Legal Considerations Affecting the Use of Public Sector Project Labor Agreements: A Proponent's View

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I. *Introduction*

The debate in academic writings and in the courts over the use of project labor agreements (PLAs) on public works construction has been marked by emotionally polarized arguments directed at a particular result. This is particularly true of the opponents who believe the use of PLAs should be banned absolutely and who seek rulings to that end. Arguments directed at the extremes are, however, too simplistic. They do not accurately portray the governing legal principles nor do they fairly balance the factors that a public body should weigh in deciding whether to adopt a PLA.

PLAs are collective bargaining agreements designed for particular projects; usually, but not exclusively, large, long-term projects. In addition to setting standardized and specially tailored terms to apply to such projects, they have as their purpose and effect the creation of a system for labor relations management, stability, and accountability — a "private governance mechanism," as one commentator phrased it.[1] They have performed that function well. In the public sector, significant advances have been made in the procedural and economic terms of PLAs.

My thesis as a "proponent" is that PLAs are an important tool for effective labor relations management on construction projects which should be available to public as well as private owners. They are neither always good nor always bad. Rather, their use should be evaluated in the context of each project. Moreover, the debate and legal adjudication should be conducted with a focus on the public interest, not the interests of the bidders, the unions, or the employees. That, in fact, is what the majority of the courts have done in the cases to date with mixed outcomes, though the PLAs that have been approved decidedly outnumber those that have been invalidated.[2] The better reasoned decisions have fashioned standards, consistent with the applicable labor laws and competitive bidding statutes, to guide the public entity in making its decision.

It is increasingly evident that litigation holds little prospect for the judicial silver bullet PLA opponents have sought to eliminate their use in the public sector. The real battle for the opponents is consequently becoming a fight for the public mind and only secondarily a dispute over the operative legal principles. As the recent attack on

President Clinton's proposed Executive Order on PLAs demonstrates, opponents seek to prevent even the "consideration" of PLAs for federal or state public works.

Consequently, the arguments made in forums like this one and in the courts tend to bog down in the personal interests of the parties. Litigating simultaneously in the media and the courts, the rhetoric is loud and biased. Objective analysis of facts and correct application of appropriate legal standards become casualties of the conflict. If this symposium helps to reduce the volume and encourages dispassionate analysis of the PLA phenomenon, it will serve a laudable public purpose.

II. *Background*

Before the Supreme Court decided the "*Boston Harbor*"[3] case in 1993, the number of times a court had considered the legal status or parties' rights under PLAs could probably have been counted on the fingers of one hand. And, in those cases the fact that the agreement in the controversy was a PLA was incidental to the litigation.

That PLAs have long been in use on private and public works projects, without being singled out among labor agreements or as bid specifications, is telling about the change in the attitudes of affected parties. The Building Trades were for a long time ambivalent about these agreements, and still today, the unions are not of a single voice on their use. As long as the agreements were used on private work, the Associated Builders and Contractors, Inc. ("ABC"), the contractor group leading the offensive today, was limited in its opposition to largely impotent attacks under the National Labor Relations Act. With the visible use of PLAs on two mega projects in Boston, ABC apparently recognized that these agreements could position unions to increase their representation of workers on public sector construction and give union contractors a competitive step up to win work. Maybe it was even believed that these agreements actually excluded nonunion bidders, though that is not in fact true in Boston or elsewhere as the courts have said. In any event, the succeeding four years has seen a proliferation of these agreements and an equal proliferation of litigation challenges, virtually all of them brought by an ABC affiliate.

III. *Legal Framework*

The legal framework in which the use of public sector PLAs is discussed has been misused and misunderstood. Most of the legal principles essential to the discussion are principles about which opponents and proponents will not disagree. They lie at the heart of virtually every case so they are properly set out here:

1. PLAs are so-called "pre-hire" collective bargaining agreements negotiated before any workers have been hired. They are specifically made lawful by the National Labor Relations Act. See Section 8(f), 29 U.S.C. §158(f).[4] They are multi-union agreements negotiated with all the trades having jurisdiction over the work. Their legality does not depend on whether the construction project to which any are applied is a public works or a private

construction project. Nor is the legality of these agreements in any way affected by state labor law or constitutional provisions, including the often-cited right-to-work statutes of several states. The paramount federal scheme of labor regulation would override any state provision making such agreements invalid in that state.[5] "When the exercise of state power over a particular area of activity threaten[s] interference with the clearly indicated [federal] policy of industrial relations [embodied in the NLRA], it [is] judicially necessary to preclude the states from acting." *San Diego Bldg. Trades Council v. Garmon.*[6]

2. Subcontracting provisions in construction labor agreements requiring all site contractors to be signatory with the participating labor unions or to recognize particular labor unions as the bargaining representative of all workers at the site of construction are also lawful. See Section 8(e) of the NLRA, 29 U.S.C. §158(e).[7]

3. In 1993, the U.S. Supreme Court in *Boston Harbor* ruled 9–0 that state and local governmental bodies when acting as purchasers of construction services may mandate the use of PLAs on public works projects without intruding on federal labor policy or violating national labor laws.[8] *Boston Harbor did not* decide whether PLAs are consistent with state competitive bidding laws, but the Court *did* intimate that a state law or regulation denying the use of PLAs on public works projects might itself be preempted.[9]

