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**Municipal Client Advisory
May 2012**

**SUPREME JUDICIAL COURT:
Municipal Awarding Authorities May Conduct Their Own
Investigations Outside Of DCAM Records To Determine Bidder
Responsibility In Public Building Construction Projects**

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Yesterday, May 3, the Supreme Judicial Court issued a decision that significantly impacts communities across Massachusetts. In *Barr Incorporated v. Town of Holliston*, SJC-10899 (May 3, 2012)(slip opinion), the Supreme Judicial Court held that Massachusetts General Laws Chapter 149, the Commonwealth of Massachusetts Public Building Construction Statute, does not limit a municipal awarding authority, in making a determination of bidder responsibility, to consideration of materials collected by the Division of Capital Asset Management and Maintenance. Instead, a municipal awarding authority may conduct its own independent investigation into the past qualifications and performance of an individual bidder.

For decades, public construction projects in the Commonwealth of Massachusetts have been required to be awarded to the lowest “responsible” and “eligible” bidder. A bidder is required by statute to submit so-called “Certificates of Eligibility” from the Division of Capital Asset Management (DCAM), as well as “Update Statements” concerning their past assessments on public projects. *Barr Incorporated* focused upon the Town of Holliston’s process for determining that Barr Incorporated, the low bidder for a new police station project, was not a “responsible” bidder. After reviewing Barr Incorporated’s DCAM file, the Town of Holliston (the Town), through its police detective, conducted a separate internet search regarding the Barr Incorporated’s past work for multiple municipalities in Massachusetts. The Town learned that, of eighteen public projects awarded to Barr Incorporated, seven had resulted in “negative experiences” for the respective municipal clients. Following a determination by the Town that Barr was not a “responsible bidder,” Barr filed a Complaint in Superior Court against the Town, claiming that the investigation fell outside its scope of authority under M.G.L. c. 149.

Affirming the Superior Court’s decision to deny Barr Incorporated’s request for injunctive and declaratory relief, the Supreme Judicial Court concluded that the Town was not precluded from conducting its own investigation in determining the responsibility status of a given bidder. The Supreme Judicial Court emphasized its reasoning in *Capuano, Inc.*

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v. School Bldg. Comm. of Wilbraham, 330 Mass, 494 (1953) and *Fordyce v. Hanover*, 457 Mass. 248 (2010), that the final determination of bidder responsibility remains the municipal awarding authority, and not DCAM. According to the Supreme Judicial Court, independent investigations are critical to a responsibility determination, since DCAM’s “certification file may exclude a significant portion of the work history of contractors with extensive experience, or with experience primarily in private sector construction projects.”

The Supreme Judicial Court’s decision in *Barr Incorporated* clearly confirms a municipal awarding authority’s ability to conduct an independent investigation of a bidder in determining whether it is “responsible” By obtaining a wide range of information, a municipal awarding authority may glean facts omitted from a bidder’s DCAM file. All municipal awarding authorities should note that while their authority in making a responsibility determination is broad, it is not without limits. “Where an awarding authority rejects a bidder ‘for lack of competence,’ that decision should be ‘justified on the record’ compiled by the authority.” Moreover, the Court stated that “[w]here an awarding authority decides to supplement the record before it as to one bidder but not as to another, that decision should also be justifiable on the record, as should an awarding authority’s decision to deny a bidder any opportunity to respond to the results of an independent investigation.” Therefore, any determination concerning bidder responsibility beyond DCAM’s records should be material and justifiable on the record. It is also critical, to honor fairness principles, to conduct a similar inquiry with respect to any bidder to whom the contract might be awarded.

***If you have any questions or concerns with regard to this alert, please contact
Bryan R. Le Blanc or the attorney assigned to your account.***

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