."[50] The facts therefore revealed a final agreement that was, in truth, for construction of a dormitory.

In first reviewing the terms of the RFP itself, the court noted that the document sought "the use of land and buildings" owned and maintained by others, and did not involve university property.[51] The sample lease called for the university to yield possession at the end of the term.[52] By the court's reckoning, the length of the lease requested (five years with options for two five-year extensions) "was consistent with the university's assertion that it intended a short-term occupancy."[53] The description of the facility desired – a mix of one- and two-bedroom apartments consistent with the architecture of the university and the city, and attractive to college students – did not dictate that a new building be constructed.[54] Four of the seven responses to the RFP proposed the use of existing buildings and two of those four proposed no modifications.[55] In addition, the building offered could have been used "as an ordinary apartment building" after termination of the lease, leaving Brasi with "an economically viable use" following the lease.[56] This factor, the court said, "weighs

statutes," various factors—contract length, use of private construction on private land, and whether the cost of minor renovations exceeded a statutory limit—"have not been determinative." *Brasi*, 456 Mass. 684 at 696 (citing Norfolk Elec., Inc. v. Fall River Hous. Auth., 417 Mass. 207, 208-09, 213-14, 216 n.8 (1994) (renovation of housing project with federal funds subject to public bidding law where state agency had "day-to-day control" of construction); Helmes v. Commonwealth, 406 Mass. 873, 874, 876-77 (1990) (procurement law not applicable because charitable entity not acting as agent of the state); Salem Bldg. Supply Co. v. J.B.L. Constr. Co., 10 Mass. App. Ct. 360, 361-62 (1980) (private development of apartments was not construction of a public building because housing agency only supplied financing and developer maintained project control)).

44. *Brasi*, 456 Mass. 684 at 696-97 (citing *Andrews*, 75 Mass. App. Ct. at 682-84).

45. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 697 (2010) (citing *Andrews*, 75 Mass. App. Ct. at 683).

46. *Brasi*, 456 Mass. 684 at 697 (citing *Andrews*, 75 Mass. App. Ct. at 683-85).

47. *Brasi*, 456 Mass. 684 at 697.

48. *Id*. at 697-98.

49. *Id*. at 698.

50. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 698-99 (2010).

51. *Id*. at 700.

52. *Id*.

53. *Id* at 700-01. The court observed that the lease period specified by the RFP was "of relatively short duration," and all risk of nonrenewal lay with the lessor. A responder proposing to construct a building would not be assured of recovering its construction costs within the initial five years and could not count on university occupancy of more than that period. Brasi's proposal, it was noted, indicated Brasi would incur at least $25 million in construction costs (beyond land acquisition costs) before the university would be obliged to begin lease payments, and that the university would be committed to pay only $8 million of those costs. *Id*.

54. *Id*. at 701.

55. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 701-02 (2010). At the university's request, a city manager had issued a letter of opinion concluding that existing multifamily residential buildings could meet the requirements of the RFP without any zoning changes or additional permits. The letter was provided to all potential responders as part of the RFP. Thus, the court commented that the Superior Court judge had "observed correctly: 'It bears noting that if Brasi had already completed construction of the facility, the substance of the parties' agreement would remain the same. A fully constructed facility would equally qualify for consideration under the RFP, as would a proposal to modify an existing structure … .'" *Id*.

56. *Id*. at 702. The city manager's opinion stated that in the institutional zoning district, where dormitory use was allowed as of right, no zoning approvals would be required. *Id*. at 702 n.25. Securing a special permit (for a new or existing building) or site plan approval (for a new building) for a dormitory use in the various districts where such use was allowed would take three to four months. *Id*. Obtaining a zoning change to allow such use in a district where not currently permitted would take from four to six months. *Id*. Therefore, the court said, the city manager's opinion did not support the attorney general's contention that no

in favor of a conclusion that the agreement was not subject to the competitive bidding laws."[57]

The court also found that under the RFP the university did not retain "significant control of the design specifications."[58] The RFP recited "basic requirements" for student housing and required responders to submit documentation of the design and floor plans of the building(s) they proposed.[59] These provisions, the court found, were "[u]nlike the very specialized requirements for construction" in *Andrews v. Springfield*.[60] Though the RFP included requirements for electrical and security systems that were particular to the university, the court noted that even the attorney general's bid protest decision had observed that the fact that a commercial agreement calls for "some level of customization or 'build out' of leased space is 'common' in commercial leases, and tenants' involvement in this process does not convert a lease into a construction agreement."[61]

This initial review led the court to find that the terms of the RFP, "viewed in isolation," indicated that the university sought to lease a building that might or might not currently exist, and its undertaking was not a construction project.[62] However, noting that the ultimate terms of the agreement with Brasi differed "markedly" from those of the RFP, the court said that its first pass was "not the end of the inquiry."[63] It then set out the important differences.