4. Under the case authority to date, the use of PLAs as bid specifications for public works projects is neither absolutely permitted nor absolutely prohibited by state competitive bidding laws.[10] Even New Jersey, which has taken the most restrictive view of PLAs and has so far invalidated the two that have reached its highest court, has said that government specifications requiring the use of a PLA may be lawful in New Jersey in appropriate circumstances. The Court cited the New York project to refurbish the Tappan Zee bridge across the Hudson River as an example. See *Tormee Constr., Inc. v Mercer County Imp. Auth.*.[11] The bid specification applying a PLA to cover that project was approved by New York's Court of Appeals.[12]

5. The same fundamental purposes underlie the competitive bidding laws of virtually every state, namely:

   (1)". . . to guard against favoritism, improvidence, extravagance fraud and corruption; to prevent the waste of public funds; . . . to obtain the best economic result for the public" and (2) "to stimulate advantageous competition" *Domar Electric, Inc. v. City of Los Angeles.*[13]

6. Conditioning the award of a public works project on the union affiliation or nonunion status of the bidder is unlawful in most states.[14] Except in special circumstances discussed below, bidding must be open to all qualified bidders without regard to whether they are union or nonunion contractors.

7. The competitive bidding laws of most states require award of public works construction projects to the "lowest *responsible* bidder" which is not necessarily the "lowest *cost* bidder."[15] A "responsible" bidder is one whose bid conforms to the "essential" specifications of the project.[16] A PLA would be a material or "essential" bid specification; i.e., one affecting price, quantity, quality or delivery of the procurement.[17] Consequently, a bidder who submits a bid refusing to comply with a lawfully adopted PLA is not "responsible" even though its bid may be lower than the lowest bidder who agrees to comply.

8. The competitive bidding laws are for the benefit of the public, *not* the bidders, the unions or the construction workers, whether they are union or nonunion.[18]

9. No court has invalidated a PLA as a bid specification on grounds of ERISA preemption, antitrust principles of the Sherman Act, state labor laws, or federal or state constitutional rights or prevailing wage laws though these claims are routinely added as allegations in the opposition's complaints.[19]

If there is so much agreement on the operative legal principles, how then can there be room for legal challenges? The answer lies in the application of the competitive bidding law principles set out above and the divergent interpretations the challengers and the defenders urge the courts to place upon them.

Equally important to the debate are the differing facts and figures each side puts forward. Because the use of PLAs in the public sector has taken on significance only recently, the facts that are relevant are only beginning to develop. Moreover, neither side of the debate has been able to cite to a complete, time tested, and reliable PLA track record. The debate, even over what kinds of facts are relevant, is not yet fully resolved. Consequently, there is much room between the parties for differences. The full understanding of the legal considerations affecting the use of PLAs in the public sector necessarily comes down to a review of the elements of the competitive bidding laws and their application to the PLA bid specification.

III. *The Application of Competitive Bidding Law Principles*

It is important to note that public officials are empowered with the basic discretion to fashion bid specifications as necessary to further their statutory mission. The courts will normally grant the officials broad discretion in establishing contract specifications unless the officials have abused that discretion or acted arbitrarily.[20] The only limitation on this discretion imposed by law is that any restrictions within a bid specification must be reasonably related to and serve the public interest. Their decisions are, of course, evaluated against the purposes of the competitive bidding laws referenced above. From those purposes, three fundamental inquiries can be framed, namely:

1. Does the specification impermissibly restrict competition?

2. Is the specification the product of fraud, favoritism, improvidence or corruption?

3. Is the specification consistent with the prudent use of public funds?

These are the only relevant areas of judicial inquiry. Unless the facts or the arguments are directed at one of these three issues, they are of no concern to the legal analysis. For example, it is often contemplated that PLAs should be ruled illegal because under these agreements a nonunion contractor's employees will be referred from the unions and a bargaining representative will be imposed on the workers. This contention means nothing to the legality of the bid specification unless it has reference to one of these three inquiries.[21] This is not to say that a number of the PLA-specific issues do not bear on the resolution of these questions, but it is to say that they do not constitute an independent self-standing basis on which to urge a court to overturn a PLA specification.

The Impact of Project Labor Agreements on Competition. Courts interpreting the effects of a bid specification on bidding competition look first to determine if the specification is "exclusionary." That is, does it actually foreclose otherwise qualified bidders from bidding at all? If the specification does not exclude bidders, the court determines next whether the specification restrains competition to an impermissible degree. A lesser standard of scrutiny is applied to nonexclusionary bid specifications. Opponents claim PLAs do both.

