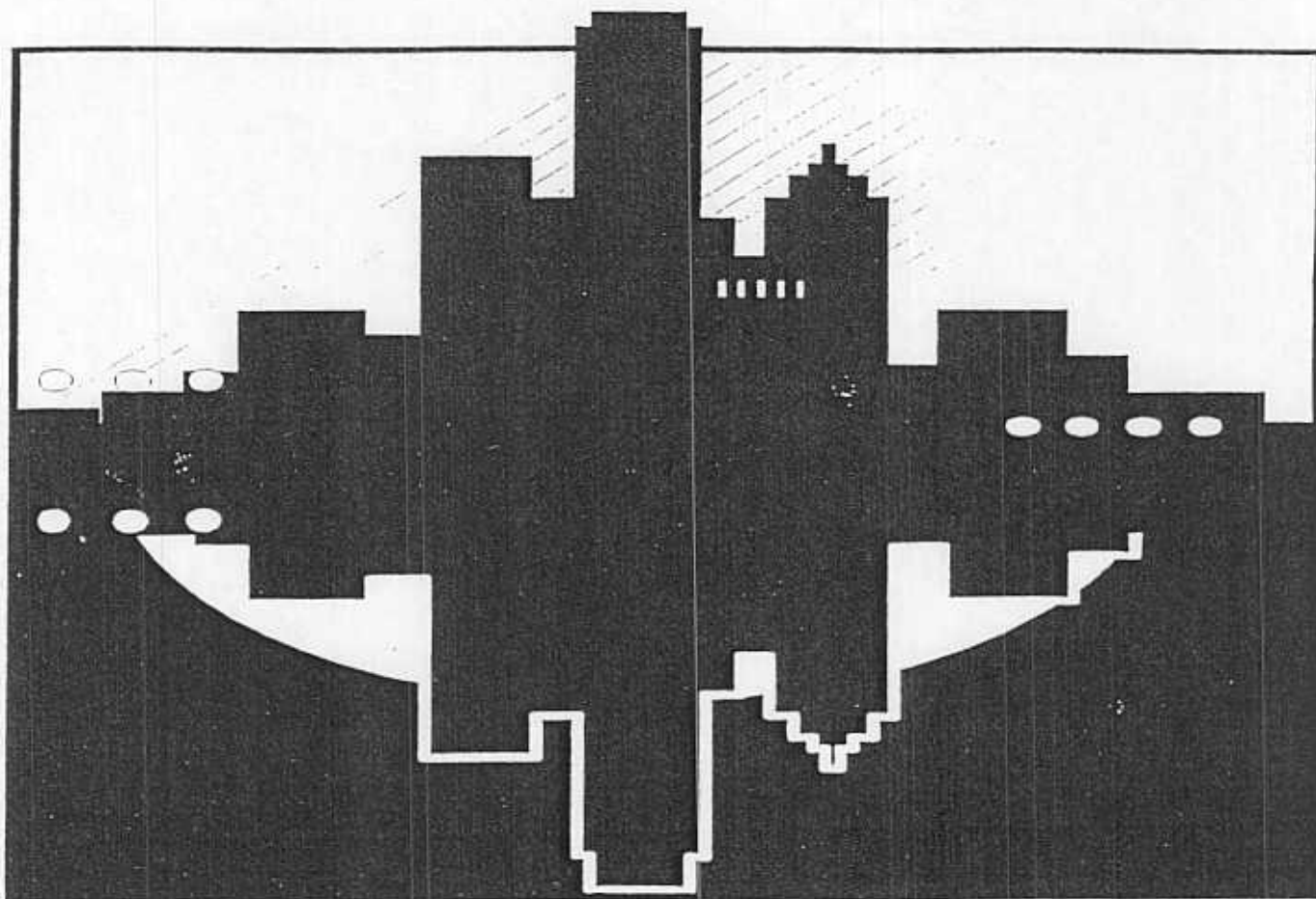


PROJECT LABOR AGREEMENTS: THE STATE OF THE LAW



Brian A. Powers & Gerard M. Waites
O'DONOGHUE & O'DONOGHUE
47848 Wisconsin Avenue
Washington, D.C. 20016
(202) 362-0041

