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June 20, 2019

In re:
Holyoke Housing Authority:
Rehabilitation of Lyman Terrace

Protestor:
The Foundation for Fair Contracting of Massachusetts

ATTORNEY GENERAL'S OFFICE

FAIR LABOR DIVISION

BID PROTEST DECISION

INVESTIGATION SUMMARY

Pursuant to G.L. c. 149, § 44H, the Office of the Attorney General, through the undersigned, conducted an investigation to determine whether the Holyoke Housing Authority ("HHA") violated the public construction bidding laws when it failed to bid out the rehabilitation of Lyman Terrace ("project"). The Protestor, The Foundation for Fair Contracting of Massachusetts ("FFCM"), argues that the project should have been bid out under G.L. c. 149, §§ 44A-44H. The HHA and the developer of the project, The Community Builders, Inc. ("TCB"), argue that the project is privately owned and operated, and consequently, the public bidding laws do not apply.

As part of the investigation, a hearing was held on May 28, 2019, attended by the HHA, FFCM and TCB. For the reasons that follow, I find that the parties' agreements and the resulting lease are a call for construction by the HHA. The Protest is, therefore, Allowed. Since the

construction of this project began in 2013, this Decision is prospective only and, therefore, does not apply to this specific project, but will serve as guidance to other awarding authorities.

STATEMENT OF THE FACTS

The HHA constructed Lyman Terrace—a 167-unit public housing development in downtown Holyoke—in 1939. In the Fall of 2012, the HHA, along with the City of Holyoke, Mass. Development, and the Massachusetts Housing Partnership (collectively the "Concept Team") undertook a study to examine the possible redevelopment of Lyman Terrace and the surrounding neighborhood. The Concept Team concluded that rehabilitation of Lyman Terrace would best be accomplished by a private developer. As a result, in August 2013, the HHA issued a public Request for Proposals ("RFP") pursuant to G.L. c. 30B, seeking "a development partner to undertake the redevelopment of Lyman Terrace" which "will involve a long-term ground lease subject to "approval from the U.S. Department of Housing and Urban Development ("HUD")". In the RFP, the HHA noted that proposals for the redevelopment of Lyman Terrace should be informed by the Concept Team's 2012 study.

Request for Proposals

In the RFP, the HHA laid out minimum program requirements for the redevelopment of Lyman Terrace, including that the redevelopment project must accommodate the desires of residents who wish to return, upgrade major mechanical systems, create diverse mixed-finance development, and "provide a keen eye towards walkable design." Additionally, the developer was encouraged to obtain funding for the redevelopment program through historic tax credits, housing tax credits, and state and local subsidy programs. The RFP noted that "[t]he developer, HHA[,] and the City of Holyoke [would] work collaboratively with local, state[,] and federal agencies to identify a variety of resources to support the redevelopment."

As part of the redevelopment project outlined in the RFP, the HHA would prepare HUD grant applications, be responsible for communications with HUD, be prepared to grant or loan the developer HHA funds consistent with meeting program goals, relocate residents from Lyman Terrace, "make financial contributions toward the cost of operating the revitalized community in the form of federal operating subsidies for the public housing units," and "monitor the [developer's] plans and efforts for reaching Section 3 goals and objectives."[1] The HHA intended to enter into a long-term ground lease with the owner of the new development, leaving the option open to "have asset management responsibilities related to the units in which HHA or its affiliate has an ownership interest." In the RFP, the HHA noted that it was "interested in resuming management of the property . . . after a short-term transition period."

The selected developer would be required to "work closely with the HHA staff and Lyman Terrace residents" to oversee and implement the redevelopment plan; provide necessary staffing, expertise, and supervision; submit monthly progress reports to the HHA on the project status and schedule (including but not limited to design, permits, financing, resident coordination, etc.); ensure that the redevelopment project used the highest quality materials; develop and maintain a detailed schedule of events; foster resident involvement in the redevelopment project; and promote and maintain good relations with the community. Further, the developer would be required to provide evidence demonstrating that: no contractors are debarred;[2] to be in compliance with HUD's Section 3 requirements; to maximize contracting opportunities for Minority and Women Owned Business Enterprises ("M/WBEs") and to obtain

[1] Section 3 of the HUD Act of 1968, 12 U.S.C. § 170(1)(u), is intended to ensure that employment and other economic opportunities generated by HUD assistance shall, to the greatest extent feasible, be directed to low-income individuals, including recipients of HUD assistance for housing.