As a general proposition, any bid specification that excludes a class of bidders is unlawful unless the exclusion is both "rational and *essential* to the public interest" and can be justified on that basis.[22] An example of a properly exclusionary specification is where a product being sought is unique and only one or a very limited number of manufacturers can satisfy the requirement. The fact that a specification may restrict the qualified companies to a limited few will not render the specification invalid if the test of "essentiality" is satisfied.[23] For example, if a PLA were to state that only union contractors, that is, contractors who *at the time they submit their bid* are union, are eligible to bid, that specification would *exclude* nonunion contractors from the procurement. The specification would be unlawful unless it was shown that limiting the eligible bidders to union contractors was both rational and essential to the public interest. Such a specification would be very difficult to justify, if it is possible at all.[24]

Public sector PLAs are not, in any case, exclusionary. Every PLA negotiated in the public sector today, allows *any* contractor to bid regardless of its status as a union or nonunion contractor, provided only that it agree to work under the terms of the PLA.[25] It is, therefore, inaccurate to say that PLAs are exclusionary by their terms. The facts are that large numbers of nonunion contractors are bidding on public works projects covered by PLAs and are winning the work. They have also performed the contracts under the PLA's terms without incident *and have come back for more.*[26]

In the face of this evidence, the opponents have redefined the form of the alleged "exclusion" and have so qualified it as to render it legally meaningless.

Rather than claiming they have been precluded from bidding on the PLA-covered projects, the opponents now claim to have been "excluded" from *performing* the work *as* nonunion contractors.[27] Of course, every valid bid specification limits a contractor's freedom in the execution of the work in some way. The opponents are only protesting a requirement with which they are able to comply but which they do not like. New York's Court of Appeals affirmed the nonexclusionary effect of the PLA in the *Thruway Authority* case and in the process spoke implicitly to the opponents' new "exclusion." The Court said, "The fact that certain nonunion contractors may be disinclined to submit bids does not amount to the preclusion of competition we identified in *Gerzof* as violative of the competitive bidding mandate."[28]

Necessarily then, the analysis of the competitive effects of PLAs must be made under the lesser scrutiny applied to nonexclusionary specifications. The courts have sidestepped any factual analysis of whether PLAs are in fact anticompetitive. Instead, they have simply assumed that they are.[29] There are few cases in which bidding statistics have been presented to the court for consideration on this issue. In those cases, the statistics show that under the PLAs the numbers of nonunion bidders are significant and the absolute numbers of bidders reflect vigorous competition.[30] Therefore, it is likely that some courts have too readily reached the conclusion that a PLA is anticompetitive when the evidence contradicts that as a universal effect.

Given the emphasis the competitive bidding laws place on this factor, however, and the willingness of the courts to assume that they are anticompetitive, defenders of PLAs in litigation and in the public eye are swimming against the current. Statistics developing on the number of bidders and their diversity between union and nonunion contractors on public projects where PLAs are being used should, over time, change this ready assumption by the courts. Fortunately, the assumption, however unproven, is not fatal to the ability of the public authorities to use PLAs when supported by the factors that satisfy the remaining inquiries.

Accepting for purposes of argument that PLAs are anticompetitive, they may still be lawful, because the degree of restriction is not so great as to reduce competition to an unacceptable level. In most states — with New Jersey as the notable, and so far only, exception — the competitive bidding laws require only that bid specifications "foster" or "promote" honest competition. In most states this has not been interpreted to require competition for competition's sake. Only New Jersey's competitive bidding statute has been interpreted to require "maximum" or "unfettered" competition.[31]

Project Labor Agreements Do Not Result from or Confer Favoritism, Improvidence, Fraud or Corruption. The most frequently cited of the grounds for invalidating a PLA bid specification is that PLAs confer favoritism on the unions or the union contractor bidders.[32] Arguing that the decision by the public agency is the product of union lobbying efforts, the opponents complain that the public officials do not make the decision on objective grounds, but are instead "dispensing favors to the unions." The argument focuses on the wrong party. The usual application of this principle has to do with favoring a single bidder over all others in fashioning a bid specification

that only one bidder can satisfy.[33] As framed by the opponents, the "favors" are dispensed, if it is true that any favors have been given, to third parties — the unions — who do not participate in the competition. In the usual PLA context, all bidders *can* meet the specification.

That nonunion contractors may be less willing than union bidders to meet the specifications, or, as they claim, they lose a competitive advantage they normally enjoy, is also not the proper concern of the competitive bidding laws. The competitive bidding laws do not guarantee equality among bidders in their ability to perform, only equality in the opportunity to bid.[34] Union and nonunion contractors do have equal opportunity to bid. Moreover, nonunion contractors in some PLAs have been given an advantage over their union competitors in being allowed to staff the craft work force with a percentage or ratio of members of their usual employee complement and union referrals, while union contractors are not granted the same entitlement.[35]

The New York Court of Appeals answered the allegation of favoritism more convincingly than the court did in *Harms*, focusing on the correct party in interest:

> Importantly, the PLA cannot be said to promote favoritism or cronyism because the PLA applies whether the successful bidder is a union or nonunion contractor and discrimination against employees on the basis of union membership is prohibited. The fact that certain nonunion contractors may be disinterested to submit bids does not amount to the preclusion of competition we identified in *Gerzof* as violative of the competitive bidding mandate. 88 N.Y.2D at 71.