December 1999

TABLE OF CONTENTS

	Page
I. PROJECT LABOR AGREEMENT: BASIC FEATURES	1
II. LEGAL STATUS OF PROJECT LABOR AGREEMENTS	2
A. The PLA Scorecard: PLAs Overwhelmingly Ruled Lawful: <u>30 (Wins) To 6 (Losses)</u>	2
B. PLAs Are Fully Open to All Contractors	2
C. PLAs Facilitate Timely, Successful Project Completion	3
PLA Bid Requirements Ensure Public Contracts Are Awarded to the Lowest “Responsible” Bidder	4
Key Functions/Advantages of PLAs Stressed In Finding Specifications Lawful, Prudent Procurement Policy	5
F. PLA Construction Surveys & Studies Prove the Substantial Benefits of PLA-Built Construction	6
III. CONCLUSION	8

I. PROJECT LABOR AGREEMENT: BASIC FEATURES

Project Labor Agreements (“PLAs”) are single-site construction labor agreements designed to:

- (a) facilitate sound project planning by supplying project owners with predictable labor costs;
- (b) promote timely and successful project completion by ensuring an adequate supply of skilled craft personnel for all trades for the full term of the project;
- (c) guarantee labor peace and stability on the job through mandatory grievance procedures and no strike/no lockout provisions; and
- (d) provide uniform terms and conditions of employment for all contractors and craft workers on the construction project.

PLAs are included on construction projects through bid conditions or specifications imposed by project owners or construction managers. Such projects are open to bidding to all contractors, union and non-union.

Access to skilled craft personnel for PLA projects is provided by giving all site contractors access to the job referral systems of local building trade unions. These referral systems, which are open to union and non-union employees, provide an organized structure for recruiting and deploying hundreds or even thousands of craft personnel for any given project.

Used widely in the United States for various types of industrial, commercial and public construction, PLAs are relied upon by hundreds of project owners each year to facilitate billions of dollars worth of new construction, renovations and other types of capital improvements.¹ Moreover, as construction markets have expanded in recent years, the industry has witnessed a proliferation of PLA-built projects.

¹See AFL-CIO Building & Construction Trades Department, Partial Listing of U.S. PLA Construction Projects, 1998-1999.

II. LEGAL STATUS OF PROJECT LABOR AGREEMENTS

While clearly lawful in the private sector, the legal status of PLAs in public works contracting has created some confusion. Fortunately, this question has largely been resolved by a number of important court cases issued in the last few years.

A. The PLA Scorecard: PLAs Overwhelmingly Ruled Lawful

A survey of the case law on this issue shows that courts have found PLAs lawful in at least thirty (30) cases, while finding legal problems with such agreements in only six (6) cases.² The principal legal challenges raised, which include those based on state competitive bidding laws, antitrust law and federal labor law, have been addressed and generally found to be without merit.

These results are not surprising since the central theme of these claims is that PLAs -- which by definition are open to any and all contractors -- still somehow exclude non-union contractors from bidding on or participating in the PLA projects. However, as recognized by the United States Supreme Court and numerous other federal and state courts, this notion has no basis in law or fact.

B. PLAs Are Fully Open to All Contractors

In the seminal case of Boston Harbor,³ the Supreme Court addressed this issue head on and found that a PLA bid specification doesn't exclude anyone from participating in the bidding process. Specifically, the Court ruled, in a 9 to 0 decision, that such conditions simply require contractors to make a choice:

they may alter their 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.⁴

² See PLA Case Law Survey, Exhibit A hereto.

³ Associated Builders & Contractors v. Massachusetts Water Resources Auth., 507 U.S. 218 (1993) (This case is commonly referred to as "Boston Harbor" since the project at issue is involved the environmental clean-up of Boston Harbor .

⁴ 507 U.S. at 231

A bid specification requiring a PLA is thus like any other legitimate bidding condition, such a payment bond or performance bond. It is a condition uniformly imposed by a project owner or construction manager on all bidders to ensure the successful completion of the work. Contractors can accept it, or bid elsewhere. No contractor is excluded from the bidding process unless it excludes itself.

In addition, it is clear that in practice non-union firms regularly bid and win work on PLA projects. See e.g. Associated Builders and Contrs. v. Metropolitan Water District, 69 Cal. Rptr.2d 885, 888 (Cal. Ct. App. 1997)(75% of all contracts awarded to non-union companies; thus unwillingness to bid by any non-union company was a “case of self-imposed exclusion”), review granted, 951 P.2d 1182 (Cal. 1998); Associated Builders and Contrs., Inc. v. Southern Nevada Water Auth., 979 P.2d at 229 n.1 (finding that competition increased under PLA and six of sixteen contracts were awarded to non-union contractors).