[2] Debarred contractors may not bid on public projects in Massachusetts. *See,* G.L. c. 149, § 27C.

all public and private financing necessary to complete the project. Proposals submitted in response to the RFP were required to include a proposed redevelopment plan that covered the planning approach to the redevelopment project, the number and size of units proposed, and a zoning analysis indicating all anticipated permits and authorizations that will be needed.

The HHA received five proposals in response to the RFP. TCB, a Boston-based nonprofit developer unrelated to HHA[3], submitted a successful proposal and was selected as the developer for the project. TCB's redevelopment plan proposed the substantial rehabilitation of the 167 units in Lyman Terrace to create approximately 160 affordable housing units, the creation of a community facility building, and the creation of new streets and infrastructure. TCB proposed to complete the redevelopment of Lyman Terrace in two phases—Phase 1 would be comprised of approximately 88 units and the new community facility while Phase 2 would be comprised of approximately 72 units. All units were anticipated to be either Section 8 units or public housing units. TCB selected Eastern General Contractors, Inc., a DCAMM[4]-certified general contractor, as the general contractor for Phase 1.

Master Development Agreement

On August 28, 2014, the HHA and TCB entered into a Master Development Agreement ("MDA"), in which TCB agreed to "initiate, coordinate[,] and administer all planning, design, development, financing, construction [,] and management activities in connection with the" redevelopment project, subject to the HHA's reserved rights. As part of the MDA, the HHA and TCB agree to "cooperate with one another to complete" the redevelopment project, including

[3] TCB has developed countless housing developments across the country. Recently, their housing projects in Boston and Somerville were subject to special legislation that excused them from the public bidding laws.

[4] DCAMM is the Division of Capital Asset Management and Maintenance.

expeditious communication with one another regarding approvals and request for information and "regular and frequent meetings" about the project. TCB selected an architect as part of its project team,[5] subject to the HHA's approval. As detailed in the MDA, TCB cannot add any members to its project team or hire any contractors or subcontractors, "unless such members [are] vetted and approved by [the] HHA." The MDA requires TCB to update and revise its budget on a quarterly basis—in consultation with and approval by the HHA—during both the design development process and the construction contract bidding process in order to reflect design alternatives agreed upon by TCB and the HHA. As with the budget, TCB is required to update and revise the preliminary development schedule on a quarterly basis in consultation with and approval by the HHA.

Through the MDA, the HHA executed a loan to TCB for $425,000 for purposes of completing any predevelopment work ("HHA's Predevelopment Loan"). The MDA made a collateral assignment of the predevelopment work to the HHA as security for repayment of the loan. The MDA lays out the terms of the HHA's Predevelopment Loan, which notes that TCB may submit to the HHA "requests for payment of predevelopment costs from the proceeds of the HHA Predevelopment Loan." No request for payment can be approved without a predevelopment budget that has been submitted to and approved by the HHA. Likewise, no request for payment can be greater than the line item in TCB's predevelopment budget without the HHA's prior written approval.

TCB is required to obtain any zoning permits necessary for the redevelopment project and all applications for zoning permits must be submitted to the HHA for review, comment, and approval/disapproval. As part of the HHA's reserved rights, the HHA has the right to review all

[5] The HHA did not follow the Designer Selection Law, G.L. c. 7C, before the architect was selected.

submissions required to carry out the redevelopment plan and has the right to request additional information or modifications. The cost of any materials, equipment, supplies, and other services constituting project expenses are required to be paid out of the budgets established for each phase of the redevelopment project, which were approved by the HHA and TCB. The MDA also requires that TCB obtain the HHA's prior written approval for any specific changes to the predevelopment plan exceeding $50,000 (or $200,000 in the aggregate).

TCB is required to consult with and secure the written approval of the HHA for any third-party advisors and consultants that TCB wishes to retain, including the general contractor.[6] Relatedly, any contracts TCB enters into with third parties (*e.g.* engineers, contractors, and consultants) must be reviewed and approved by the HHA. As part of the MDA, TCB is primarily liable to the HHA if any of the third-parties it hires fail to supply the skill and judgment necessary to complete the redevelopment project in accordance with the requirements laid out in the MDA.[7] The MDA requires TCB to provide independent third-party estimates for the cost of the redevelopment project to the HHA. Subsequently, the HHA has the authority to approve the cost of TCB's estimate and commission an additional cost estimate at its own expense. The HHA also reserves the right to require the general contractor to engage in a competitive solicitation process (which would be subject to the HHA's approval) for sub-contracted services.