Unless a particular PLA is shown to have been clearly motivated by an attempt to confer advantage in the bidding process, challenges should not be successful on these grounds. However strongly the opponents believe that the public agency decision is a response to union overtures, they will ultimately find that the adoption of a PLA is done with objective deliberation on the merits and an active insistence that the project bidding opportunities be open to all.

Prudent Use of Public Funds. The courts have not settled on how the cost impact of PLAs is to be evaluated. After the New York Court of Appeals' strong reliance on the cost savings predicted by the Authority's consultant in *Thruway Authority*, the challengers have urged the courts to require an estimate of the PLA's financial impact and to make a showing of savings the prerequisite for an agreement's validity. While a reasonable prediction of significant savings will all but immunize the agreement from attack, there is no body of case law making such savings necessary to save a PLA or any other specification from illegality.[36]

The various statutory and judicial terms used to describe this component of the competitive bidding principles speak only of avoiding the "waste" of funds and "protecting the public fisc."[37] While the goal of the competitive bidding laws is to obtain "the best work at the lowest possible price,"[38] there is no requirement that each specification affirmatively *save* money to be lawful. The only the requirement is that the specifications not waste money.

Contrary to the common perception of the *Thruway Authority* holding, the court did not place ultimate reliance on the estimated savings predicted to result from the PLA. Rather, the court said:

> . . . in adopting a PLA the Authority assessed specific project needs and demonstrated that a PLA was directly tied to competitive bidding goals. . . .
>
> The Thruway Authority's detailed focus on the public fisc — both cost savings and uninterrupted revenues — the demonstrated unique challenges posed by the size and complexity of the project, and the cited labor history collectively support the determination that this PLA was adopted in conformity with the competitive bidding statutes. 88 N.Y.2d at 71.

In most instances the public officials can only make a reasonable estimate of the economic benefits and that is all that can be expected or required. Numerous terms of PLAs have been negotiated that do have a positive impact on costs. These cost savings, some of which are discussed below, can be both direct and tangible while others are no less real but are very much dependent upon circumstances tied to the operation of the project.

Wage and Related Economic Terms. On public works, the prevailing wage applied to both union and nonunion contractors equalizes the wage rates and fringe benefit components for both groups and eliminates the largest economic difference that exists between them on private works projects. The remaining economic terms (e.g., overtime, travel pay, shift differentials, show-up time) and other elements, such as apprentices, holidays, starting times, and workweek definition, will vary in their economic impact. Other provisions, such as the no-strike commitment, grievance procedures, jurisdictional dispute procedures, and labor-management administrative and safety committees are also economically beneficial to the project but an estimate of their cost benefit is difficult to make.

In one area actual savings from the use of a PLA can be predicted. Many states have adopted statutory provisions allowing parties to collective bargaining agreements to negotiate a workers compensation ADR "carve-out" through which they can bypass the state workers compensation system in favor of a negotiated evaluation, treatment, and dispute resolution program for worker injuries and claims.[39] By combining the negotiated procedure with an owner-controlled insurance program, public owners *can* realize direct and substantial savings in the premium and treatment costs and a significant part of the savings can be known in advance.

At the East Side Reservoir Project in southern California, the Metropolitan Water District of Southern California has been able to show the court that its project will save $14–17 million in reduced premiums alone.[40] Estimates of additional savings total $20 to $35 million over the life of the project. These are savings, moreover, that the MWD could not have achieved without a PLA, because the workers compensation carve-out is permissible *only* through the vehicle of a collective bargaining agreement (California Labor Code §3201.5).

Modifications to direct wage components have been negotiated in some PLAs. As a general proposition, the application of the state or federal prevailing wage laws (Davis-Bacon Act and state-enacted "Little Davis-Bacon" Acts), equalizes the wage and benefit components of wages for all contractors, union and nonunion. To address the issue of wage stability over the life of the project, there are at least two PLAs that conform local union wage terms to the operation of the prevailing wage law so that wage rates set at the outset of a particular contractor's contract by the prevailing wage law are frozen for the life of that contract.[41] In one other PLA, a freeze at the current prevailing rate has been negotiated with annual adjustments upward to the then prevailing wage, if it is modified during the year.[42]

Apart from wage modifications, there are numerous examples of other compensation terms, such as the reduction of overtime premiums where the local terms would otherwise specify double time, standardized shift premiums, elimination of travel or subsistence and arrangements for four 10–hour day workweeks. These modifications are necessarily project-specific and a function of the unions' responsiveness to the public agency's expressed needs. The modifications made illustrate, however, that the union negotiators have been open to addressing virtually any issue where the interests of the public can be satisfied consistent with the effective representation of their workers.

Equally important to the full evaluation of the PLA potential is the consideration of the indirect economic benefits PLAs provide in terms of stability, the supply of skilled labor, and the creation of a system for management of the project's labor relations functions. These savings are more difficult to quantify in advance of a project, but they are real and their potential is obvious if the labor market and labor-management climate is examined.

Stability. One of the most significant benefits that a PLA offers is the assurance of stability; that is, that there will be no strikes or disruptions of the project in any form. In modern PLAs that commitment is backed by a provision for expedited arbitration to produce a court-enforceable order even in cases where a court would not otherwise issue an injunction. The procedure in some agreements even permits the arbitrator to impose liquidated damages of $10,000 per shift, payable to the owner/public agency, if the violating union does not return to work at the beginning of the next regularly scheduled shift.