C. PLAs Facilitate Timely, Successful Project Completion

Equally important, the Supreme Court’s Boston Harbor decision, as well as subsequent authorities, recognize that Project Labor Agreements assist project owners facilitate the successful, timely delivery of construction and other capital improvement projects. This, of course, is why PLAs are so widely used in the private sector.

The reasoning here is straight-forward. Facility owners, construction managers and other entities responsible for capital improvements often require PLAs, as a matter of prudent project planning, to address critical project staffing requirements for craft labor. The failure to adequately staff a project with properly trained craft personnel can undermine and even cripple any construction job in terms schedule, quality and/or cost.

Other conditions unique to the industry also compel the use of PLAs. A construction project of any magnitude typically involves at least 15 individual trade crafts (e.g., plumbers, pipefitters, electricians, carpenters, etc.), hundreds, even thousands of craft personnel and dozens of contractors and subcontractors. Recruiting, deploying and coordinating these various forces can be performed in a more orderly and efficient manner when all site contractors, subcontractors and craft personnel are subject to a single labor policy, establishing uniform terms and conditions for the project.

In Boston Harbor, the Supreme Court recognized that these are the realities that face project owners in the construction industry and that Congress understood these realities in crafting federal labor law. Thus, in authorizing PLAs, the Court explained, "Congress intended to accommodate conditions specific to the . . . industry," which include:

- (1) the short-term nature of employment which makes post-hire collective bargaining difficult;
- (2) the contractor's need for predictable costs;
- (3) a steady supply of skilled labor,
- (4) and a long-standing custom of prehire bargaining in the industry.⁵

Project Labor Agreements serve these interests and address the unique demands of the construction industry because they:

- (1) provide project owners with predictable labor costs;
- (2) establish uniform wages, benefits and other working conditions for all contractors and all crafts employees on the site;
- (3) eliminate union/non-union friction among the crafts;
- (4) guarantee labor peace through no-strike/no lock-out provisions; and
- (5) ensure a secure supply of skilled workers for the duration of the Project.

D. PLA Bid Requirements Ensure Public Contracts Are Awarded to the Lowest "Responsible" Bidder

Generally, cases challenging PLAs have relied on state competitive bidding laws. In reviewing such challenges, courts have repeatedly upheld PLAs as fully consistent with the goals and purposes of public procurement laws. In so ruling, courts have found that PLAs are economically beneficial to contracting agencies because they facilitate the procurement of the "best work at the lowest possible price."⁶

⁵ 507 U.S. at 231 (emphasis and numbers added).

⁶ Albany Specialties, Inc. v. County of Orange, 662 N.Y.S.2d 773, 740 (N.Y. App. Div. 1997), leave to appeal denied, 91 N.Y.2d 802 (N.Y. 1997) citing New York State Chapter, Inc., Associated General Contractors v. New York State Thruway Auth., 88 N.Y.2d 56, 151 L.R.R.M. (BNA) 2891 (N.Y. 1996).

In other cases, courts have simply inquired as to whether the use of a PLA bid specification was reasonably related to project needs and agency goals. For example, in reviewing a PLA requirement for airport construction, the California Supreme Court recently took this approach. In finding the PLA valid, the court held that where a public agency is required to award contracts pursuant to lowest responsible bidder laws it may adopt "any requirements reasonably relating to the 'quality, fitness and capacity of a bidder to satisfactorily perform the work.'"⁷ PLAs so qualify, the court found, particularly since they can help ensure timely project completion.

Similarly, the Alaska Supreme Court recently ruled that PLAs will be found lawful where the contracting agency has a "reasonable basis" for determining that such bid specifications further the interest of the public procurement/lowest responsible bidder rules.⁸ In the case before it, the court found that the PLA clearly furthered such interests, emphasizing that the bid condition helped the agency meet scheduling challenges.

E. Key Functions/Advantages of PLAs Stressed In Finding Specifications Lawful, Prudent Procurement Policy

In upholding PLAs, the key functions and advantages discussed above have been repeatedly cited by numerous federal and state courts.⁹ Moreover, it has also been recognized that since Project Agreements provide such advantages, when used for public works construction, they promote the interests of the public contracting agencies and taxpayers.¹⁰

⁷Associated Builders and Contractors, Inc. v. San Francisco Airports Comm's 87 Cal Rpt. 2d 654, 663 (Cal 1999)(citations omitted).

⁸Laborers Local #942 v. Lampkin, 956 P.2d 422, 435, 157 L.R.R.M. (BNA) 2985 (Alaska 1998).