As part of the MDA, TCB is responsible for obtaining funding for the redevelopment project. However, all agreements and financing secured by TCB are subject to the HHA's review

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[6] Specifically, the HHA reserves the right approve the selection of one or more general contractors for the redevelopment project. The MDA states that TCB must require the general contractor to provide it and the HHA with a plan for how TCB will meet HUD's Section 3 goals. Such a plan is subject to the HHA's review and approval.

[7] Any general liability insurance, builder's risk insurance, employee dishonesty insurance, and error and omissions insurance, must be submitted to and approved by the HHA.

and approval. Further, TCB must submit all funding applications to the HHA for its review, comment, and approval/disapproval before submission to funding sources.

TCB's plans for the community facility must be approved by the HHA. Once each phase of the redevelopment project is complete, TCB, in conjunction with the HHA and other members of the development team, must inspect the site. TCB will subsequently create an inspection list comprised of defective or incomplete work, subject to the HHA's approval. Once that outstanding or defective work is completed to the satisfaction of the HHA, TCB will "be paid any sums retained by the [HHA]." At the construction closing for each phase of the redevelopment project, the HHA will enter a long-term ground lease with TCB for the portion of the property associated with each phase. At that stage, the HHA will receive payment for the ground lease.

Subject to the Massachusetts Department of Housing and Community Development ("DHCD") and HUD approval, the HHA is entitled to a ground lease payment of not less than $150,000 for each phase and an asset management fee of $15,000 per year with a pro rata portion to be paid from each phase. After each phase of redevelopment is complete, TCB (as the owner of the phase) cannot sell the completed phase without first offering the property in question to the HHA. If the HHA exercises its right of first refusal, it must pay a minimum purchase price equal to the sum of the principal amount outstanding debt secured by the building and all federal, state, and local taxes attributable to such a sale. *See* 26 U.S.C. § 42(i)(7)(B). Additionally, the HHA will have an option to acquire all furniture and equipment for $1.

The Amended and Restated Operating Agreement

On December 1, 2016, the parties executed an Amended and Restated[8] Operating Agreement. This document requires, *inter alia,* that TCB pay the federal prevailing wage rate, known as the "Davis-Bacon[9]" rate, or any other prevailing wage rate required by any lender or project document. To date, the construction workers involved in Phase 1 have been paid at the Davis-Bacon rate.

First Amendment to the MDA

On December 22, 2016, the HHA and TCB amended the MDA and agreed that, upon the construction closing for Phase 1, the MDA would terminate as to Phase 1. Because the ground lease and other closing documents executed in 2016 relative to Phase 1 superseded the MDA, the MDA would no longer bind TCB or preserve any further rights of the HHA relative to the operation or ownership of Phase 1.

Ground Lease

On December 28, 2016, TCB entered into a 75-year ground lease with the HHA for 88 units that were previously a part of the Lyman Terrace public housing development (*i.e.* Phase 1 of the redevelopment project). The HHA retained ownership of the land, and the buildings thereon were leased to TCB. The HHA secured approval from HUD to convert the 88 units from public housing to Section 8 assistance pursuant to HUD's Rental Assistance Demonstration ("RAD") Program. As part of the agreement, the HHA authorizes TCB to redevelop and construct the leased property in accordance with plans that had been prepared by TCB and

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[8] The original Operating Agreement was signed in 2014. This document is not in the record.

[9] See, 42 U.S.C. § 1440 and 24 C.F.R. § 906.37 (requiring Davis-Bacon and HUD wage rates to be paid for rehabilitation, repairs, and accessibility modifications performed under an agreement or contract with a public housing authority).

approved by the HHA. TCB is prohibited from making any material amendments or modifications to these plans without the HHA's approval. The redevelopment project was to be completed within 32 months of the signing of the ground lease.

Like the MDA, the ground lease lays out a number of instances in which TCB must seek the HHA's approval to proceed. For example, the ground lease provides that while working on the redevelopment project, TCB can erect any signs approved by the HHA. Likewise, TCB must erect any signs that the HHA requests "in order to advise the public of [the HHA's] involvement in the [redevelopment project]." If "a decision is made" to restore the remainder of the premises leased to TCB, then TCB and the HHA must agree upon and approve plans to modify the remaining premises.