Open-shop representatives, with some support from the judiciary, argue that imposing a PLA to obtain the unions' commitment not to strike is rewarding the party threatening to strike, and, as one court has said, that "smacks of capitulation to extortion."[43] Other courts have minimized the value of stability and its contribution to the timely completion of the project with the notion that all public owners want to complete their projects on time and, therefore, crediting the effect of the PLA for this purpose would amount to the wholesale approval of PLAs.[44]

This is yet another instance where opponents and proponents of PLA's must agree on the operative legal principles. Like it or not, the right to strike is deeply

rooted in the national fabric of our labor laws. The legality of strikes has been carefully and, indeed, liberally defined to permit lawful and expansive use of this economic weapon. The Supreme Court has said that the strike is "part and parcel" of the collective bargaining process.[45] Federal and state anti-injunction laws form solid barriers to court-ordered relief from lawful strikes.[46]

It cannot be denied that unions have wide latitude, with or without any prior threat, to strike or to conduct other forms of economic action. A public official who does not take that possibility into account is not serving the best interests of the public. He or she does not have to decide every time that this factor tips the scales in favor of using a PLA, but the failure to weigh its potential and to evaluate the labor-management climate in the region would be irresponsible. The public official should no more ignore the possibility of a strike or picketing than it should ignore the self-fulfilling prophecies of the ABC that if a PLA is adopted its members will not bid on the project or that adoption of a PLA will give rise to the cost of litigation, litigation that ABC itself will bring. Would the opponents also urge a court to ignore these threats as "extortion"?

The opponents urge rejection of a PLA's assurance of stability as a factor saying, for example, that "the contracting officer cannot simply assume that the NLRB and the larger web of relationships between and among labor organizations and employees will fail the [public agency]."[47] No public official should be reassured by this statement. The NLRB offers no effective remedy; separate gates are at best an ineffective band-aid that do not in any case end the picketing. They certainly do not compare with the effective and real remedy that modern public sector PLAs (including the model agreement recently approved by the AFL-CIO's Building Trades Department) provide. Whatever the "larger web" of labor management relationships is, in the end it is probably the no-strike clauses of local agreements. When a strike over contract renewal occurs, or when a union pickets against or boycotts a nonunion contractor, the "larger web" evaporates and there are no restraints or remedies for the public project. In contrast, where a PLA is in place, a local bargaining strike will not be conducted against the project or its contractors, even those who are being struck elsewhere.[48] Even if identical no-strike clauses were replicated in each of the individual local agreements, those individual clauses would not give the same rights and remedies that are available under a PLA.

The courts that have offhandedly dismissed this issue have jumped to a conclusion that ignores the real issue in favor of an emotional reaction to unions and strikes. Courts cannot ignore this vital reason for considering PLAs where the labor climate warrants.

Supply of Skilled Workers. Large sophisticated projects require large numbers of qualified craftsmen to perform the work. We are at a time when the numbers of skilled construction workers are dangerously low. The greatest resource continues to be the union apprenticeship programs and hiring halls. Nonunion contractor groups claim they have well-trained work forces and that they have an increasing number of

apprenticeship programs. There simply is no basis to claim that the numbers of participants in nonunion training programs or the extent of their training begins to equal those of the unions.

A second claim by the nonunion contractors is that they deploy their workers so that they maintain a lower ratio of skilled to unskilled workers and, therefore, need fewer skilled employees. A corollary to that argument is that the ratio permits lower costs because the unskilled workers are lower paid. Whatever that ratio might mean on a private project, it does not hold true on public projects where all employees must be paid at the prevailing journeyman rate unless they are indentured in an approved apprenticeship program. Because the nonunion contractors tend to have few if any approved apprenticeship programs, they must pay their unskilled labor at full journeyman rates adding costs to their method of deployment. Operating under a PLA however, nonunion contractors who typically do not have access to lower cost apprentices on public works projects are able to draw from the union apprentice programs and pay the lower approved apprentice rates.

This factor relates to both quality and safety. The better skilled the worker — whether he or she is union or nonunion — the safer that employee will work and the better the quality of the work. Whether nonunion or union contractors are safest as a class is not susceptible to a generalized conclusion. Too many factors can affect the answer, such as the attitude of the contractor management, the nature of the work, and, as noted, the skill levels of the work force. To say, however, that there is no basis to conclude that a PLA can have any effect on safety is not to acknowledge the ability of the negotiating parties to address the issue and to commit both labor and management to a structure for safe work practices and training regimens that can have a positive impact on safety.

IV. *Conclusion*

In the fight over PLAs the application of the competitive bidding law principles quickly shifts to political arguments. What really fuels the conflict are other sentiments and biases about the perceived good and evil of unions. Underneath the claims of preclusion from work opportunities or the alleged disadvantage to the taxpayers or the alleged discrimination against the workers is the bedrock resolve the nonunion contractors have against entering into any union relationship, however limited, even at the expense of foregoing the work.

