

There are statutory requirements Towns must comply with prior to leasing or constructing a building on Town-owned land.

## Uniform Procurement Act

The *Uniform Procurement Act*, *M.G.L. c.30B*, §16 governs leases of real property. It requires Towns to issue a request for proposals (RFP) prior to disposing of real property with a value more than \$25,000. Value is determined by using procedures customarily accepted by the appraising profession as valid. For a lease, Towns should use market rent data or advertised rental rates, multiplied by the number of lease payments one would expect to receive over the term (even if the Town does not intend to collect rent).

Once a Town determines the value of the property, it then develops an RFP, which includes a description of the property, including any reuse restrictions, evaluation criteria (including comparative evaluation criteria, if you so choose), rules for award, proposal submission requirements and the contract terms and conditions.

## Public Construction Laws

*M.G.L. c.149*, § 44A, et. seq., establishes rules for building construction. For any public building construction project with an estimate cost exceeding \$100,000, Towns must also comply with the designer selection law, *M.G.L. c.7*, §38A½-O. In addition, all projects performed on public land for the public benefit (regardless of whether or not it is performed by a public or private entity) must comply with the *Prevailing Wage Law*, *M.G.L. c.149*, §§26-27.

## Is it a Lease or a Public Construction Contract?

If Wellesley wanted to lease the property to an entity that would design and construct the recreational facility, such a lease of land would require a Town Meeting vote and a Town-driven procurement process. It also would pose an additional risk for the project: A recent line of court decisions has held that certain “agreements labeled as ‘leases’ that are intended to create buildings for long-term use by public agencies” are, in fact, public construction contracts subject to the competitive bidding statutes. *See Brasi Development Corp. v. Attorney General*, 456 Mass. 684, 696 (2010); *Andrews v. Springfield*, 75 Mass. App. Ct. 678, 683–685 (2009). These decisions set up a complicated, multi-part test for distinguishing between true leases and public construction contracts. Because the test does not create a “bright line” that is easy to apply, the Town (and the tenant) are taking a chance, if they entered into a lease, that the agreement may ultimately be construed to be a public construction contract.

The *Brasi* Court established a “totality of the circumstances” test for deciding when a lease is actually public construction contract subject to *M.G.L. c.149*, §44A(2). The Court found the following factors useful in reaching its decision:

1. The extent of control retained by the awarding authority during development and construction;
2. The length of the proposed lease (including extensions);

3. Whether the source of money is public funds;
4. Whether payments made under the agreement essentially cover the costs of construction;
5. Whether an awarding authority retains an option to purchase for a nominal sum at the end of the lease term (or whether there is automatic reversion to the awarding authority);
6. Whether the awarding authority initially owned the land and then sold/leased it to the private party; or
7. Whether the awarding authority had the building constructed and then leased the newly constructed building;
8. Whether the facility is of a specialized nature that would render it unsuitable for another commercial purpose without significant renovations.

In our circumstances, we hope to lease 900 Worcester Street to a private entity so that that entity may construct and operate a recreational facility. In return, we hope to get favorable use schedules for Town departments. I don't think a court would decide that such a lease was really a public construction contract, subject to public construction bidding laws. However, it would not be out of the realm of possibility.

## Prevailing Wage

The Massachusetts Prevailing Wage Law, *M.G.L. c.149, §§26-27* applies to the "construction of public works" by the commonwealth, or by a county, town, authority or district. There is no dollar threshold that triggers prevailing wage compliance.

Over the years, the Department of Labor Standards ("DLS") has issued inconsistent opinions on the issue of whether privately-funded projects are subject to prevailing wage. In 2001, the Division of Occupational Safety (now DLS) decided that the following project was not subject to prevailing wage law: an arrangement whereby a private entity licensed piece of land from the Town, constructed a rowing facility on the land and then gifted the facility to the Town. Similarly, in 2006, DLS decided that a private contract to paint a Town Hall performed by private individuals was not subject to prevailing wage law.

However, more recently, DLS has reversed its position on these matters. In 2007, it determined that an agreement with a private organization to build a youth center on Town-owned land with private funds and then turn the building over to the Town was subject to prevailing wage law. In that opinion, DLS reasoned:

While the prevailing wage law does not define "public work," this agency looks to relevant factors such as whether the property is publicly owned, and if public funds are being utilized. In this instance, while private funds will be used to construct the youth center, the property involved is owned by the town. In addition, the youth center will be turned over to the town upon completion of the project. In fact, the ultimate goal of the project is to build a youth center that can be operated and staffed by the town for years to come. Moreover, it is clear from the proposed RFP [for the proposed lease agreement] and development agreement that the Town is very much involved in the

direction of the project. ... A review of these provisions indicates that the development agreement is, in essence, is a call for construction of a public work by a public entity.

Most recently, in February of this year DLS gave the following guidance in an opinion regarding whether the build-out of leasehold premises for use of a charter school is a “public work” being undertaken by a public entity, subject to the prevailing wage law:

in determining the applicability of the prevailing wage law to a particular project, this agency considers the following questions: 1) is the project “construction”, within the meaning of the statute; 2) is the project a “public work” within the meaning of the statute; and 3) is the project being undertaken by a public entity subject to the statute. In general, consideration of whether a project constitutes construction is fairly straightforward. However, in the context of projects which include both public and private elements, such as construction of a charter school in a private building, the analysis of whether the project is a “public works” project and whether it is being undertaken “by the commonwealth, or by a county, town, authority or district” can be more complex.

It appears that DLS now looks at many factors when determining if a particular project or gift is a public work being undertaken by a public entity. Among the factors are the following:

1. Is the project being paid for with public funds?
2. Is the project on public land?
3. Will the facility (or thing) be used by the public?
4. Will the awarding authority be a party to the contract with the contractor?
5. Will the facility (or thing) be turned over to the awarding authority at the completion of the project?
6. Will the facility be staffed or operated by the awarding authority?

It appears that if any of these questions are answered in the affirmative, DLS is of the opinion that prevailing wage applies.

## **Obtaining A Special Act**

In Braintree, the Town opted to obtain a Special Act from the Legislature, which gave it permission to use its own procurement method to find an organization to construct and operate its recreational facility on Town-owned land. I assume Braintree chose this option because it intended to provide financing (\$1.7 Million) toward the project and decided it was easier to obtain permission to utilize their own procurement method, rather than risk having the Attorney General or court determine that the procurement method it chose was incorrect. Their Special Act, [Chapter 151 of the Acts of 2011](#), exempts this lease from the Public Construction Laws and many provisions of the *Uniform Procurement Act*. It specifically states that the *Prevailing Wage Law* will apply to the project. I assume that obtaining legislative approval of an exemption to the *Prevailing Wage Law* may be difficult, if not impossible.