During the term of the ground lease, all improvements and equipment shall be owned by TCB for the 75-year term and TCB "alone shall be entitled to all of the tax attributes of ownership." In terms of rent, TCB agreed to pay the HHA annual rent payments for the land amounting to $5,200 per year, rent for existing improvements in the amount of $2,325,000 per year, and payment for site improvements in the amount of $1,100,000 per year.[10] TCB paid an initial rent payment of $150,000 in cash at the closing of the lease; the rest of the rent was structured as a deferred obligation at 2.26% interest, paid through cash flow. TCB is also responsible for all costs, expense, and liabilities associated with the redevelopment work at the

[10] As part of the lease, the HHA agreed to conduct improvements on the leased premises and outside the bounds of the leased premises, including stormwater improvements, water and sewer improvements, sidewalk and road improvements, gas and electric service improvements, and streetscape improvements (*e.g.* landscaping, street lighting, curbing, etc.). These site improvements were funded by the HHA under separate contracts using separate funding sources—namely state and grant proceeds. Some of the public improvements were conducted by a contractor that the HHA selected directly through a public bid process. The HHA also separately contracted with a TCB affiliate for the remainder of the site improvements. Because the TCB affiliate was operating on behalf of the HHA and was exclusively funded with grant funds from the HHA, the TCB affiliate also procured a contractor in accordance with the requirements of the public bidding laws.

leased premises. Both the HHA and HUD reserve rights under the ground lease to enforce affordability and other tenant protections for the benefit of the residents.

To finance the redevelopment of Phase 1, TCB assembled over $35 million in funding, including nine loans and approximately $16 million of private equity derived from an allocation of low-income housing tax credits. Of those loans, approximately $1 million came from the HHA; the remainder of the loans were from other public, private, state, and local lenders. The public loans are all at zero percent interest.

The $16 million of private equity is from a private investor that holds a 99.99% ownership interest in Phase 1. As part of the redevelopment project, TCB formed a subsidiary that serves as a "managing member" of the Phase 1 project, with a nominal percentage interest and with control over day-to-day decisions. Major decisions by TCB's managing member are subject to approval rights held by the private investor that holds a 99.99% ownership. The HHA also formed an affiliated entity to serve as a "special non-managing member" in Phase 1 with a 0.001% interest and similar approval rights to major actions, including selling or refinancing the redevelopment project. The HHA also holds an option to acquire Phase 1 approximately 15 years after TCB completes the rehabilitation work if it pays fair market value at the time. Additionally, the HHA holds a right of first refusal to acquire Phase 1 after the same 15-year period if TCB receives an offer to purchase it and if the HHA agrees to pay at least the amount of TCB's outstanding debt plus taxes that would be incurred by the investor (approximately $20 million, including remaining debt and rent due to the HHA).

The tenants of the development entered into leases with TCB in December 2016. The construction of Phase 1 was completed in October 2018. TCB and the HHA are ready to enter into agreements regarding Phase 2. Eastern General Contractors will continue as general

contractor for Phase 2, and the subcontractors have been selected. Both the general contractor and the subcontractors are DCAMM-certified, allowing them to bid on public projects.

ANALYSIS

The issue in this case is whether the public bidding laws apply when a private entity undertakes construction on a housing project that was initially owned by a public housing authority, was initiated by the public housing authority, is funded by public money, serves a governmental purpose, with control over the design and construction process retained by the public housing authority and which may revert to the public housing authority if the authority pays fair market value, within a relatively short amount of time. For the reasons that follow, I find that the public bidding laws do apply in these circumstances.[11]

General Laws chapter 149, section 44A requires a public, competitive bid process for "[e]very contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost over $150,000." This law applies to "*every*" contract; it does not define what types of contracts, such as leases, are included. It also applies to any "building," which need not be a *public* building: the Legislature amended the statute in 1967 to remove the word "public" from the phrase "any public building." *See also Brasi Development Corp. v. Attorney General*, 456 Mass. 684, 696 (2010). The public bidding law is to be strictly construed to effect its remedial purposes. *See Modern Cont. Constr. Co. v. Lowell*, 391 Mass. 829, 840 (1984).