Boston Harbor eliminated federal preemption as the stealth weapon that could have doomed all public sector PLAs. As the courts increasingly and sensibly apply a case-by-case analysis to these challenges, ABC's national campaign to foil public sector PLAs wherever they exist becomes a state-by-state, agreement-by-agreement war of attrition. If political pressures fail to persuade the public agency to abandon its consideration of PLAs, the agency is quickly presented with the cost of defending against a litigation challenge to its decision.

There is nothing inherently wrong with PLAs in the public sector. They were around long before *Boston Harbor* made them fashionable. They have a well-established place in the law and in the effective performance of the projects to which they have been applied. They have a purpose that is neither universally good nor bad but, from this vantage point, they have served more projects well than poorly. Public authorities can rationally evaluate their benefits and where there are clear abuses, the competitive bidding laws will provide effective remedies. Lawsuits directed at every instance where a PLA is adopted serve only to deter the public agencies for reasons grounded in the cost of vexatious litigation, not the merits. The use of legal process should be saved for the bona fide abuses of the competitive bidding laws and not become the vehicle for waging a campaign rooted in the wholesale elimination of public sector PLAs.

NOTES

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[1]See Perritt, *Keeping Government Out of the Way: Project Labor Agreements Under the Supreme Court's Boston Harbor Decision*, 12 *The Labor Lawyer* 69 (1996); Declaration of John T. Dunlop dated October 28, 1996 submitted in *Associated Builders and Contractors, Inc. v. Miller & Southern Nevada Water Authority* ("*ABC v. SNWA*"), Case No. A359730 (Clark Cty., Nevada, filed 1996).

[2]While commentators and even some courts speak loosely about agreements being "invalidated," that is not an accurate statement of what the courts have actually done. When they have ruled against the PLA, a successful bidder on a public works project would always be entitled to agree on its own to a PLA and to impose it on its own subcontractors. It is because the public agency decides to impose the agreement through the competitive bidding process that the challenge arises.

[3]*Building and Constr. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Mass./R.I., Inc.*, ("*Boston Harbor*") 507 U.S. 218 (1993).

[4]*John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), *enf'd sub nom, Iron Workers Local No. 3. v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied, sub nom. Deklewa v. NLRB*, 488 U.S. 889, 109 S.Ct 222 (1988).

[5]*Roundout Electric v. Orange County*, 151 L.R.R.M. (BNA) 2254 (Sup. Ct. Orange Cty., 1995); *Albany Specialties, Inc. v. County of Orange*, Civ. No. 7351/96 (Sup. Ct. Orange Cty., February 6, 1997).

[6]359 U.S. 236, 243 (1959).

[7]*Connell Construction Co. v. Plumbers Local* 100, 421 U.S. 616 (1973); *Woelke & Romero Framing Inc. v.* NLRB, 456 U.S. 645 (1982).

[8]507 U.S. 218, *supra* n.2.

[9]*Id.* at 232; Perritt, supra n.3, at 88.

[10]*Associated General Contractors v. New York State Thruway Authority*, 88 N.Y.2d 56 (1996), ("*Thruway Authority*"). PLAs are, therefore, recognized as lawful under the competitive bidding statutes in New York, California, Ohio, Nevada, Minnesota and Massachusetts. Only New Jersey has so far interpreted its competitive bidding laws to ban PLA specifications.

[11]143 N.J. 143, 148-149 (1995).

[12]*Thruway Authority*, 88 N.Y.2d 56. The *Thruway Authority* case was heard and decided in a joint opinion with *General Bldg. Contractors of New York State, et al. v. Dormitory Authority of the State of New York*, 88 N.Y.2d 56 (1996) ("*Dormitory Authority*") in which the Court struck down a bid specification applying a PLA to the modernization of the Roswell Park Cancer Institute in Buffalo, New York.

[13]9 Cal. 4th 161, 172-73 (1994). *See also Jered Contracting Corp. v. New York City Transit Authority*, 22 N.Y.2d 187, 292 N.Y.S.2d 98 (1968); *Nevada State Purchasing Div. v. George's Equip. Co.*, 105 Nev. 798 (1989); *City of Inglewood v. Superior Court*, 7 Cal. 3d 861 (1972)

[14]*Neal Publishing Co. v. Rolph*, 169 Cal. 190 (1915); *Davenport v. Walker*, 57 A.D. 221 (3d Dept 1901); *Wittie Electric Co. v. State*, 139 N.J. Super. 529 (App. Div. 1976).

[15]*Associated Builders & Contr. Inc. v. Metropolitan Water Dist.*, (hereinafter "*ABC v. MWD*"), Case No. BS041945 Slip Op. p.6 (Sup. Ct. Los Angeles, January 2, 1997) .

[16]*See Prestex, Inc. v. United States*, 320 F.2d 367, 372 (Ct.Cl. 1963).

[17]*See* Donald P. Arkavas & William J. Ruberry, *Government Contract Guidebook* 3-26 (2d ed.1994).