While the RFP stated a five-year term with an option for two five-year extensions, the signed contract contemplated a maximum term of thirty years – an initial five-year term with automatic renewals for two five-year periods, and a university option to renew for up to three more five-year terms.[64] The court found this contract provision supported the conclusion that the university intended to acquire the building or at least "retain effective permanent control" of it.[65] This provision, it said, "suggests" that the RFP requirements "did not reflect the university's true purpose."[66] In addition, the ultimate agreement called for Brasi's construction of a new building. The court commented that although creation of a new structure is not decisive, it was a factor "entitled to weight in this case, in conjunction with other factors such as the length of the lease," in determining whether the university had undertaken a construction project.[67]

Another "meaningful factor" was the "degree of supervision and control" the university retained over the construction process.[68] While the RFP afforded the university the right to approve the architectural design and construction materials, the agreement gave it "significantly greater control and approval" authority.[69] In particular, the court focused on the university's right to attend the weekly construction meetings and to approve various phases of work.[70] It found these retained rights "similar in kind" to Springfield's right to hire a construction manager for inspection and approval of the construction in *Andrews v. Springfield*.[71]

Other elements not present in the RFP, but present in the final agreement and indicating that it was a contract for construction, included the facts that the contract would have resulted in creation of a new building that depended on the use of university land, and an arrangement under which Brasi was required to construct a climate-controlled pedestrian bridge over commuter rail tracks adjacent to its property and, in turn, would be granted an easement by the university over a portion of the university parking lot.[72] The zoning permit Brasi had received for the unconsummated dormitory project it had previously proposed to the university included a provision requiring dormitory parking to be in a university lot on the campus, because Brasi's property was not of sufficient size to contain a parking lot complying with the city's zoning provisions.[73] Thus, the agreement left Brasi owner of a building that would be dependent on indefinite use of university land for compliance with the applicable building permit, and conveyed to Brasi an interest in part of the university's campus and indefinite use of other campus property.[74] The court found these provisions suggested the university "intends indefinite use" of the dormitory and "eventually to incorporate the dormitory into the university campus."[75] Therefore, upon consideration of "all the provisions of the RFP and the lease agreement," the

other responders would be able to compete adequately with Brasi, which already held a special permit, under the eighteen-month time frame from issuance of the RFP to the required occupancy date. Notably, the court added that "as long as all bidders are responding to the same set of requirements, and evaluated by the same set of criteria, the process is fair. That some bidders have advantages in experience, financial strength, or available resources does not infringe on the purpose of the competitive bidding law to allow all to compete on an equal footing." *Id.* (citing Department of Labor & Indus. v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 621, 626 (1984)).

57. *Brasi*, 456 Mass. at 702.

58. *Id*. at 703.

59. *Id*.

60. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 703 (2010) (citing Andrews v. Springfield, 75 Mass. App. Ct. 678, 683 (2009)).

61. *Brasi,* 456 Mass. at 703. In support of this conclusion, the court cited prior bid protest decisions of the attorney general. *Id*. It must be noted, however, that the court had ruled earlier in its opinion that the attorney general's decision in the matter before it was not entitled to any deference because it involved neither an adjudicatory proceeding (the attorney general having "authority only 'to require compliance' with chapter 149 'after investigation of the facts'") nor rule making. *Id.*at 694 (citing Annese Elec. Servs., Inc. v. Newton 431 Mass. 763, 771 (2000)). In addition, the court observed that in *Andrews v. Springfield*, the city was found to control the design specifications where it hired an architect to prepare detailed design and construction documents, included those documents with the RFP, and required all responders to meet the specifications, which included the location of over eighty-five rooms in the requested building, described finishes with particularity, and set out manufacturers and model numbers for fixtures and fittings. *Brasi*, 456 Mass. 684 at 703-04 (citing *Andrews*, 75 Mass. App. Ct. at 680-81, 683-84).

62. *Brasi*, 456 Mass. 684at 704.

63. *Id*.

64. *Id*.

65. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 704 (2010).

66. *Id*.

67. *Id*. at 704-05.

68. *Id*. at 705.

69. *Id*.

70. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 705 (2010).

71. *Id*. (citing Andrews v. Springfield, 75 Mass. App. Ct. 678, 681 (2009)).

72. *Brasi*, 456 Mass. at 706.

73. *Id*.

74. *Id*.

75. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 707 (2010).

76. *Id*.

77. *Id*. at 699.

78. *Id*.

court concluded that the agreement was subject to chapter 149 and had been entered into in violation of the statute.[76]

V. Conclusion

Although the *Brasi* decision provides 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, it does not establish a bright line for determining when a lease by a public agency should be treated as a construction project that must proceed in accordance with the public construction bidding laws. The decision, as the court's explanation of the multifactor analysis confirms, is based on application of various factors to the particulars of the transaction at issue. Yet, the court offered instructive commentary when it stated that in situations such as the one presented, "considering only the RFP would defeat entirely the purposes of the competitive bidding statute."[77] If agencies may issue an RFP not within the scope of the statute, but then incorporate into the resulting agreement "key terms that indicate that the agreement is in fact a construction contract, the objectives of the competitive bidding statute would easily be frustrated."[78] The court's opinion in *Brasi* should go a long way toward preventing that result.

David J. Doneski