Brasi focused on whether the construction project will assist the public entity in "carrying out its public purposes." *Brasi*, 456 Mass. at 698. The provision of low-income housing is

[11] Neither TCB nor the HHA argued that, had the public bidding laws been followed at the inception of this project, there would have been negative consequences, such as an undue delay or the loss of funding from any source.

undoubtedly a public purpose. *See Opinion of the Justices*, 356 Mass. 775, 795 (1969) (noting that the provision of housing is "clearly and directly" a public purpose). The First Circuit, in *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971), held that the provision of quality low-income housing is a "specific governmental purpose." *Id.* at 784.[12]

In reviewing the many agreements[13] between the parties, it is apparent that TCB must maintain the public purpose of the housing development. For example, the housing units must remain affordable; TCB must: "foster resident involvement in the redevelopment project;" must comply with HUD's Section 3 requirements; must maximize contracting opportunities for M/WBEs; must pay Davis-Bacon wages; and must ensure that subcontractors have not been debarred by a public agency.

The Brasi Analysis

The Court in *Brasi* set out non-exclusive factors for determining whether a lease between a private and a public entity implicates the public bidding laws. 456 Mass. at 697. *Brasi* held that the "totality of the circumstances" surrounding the agreement between the parties included the following factors discussed below.

1. Control Retained by Public Entity During Development and Construction

In *Brasi,* the court found that the public entity had retained significant control over the construction of the building, since it had the right to approve phases of the development plan and to attend weekly construction meetings. *Brasi*, 456 Mass. at 705. In the instant case, the HHA

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[12] The *McQueen* Court further held that a private developer who bought property from the Boston Redevelopment Authority, who was heavily subsidized by public funds and subject to substantial restrictions on the use of the property—including public approval for construction or improvements and limitations on rental agreements as to amount, duration, and increases, admission policies, management and transfer of title—was acting under color of state law. 438 F.2d at 783-84.

[13] The *Brasi* Court did not limit its inquiry to the lease between the parties to discern their intent – it also considered the RFP. *Brasi*, 456 Mass. at 699. In the instant case, *all* of the agreements between the parties must be analyzed.

retains approval rights over the architect, the plans and specifications, the financing, permits, TCB's budget, the general contractor and the subcontractors. The HHA is an indispensable conduit for HUD and state approval and financing. The HHA has the power to approve the construction phases of the project, which was a factor indicating public control in *Brasi. Id.* The fact that the HHA did not exercise all of these rights during Phase 1 is irrelevant, since it is the *retention* of control that is significant. *Id.* at 703.

On balance, the HHA *did* retain sufficient control over design and construction to implicate the public bidding laws. In *New England Regional Council of Carpenters v. MBTA*, Attorney General Bid Protest Decision (April 17, 2018), we found the following factors indicated significant control by the public entity: approval of the design process; input from the public entity into the development plan and the ability to comment on the plans and specifications and make suggestions regarding them. There is similar input and control by the HHA in this case.

The HHA and TCB cite *ASM v. Baystate Charter School*, Attorney General Bid Protest Decision (February 27, 2015), where we found that the charter school did not retain significant control over construction, despite the fact that it had the power to approve all construction plans and changes thereto. This case is significantly different from *Baystate*, however. *Baystate* involved land and a building owned by the private entity, and the desired construction was a build-out, with public entity approval over finishes and schedules. We have consistently held that customization of build-out of private property, by a private party for the benefit of a public entity, is not the same as the full-scale rehabilitation of public property. In two cases prior to *Brasi*, we addressed build-outs of private space that include some level of customization at the

behest of a public entity. Viewing the totality of the circumstances, we found the bid laws did not apply.

In *Sheet Metal Workers International Union v. Registry of Motor Vehicles,* Attorney General Bid Protest Decision (December 2, 2008), we found that a lease and associated construction were not subject to the competitive bidding laws. The RMV's lease was for ten years, as provided for by the state leasing law, G.L. c. 7, §§ 40G & 40H. In order to meet the requirements of the RFP, the developer had to undertake a number of construction activities. This work included the removal of certain walls and the relocation of an electrical panel. The developer hired outside contractors to perform certain aspects of the necessary work, including painting the walls and installing the sprinkler system. Outside contractors were also hired to perform work related to the ceiling grid, counters, automatic entrance doors, furniture, and floor. The developer coordinated the build-out process with the leasing project manager at DCAM[14], and the overseer at the RMV, who remained in touch with the developer throughout the process by both telephone and e-mail. The RMV chose the paint colors, carpets, and countertops for the space and answered other questions from the developer about how to satisfy the requirements of the RFP.