[18]*See*, e.g. *Domar Electric*, 9 Cal.4th 161 ("they are enacted for the benefit of property holders, and taxpayers, and not for the benefit or enrichment of bidders"); *George Harms Const. Co. v. New Jersey Turnpike Authority*, 137 N.J. 8, 36 (1994); *Conduit & Found. Corp. v. Metropolitan Transp. Auth.*, 66 N.Y.2d 144, 148 (1985).

[19]*See* e.g., Northrup and Alario, *"Boston Harbor"-Type Project Labor Agreements in Construction: Nature, Rationales, and Legal Challenges, Journal of Labor Research* (Preprint Winter, 1998, p. 22), ("Northrup & Alario") stating only that "challenges" have been brought on such theories.

[20]*See*, e.g., David J. Langworthy, *Project Labor Agreements After Boston Harbor: Do They Violate Competitive Bidding Laws?*, 21 Wm. Mitchell L. Rev. 1103, 1111 (1996); *Nevada State Purchasing Div. v. George's Equip. Co.*, 105 Nev.798, 806 (1989); ("When [public agency's] actions are challenged, the burden of showing to the contrary rests on those asserting it, and it is a heavy burden. . ."). *See also, Edenwald Contracting Co. v. New York*, 86 Misc. 2d 711, 721-23 (1974), aff'd, 47 A.D.2d 610 (1st Dep't 1975).

[21]It has no legal significance otherwise, because federal labor law regulates this area and hiring halls, as long as they conform to the requirements for their nondiscriminatory operation, are lawful under the NLRA. *See generally, Retail Clerks Local 1625 v. Schermerhorn* 375 U.S. 96 (1963); *Laborers Local 107 v. Kunco*, 472 F.2d 456 (8th Cir. 1973); *Mountain Pacific Chapter, Associated General Contractors*, 119 N.L.R.B. 883 (1958) The *Harms* court concluded that the required use of the union hiring halls lessened competition because it imposed a "sole source" of labor which it then likened to a specification that all bidders be required to use "Smith Family Steel." 137 N.J. at 42. Apart from the logical fallacy of equating the products purchased by the procurement with the hiring of workers by the low bidder, the analogy is otherwise misplaced. Whether or not a particular brand of steel is available to all bidders, the workers are. Moreover, if the failing is that price competition may be eliminated by specifying a single source of steel, price competition for workers is already eliminated on a public project, not by the PLA specification, but by the prevailing wage law that specifies a uniform cost of labor.

[22]*Thruway Authority, supra* n. 10 at 67-68 (emphasis added).

[23]*Gerzof v. Sweeney*, 16 N.Y.2d 206 (1965).

[24]There have not been many,if any, cases where this kind of exclusion was attempted in a labor-related context. A case that is governed by this analysis is *Associated Builders and Contractors, Inc. v. City of Rochester*, 67 N.Y.2d 854 (1986) in which a city ordinance provided preferences to bidders who were participants in a State-approved apprenticeship program. This "precondition" was invalid because it excluded from the competition entirely those contractors who were not participants in such an apprenticeship program, and it could not satisfy the test of essentiality. Likewise, where public officials have been pressured after a bid to reject all bids because the low bidder is nonunion is a form of retroactive exclusion and refusals to award to the nonunion low bidder for that reason have been properly overturned. *Wittie Electric Co.*, 139 N.J. Super. 529; *Davenport*, 57 A.D. 221.

[25]Even the model PLA recently drafted and approved by the international union affiliates of the AFL-CIO's Building and Construction Trades Department contains a provision found in the better PLAs expressly permitting all contractors to become parties. Specifically, Article II, Section 4 of that model agreement states:

> The Owner and/or the Project Contractor have the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any agreements between such bidder and any party to this Agreement; provided, however, only that such bidder is willing, ready and able to become a party to and comply with this Project Agreement, should it be designated the successful bidder. *Daily Labor Report* (BNA) No. 100, at E-5 (May 23, 1997).

Moreover, virtually all public sector PLAs do not require the nonunion contractors to commit to the union representation of their workers for any work other than on the project. Such a broader requirement, i.e., to commit for all work in the full geographic region of the signatory union would be lawful under Section 8(e) of the NLRA. One such PLA has been approved in the Seventh Circuit, *Colfax Corporation v. Illinois State Toll Highway Authority*, 79 F.3d 631 (7th Cir. 1996).

[26]*See* Affidavit of Douglas A. Selby, dated January 10, 1997, and Declaration of John T. Dunlop, dated October 28, 1996, submitted in *ABC v. SNWA*, Case No. A359730.

[27]*See*, e.g., Deposition of Herbert R. Northrup, pp.78–81, from "*ABC v. SNWA*," Case No. A33599730; Northrup & Alario, p.9, "One reason for these developments (alleged cost increases attributable to PLAs) is that the exclusion of open-shop contractors who are not willing to work as unionized ones substantially reduces the number of contractors who submit bids on government-mandated PLA-controlled jobs."

[28]*Thruway Authority, supra* n. 10 at 71. Similarly, the Supreme Court in *Boston Harbor* stated:

> To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. *supra* n. 2 at 229.

[29]With no explanation or reference, the Court in *Harms* stated; "the effect of project labor agreements is to lessen competition." 137 N.J. at 44. The New York Court of Appeals in *Thruway Authority*, agreed for ease of analysis with its lower court's assumption that the use of the PLA "somehow discourages competition." 88 N.Y.2d at 71.