⁹ See e.g., Boston Harbor, 507 U.S. at 1197; Enertech Elec., Inc. v. Mahoning County Comm'rs, 85 F.3d 257, 259 (6th Cir. 1996); Albany Specialties, Inc. v. Board of Ed. of South Glens Falls Sch. Dist., Case No. 99-CV-1462 (TJM)(N.D.N.Y. Oct. 1, 1999), slip op at 20-21; Minn. Chapter of Associated Builders and Contractors v. County of St. Louis, 825 F. Supp. 238, 243 (D. Minn. 1993); Associated Builders and Contrs. v. San Francisco Airports Comm'n, 87 Cal. Rptr.2d 654, 666 (Cal. 1999); Laborers Local #942 v. Lampkin, 956 P.2d 422, 431 (Alaska 1998). See also, Ex. A hereto.

¹⁰ Albany Specialties, supra, slip op at 21 [record citations omitted].); see also, cases cited at fn. 6 supra and Ex. A hereto.

In Albany Specialties v. Board of Ed., for example, the United States District Court for the Northern District of New York, addressing a PLA specified for school construction, recently explained this nexus as follows:

In this case, like . . . in Boston Harbor, the School District is the owner of a construction project, the timely completion of which has serious public impact -- both financial and educational. The project is financed by taxpayers, and delay will increase the cost of the project. Therefore, the underlying goals of . . . [federal labor law] outlined in Boston Harbor are impacted . . . and the PLA furthers these goals.

In this case, the School District, prior to issuing a PLA bid specification, directed its construction manager to conduct a "PLA Feasibility Study." The results of this study, the court emphasized, demonstrated that "the PLA would save significant costs, minimize work stoppages and increase labor productivity." Id. at 14.

F. PLA Construction Surveys & Studies Prove the Substantial Benefits of PLA-Built Construction

Like the school district in Albany Specialties v. Board of Ed., *supra*, most public project owners conduct some type of initial labor market survey, feasibility study or due diligence report prior to issuing PLA bid specifications. Good project planning would counsel that such investigations be conducted by a public agency or its construction manager prior to the adoption of a PLA specification.¹¹

Significantly, for virtually all of the projects for which feasibility studies or surveys were conducted, at least those which were reviewed in subsequent legal proceedings, the investigations concluded that the proposed PLAs would substantially further the interests of the public and the contracting agency by producing cost-savings and facilitating the timely, economical completion of the construction projects in question.

¹¹In the handful of cases where courts have found problems with PLAs, feasibility studies were generally not conducted, thereby making it more difficult for the government agency to justify its contracting decision. See Ex. A. Thus, in these cases, the courts did not rule that all PLAs were per se unlawful or completely prohibited in the particular state at issue, but only that the public agency failed to show that PLA was warranted for the project at issue.

For example, in upholding the PLA in Albany Specialties v. County of Orange, the court emphasized that the record showed that the PLA would produce cost advantages of \$2.1 million for the construction of court and government facilities. Conversely, it stressed that delays or disruptions in the project schedule could have a substantial negative impact on project costs for the county, including jeopardizing \$29 million in state funding for the project.¹²

These results are not surprising given the principal functions and advantages of PLAs, which are widely recognized by public and private construction owners, and which have been repeatedly cited by the courts. Moreover, current market conditions now dominating the industry will likely facilitate further justification and use of PLAs for both public and private construction.

These conditions include, for example, strong construction markets in all sectors – industrial, commercial and residential – which will be further fueled over the next decade by major public spending for new infrastructure investments. In strong construction markets, the pool of qualified contractors becomes increasingly limited.

In addition, for several years running now, severe skill shortages of craft labor have been widely recognized as the industry's number one problem.¹³ This factor, when coupled with strong market demands, will serve to further limit the availability of contractors who can guarantee an adequate supply of qualified craft personnel.

To protect their interests, project owners will expand their use of bid specifications, such as PLAs, that serve to ensure that all contractors hired are fully capable of performing the work. This approach to construction project planning is legal, economical and sensible.

¹² 240 A.D.2d at 739-741

¹³ See e.g., *Confronting the Skilled Construction Work Force Shortage*, The Business Roundtable, October 1997; *Dealing With Growing Skill Shortages*, Cockshaw's Labor News, June 1999.

III. CONCLUSION

Given the substantial benefits PLAs provide, the failure of their opponents to articulate or prove any sustainable challenges, and current market conditions driving an increased reliance on prudent, common sensed-based project planning -- PLAs will continue to serve as a productive and stabilizing force in the construction industry.