Viewing the totality of the circumstances, we found that the *RMV* case involved the common situation wherein a private property owner, entirely independent from a public entity, purchased land or a building for private commercial profit, undertook construction of its private property and, acting as a private landlord in its own interests, offered to lease it to a public entity in an arms-length transaction.

[14] DCAMM was formerly known as the "Divison of Capital Asset Management" or "DCAM."

In *Everett Mills Real Estate, LLC v. DCAM*, Attorney General Bid Protest Decision (July 28, 2011), the protestor argued that DCAM controlled the details of a private landlord's build-out of space for a public entity. DCAM's space allocation and finish schedule called for a build-out with 341 offices and shared support space as well as one Main Distribution Frame Area, four Intermediate Frame Areas, one staff support area, one central copy/mail center, ten interview rooms, one reception area, one waiting/seating area and four client restrooms. DCAM specified the exact square footage of each office and area. Any modifications to the landlord's improvements had to be approved by DCAM. During the final phase of the Working Drawings, the landlord had to submit for review, color selection, cuts, samples, and color swatches necessary to show the manufacturer's product line for any new finishes. The submittals covered included wall, floor, ceiling, and architectural-woodworking finishes and materials. We found that the public bidding laws did not apply to that build-out of private space.

Build-outs and customization of privately-owned commercial space, acquired as a leasehold by a public entity in an arms-length commercial transaction, are significantly different from the total rehabilitation of buildings on public land, which is dependent on the participation of a public entity for its existence. TCB's and the HHA's reliance on the *Baystate* decision regarding the degree of control maintained by the public entity is therefore misplaced.

2. Length of the Lease

This 75-year lease is for a long term; however, the HHA has the right of first refusal and the option to buy back the buildings from TCB in 15 years. These rights are a function of the Internal Revenue Code's Low Income Housing Tax Credit provisions, 26 U.S.C. § 42 (i)(1). *See also* G.L. c. 40T, § 3 (requiring an owner of a public housing facility to offer its property to DHCD prior to sale to another party). The *Brasi* Court found a 15-year term, with reference to

the RFP (but not the 30-year lease), to be short, since it did not indicate indefinite control by the public entity. *Brasi*, 456 Mass. at 704. In the instant case, the term of the lease must be viewed in light of the fact that, unlike *Brasi,* TCB is the tenant and the HHA is the landlord. The potential short term is the opposite of the long-term lease found to implicate the bidding laws in *Brasi.* The public bidding laws may apply where the public entity may regain control in a relatively short period of time. The HHA's option to purchase and the rights of first refusal indicate that the bidding laws apply, since TCB may only hold the buildings for 15 years.

3. Whether the Source of Money is Public Funds.

The *Brasi* Court did not consider whether public funds were the source of the money for the construction of that project, since a record of the financial terms of the project had not been developed in the lower court. *Brasi*, 456 Mass. at 707. The Court did indicate, however, that this may be a factor to be considered in the "totality of the circumstances" analysis. *Id.*

The funds for this project are both public and private. Low- or no-interest, long-term state and federal loans are involved as well as federal and state tax incentives. These financial terms would not be available to a lessee in a purely private, arms' length transaction. Indeed, the HHA and TCB admitted that the project would not exist but for the existence of these long-term, no-interest loans.

The grant of tax breaks (such as incentives) has been found by the Supreme Court to be the equivalent of direct governmental subsidies. In *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 157–58 (2011), the Court compared "special tax benefits" and "cash grants":

> Tax breaks "can be viewed as a form of government spending," *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 589–590, n. 22 (1997), even assuming the diverted tax funds do not pass through the public treasury… Both special tax benefits and cash grants "represen[t] a charge made upon the state," *Committee for Public Ed. and Religious Liberty v. Nyquist,* 413

U.S. 756 at 790–791, both deplete funds in the government's coffers by transferring money to select recipients.

Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 157–58.

TCB cites a 2005 letter from Assistant Attorney General Jed Ruccio of the Attorney General's Bid Unit to DHCD, in which he concluded that tax credits, public loans and public grants do not turn a private project into a public one. Note, however, that this letter was pre-*Brasi;* there was no finding of significant control by the public entity and the lease term was for the useful life of the building, with no apparent right in the public agency to acquire the buildings in the short term.