[30]Under the PLA for Southern Nevada Water Systems Improvements Project Labor Agreement, 34 bids were submitted by nonunion contractors out of a total of 93 bids on 16 contracts. Reply Affidavit of Douglas Selby dated March 21, 1997, *ABC v. SNWA*, Case No. A359730. Moreover, six of the sixteen contracts were awarded to nonunion contractors. A comparison of the numbers of bids between project agreement-covered work and earlier work that was not covered, showed that the PLA-covered work attracted 31% more bidders per package. Similarly, under the East Side Reservoir Project Labor Agreement in California, 32 percent of the bids were submitted by nonunion contractors and, including subcontractors, more than half of the contractors working on the site have been nonunion. *ABC v. MWD*, *supra* n. 15 at p.8.

[31]Drawing a clear distinction between New York's interpretation of its competitive bidding statutes and that of the New Jersey court in *Harms*, New York's Court of Appeals in *Thruway Authority* said it had "never construed New York's competitive bidding statutes to be so absolute." 88 N.Y.2d at 67.

[32]There has been no claim in the litigation to date that the decision by the public agency to apply a PLA is the product of fraud or corruption. There is, therefore, no reason in this debate on the merits of PLAs to address these kinds of conduct.

[33]*Gerzof*, 16 N.Y.2d 206.

[34]Specifications are not illegal, "merely because they tend to favor one manufacturer over another." *Gerzof*, 16 N.Y.2d at 211; *accord Varsity Transit, Inc. v. Saporita*, 71 A.D.2d 643(2d Dep't), *aff'd*, 48 N.Y.2d 767 (1979) (nonexclusionary provision not illegal merely because it reduced plaintiff's chance to receive award).

[35]In the *Thruway Authority* PLA, the nonunion contractor could direct hire 12% of the workers per craft from his own employees. In the SNWS Improvements PLA, the nonunion contractor can hire, 1–for–1 to a maximum of 7–for–14 per craft. The suggestion by commentators that this permissible exception to the straight referral of all workers from the union hiring hall (to which all union contractors are bound) is discriminatory *against the nonunion contractor*, and somehow favors the union contractors reflects, at a minimum, a lack of familiarity with the operation of union hiring halls and referral procedures. See Northrup & Alario.

[36]The *Dormitory Authority* court's statement that an estimate of cost savings attributable to the Dormitory Authority's PLA was "glaringly absent" is baffling. What was "glaring" was the absence of any prior case in New York or elsewhere that relied upon or even referenced a cost estimate as a factor in finding the adoption of bid specification to be lawful.

[37]*Thruway Authority, supra* n. 10 at 68; *Domar Electric, supra*, n. 13 at 173.

[38]*Thruway Authority, supra* n. 10 at 68.

[39]To date eight states have enacted statutes permitting alternative dispute resolution proceduress for workers compensation claims involving parties to collective bargaining arguments. They include: New York, California, Massachusetts, Maine, Kentucky, Florida, Hawaii, and Minnesota.

[40]*ABC v. MWD, supra* n. 15 at p. 10.

[41]CRC Power Delivery Project Labor Agreement, covering a power project being constructed by the Colorado River Commission in Las Vegas, Nevada, and the SNWS Improvements Project Labor Agreement covering the expansion to the Southern Nevada Water Authority's water delivery system for Las Vegas, Nevada. Recent reports of a PLA negotiated for the City of Boston indicate that it, too, freezes prevailing wage rates. *Construction Labor Report*, (BNA) Vol. 43, at 663 (September 10, 1997).

[42]National Ignition Facility Project Labor Agreement, covering the construction of the Lawrence Livermore National Laboratories' super laser in Livermore, California.

[43]*See Albany Specialties, supra*, n. 5 at 7; *Dormitory Authority, supra* n. 12 at 75. The court in *Albany Specialties* suggested that the public agency should no more submit to such threats than it should yield to a bidder that threatens vandalism if not awarded the contract. *supra* n. 5 at p. 7. The fallacy in the court's logic is evident from the analogy. A union threatening to strike or picket is threatening to exercise a legal right. A threat of vandalism is not.

[44]*Dormitory Authority, supra* n. 12 at 75.

[45]*N.L.R.B. v. Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960).

[46]29 U.S.C. §101 *et. seq.* Many states have "Little Norris LaGuardia Acts" further protecting labor's ultimate right to engage in concerted economic action.

[47]Associated General Contractors "*Recommendation for Executive Department and Agencies on the Presidential Memorandum on PLA's for Federal Construction Projects*," Associated General Contractors Labor Law Bulletin, p. 13 (July 25, 1997).

[48]Despite a three-month strike by the Operating Engineers during the summer of 1995 against local contractors, three of whom were contractors on the East Side Reservoir Project, neither the work of the project nor that of the three contractors on-site was struck or disrupted during the strike because of the PLA. Affidavit of William Waggoner, Business Manager, International Union of Operating Engineers, Local 12, submitted in *ABC v. MWD, supra* n. 15.