



Municipal Client Advisory
July 2010

**Supreme Judicial Court Upholds Town's Right to Exercise
Discretion under the Pre-Qualifications Statute:
\$46,000,000 School Construction Project Continues**

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The Massachusetts Supreme Judicial Court issued a critical decision this month which enabled the Town of Hanover to proceed with its forty-six million dollar (\$46,000,000) high school construction project, on schedule and within budget, almost ten months after construction commenced.

In Fordyce et al. v. Town of Hanover et al., SJC-10643 (July 9, 2010), in which Murphy, Hesse, Toomey & Lehane, LLP, represented the Town, ten taxpayers filed an action against the Town and the General Contractor, Callahan, Inc., arguing that the General Contractor had made misleading statements regarding a past construction project in response to the Town's Request for Qualifications. The ten taxpayers did not say that the Town, an innocent party, had committed fraud, but that the Town was powerless to waive any possible misrepresentations made by a contractor candidate during the pre-qualification process. The Supreme Judicial Court held that "no fraud" was present, since the Town of Hanover Pre-Qualification Committee had knowledge of what actually occurred in the past construction project and consciously decided to qualify the General Contractor. The Supreme Judicial Court thus confirmed that the concept of "fraud," as a basis for overturning the decision of a municipal pre-qualification committee under M.G.L. c. 149, §44D½, requires not only a material misrepresentation, but also a detrimental reliance upon such a statement.

"The Supreme Judicial Court's decision was a key victory for pre-qualification committees in the midst of the public construction process" said James Toomey, a partner at Murphy, Hesse, Toomey & Lehane, LLP, who successfully argued the case on behalf of the Hanover Public Schools. "The Supreme Judicial Court's decision allows the project to proceed and confirms that cities and towns in the Commonwealth may exercise sound discretion in choosing to proceed with pre-qualification notwithstanding any perhaps inartful statements of a particular contractor regarding past work."

The Hanover School Building Committee maintained throughout the case that it had not been subject to fraud as it was aware of all the facts and had considered them in establishing the General Contractor's pre-qualification. Although the Attorney General



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and Superior and Appeals Court justices rejected the Committee’s contentions, the Supreme Judicial Court justices unanimously agreed with the Building Committee and allowed its decision to stand.

The local pre-qualification committee, the Supreme Judicial Court noted, exercised sound discretion in making decisions during this process. This discretion, the Supreme Judicial Court most importantly reasoned, is not curtailed under circumstances in which a pre-qualification committee learns that a general contractor has made misrepresentation in any filing, including a response to a Request for Qualifications. A pre-qualification committee may choose to pre-qualify that contractor under the circumstances, provided that it has not been deceived in any way during the process.

Had the Supreme Judicial Court held otherwise, the ramifications could have been significant for cities and towns as well as contractors across the Commonwealth. In construction projects estimated to cost in excess of \$10,000,000, where pre-qualification is mandatory, pre-qualification committees would have been forced, regardless of their own knowledge and investigation, to disqualify any general contractor candidates which had made any factual misstatement in their Statement of Qualifications. The Fordyce decision protects the integrity and recognizes the nuances of the pre-qualification process, while acknowledging the due diligence undertaken by pre-qualification committee members.

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Murphy, Hesse, Toomey & Lehane, LLP is a full-service law firm with offices in Quincy, Boston, and Springfield, Massachusetts. The firm represents a wide range of public entities and private corporations throughout the Northeast. For questions about the Hanover decision, and its impacts on the municipal bidding process, interested parties should contact Attorney James A. Toomey or Bryan R. Le Blanc at (617) 479 - 5000, or contact the attorney assigned to your account.

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