A finding of public money is not essential to a finding that the public bidding laws apply. *See generally Brasi*, 456 Mass. 684 (holding that the bid laws apply even though the Court did not reach a conclusion on whether the source of funds for that project were public). In the instant case, however, the entire project would not exist but for the substantial federal, state and local monies earmarked for the project. This indicates that the public bidding laws do apply.

4. Whether Payments Made Under Agreement Cover Costs of Construction

The rental payments made by TCB to HHA do not cover the cost of construction. They only cover the appraised as-is value of the buildings and the site improvements funded by the HHA. This factor, in and of itself, does not implicate the public bidding laws when viewed in isolation. However, the fact that the HHA may buy back the buildings at fair market value, as discussed *infra* at page 18, does indicate that the bidding laws may apply. In addition, TCB will rely on the HHA as the flow-through for HUD rental subsidies, which will be used to defray the costs of construction. Another pertinent inquiry is whether the rents and subsidies received by TCB equal the costs of construction, but there was no evidence offered by the parties on this point. At the very least, the rents and subsidies received will help to cover TCB's construction

costs. Public money is therefore being used to pay the costs of construction. This indicates that the public bidding laws do apply.

5. Whether the Public Entity Retains an Option to Purchase the Property for a Nominal Sum at the End of the Lease Term

Once again, this *Brasi* factor must be adjusted when the public entity is the landlord rather than the tenant. Here, the HHA must pay fair market value if it wishes to buy back the buildings. This would include the cost of the improvements paid for by TCB, suggesting that HHA might ultimately pay for the construction. This indicates that the public bidding laws do apply.

6. Whether the Public Entity Initially Owned the Land and Sold or Leased It to a Private Party.

The land and buildings were owned by the HHA, and the buildings were leased to TCB. This factor is met in the instant case and indicates that the project is subject to the public bidding laws.

7. Whether the Public Entity Initially Had the Building Constructed and Then Leased the Newly-Constructed Building.

This factor applies when the public entity owned the land, conveyed it to a private party, then leased it back from the private party. This is not a consideration in the instant case.

8. Whether the Facility Is of Specialized Nature that Would Render It Unsuitable for Another Commercial Purpose Without Significant Renovations

As in *Brasi,* the housing units are not specialized, and could be used as private apartment buildings without significant renovations. This tends to indicate that the project is not uniquely public.

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In sum, considering the totality of the circumstances, I find that application of the *Brasi* factors leads to the conclusion that this project is subject to the public bidding laws.

Other Factors Indicating the Public Nature of the Project

I find that the following additional factors indicate that the public bidding laws apply. First, federal Davis-Bacon prevailing wages apply to the project.[15] Regulations issued pursuant to 40 U.S.C. § 3145 define "public work" to include a "building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency." 29 C.F.R. § 5.2(k).

Second, the HHA financed the site improvement which facilitated TCB's renovation of the buildings. The *Brasi* Court noted that this type of public-private interdependence was significant:

> We also deem critical several provisions that were added to the lease agreement that were not part of the RFP, particularly the facts that the new facility depends on other property already owned by the university, and that the university is granting Brasi an easement, apparently unlimited in duration, for use of university land.

Brasi, 456 Mass. at 700. In addition to the site improvements, this interdependence is also demonstrated by the fact that TCB will rely on HHA as the flow-through for HUD rental subsidies, which will be used to defray the costs of construction.

The Applicability of this Decision

Since the construction of this project began in 2013 and is ongoing, this Decision is prospective only. *See, e.g.*, *Sheet Metal Workers International Union, Local 17 v. Burlington*, Attorney General Bid Protest Decision (July 3, 2018) (it would be inequitable to penalize a

[15] This Office does not jurisdiction to decide whether the State Prevailing Wage Law, G.L. c.149, §§ 26 *et seq.*, applies to this project. The Massachusetts Department of Labor Standards ("DLS") makes applicability determinations. FFCM should seek an opinion letter from DLS regarding this project.

contractor who has been working on the project for three months, when the error was made by the Town). Although the "totality of the circumstances" test is necessarily fact-specific, this Decision is meant to provide guidance for awarding authorities in the future.

CONCLUSION

In light of the foregoing, the project is subject to the public construction bidding laws. The protest is Allowed.

Respectfully submitted,

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