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MEMORANDUM

To: Massachusetts Municipal Association November 10, 2004 Conference Attendees

From: Christopher J. Petrini

Date: November 10, 2004

Re: Construction Reform Legislation
Chapter 193 of Acts of 2004
Comments from the field: Key Issues for Municipalities

Chapter 193 of Acts of 2004, An Act Further Regulating Public Construction in the Commonwealth (Construction Reform Act), enacted comprehensive changes to the public construction scheme in Massachusetts. While I will be speaking on the design-build aspects of the legislation today, I wanted to provide you with a summary of several key issues that the law presents for municipalities.

Five issues that should be considered include:

1. **Immediate effective date.** With the exception of two sections (pertaining to subbidder certification and alternative delivery systems), most of the Act's provisions became effective immediately upon enactment, on July 19, 2004, by virtue of an Emergency Preamble included with the legislation. The impact of this immediate effective date is that most if not all of the Commonwealth's cities and towns were placed in positions of non-compliance. Each ongoing project will need to be examined by counsel and local officials to determine if the project is in compliance and, if not, how to bring it into compliance moving forward.
2. **Owner's Project Manager:** Owner project managers are now required for projects of \$1.5 million or more. Cities and Towns must enter into a contract with a qualified project manager before entering into a project for design services. The Project Manager can be a public employee or official of the municipality if he/she possesses the requisite experience. How do municipalities choose such individuals? How do they assure they are picking the right person? How do municipalities achieve quality assurance?
3. **Prequalification of General Contractor and filed subbidders:** Prequalification is now required by awarding authorities where construction costs are estimated to be greater than \$10 million, and optional at projects between \$100,000 and \$10

million. Construction Reform Act, Section 19--How to implement? How to comply? RFQ/Bidding Process; Prequalification Committee. DCAM is promulgating regulations and guidelines. Do municipalities have the expertise and staff resources to effectively conduct such prequalification?

4. **Affirmative marketing program plans for MBE/WBE:** Now required on state-assisted (broadly defined to include reimbursements, grants, etc.) How to implement? How to comply? DCAM and SOMWBA will work to develop applicable guidelines that will be published in the Central Register but what will these regulations require?
5. **Alternative Delivery Systems:** Chapter 149A permits and creates Construction Manager at Risk for public building projects (vertical construction) and Design-Build for public works projects (horizontal construction) as acceptable alternative delivery systems for public construction. For each of these delivery methods, prior approval is required from the Inspector General and the project must be estimated to exceed a value of \$5 million or more. These are potentially attractive alternative delivery methods but do our municipalities have the considerable expertise necessary to obtain IG approval and utilize these alternative delivery systems? Will these methods result in better quality construction at a lower price?

Other unknown challenges to municipalities are bound to arise in the implementation of Construction Reform Legislation but the five issues noted above are worthy of consideration at the early stages of implementation of this important legislation.