PROHIBITIONS ON PROJECT LABOR AGREEMENTS

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by:

Roger L. Sabo
Schottenstein, Zox & Dunn
41 South High Street
P.O. Box 165020
Columbus, Ohio 43216-5020
(614) 462-5030
(614) 462-5135 - Fax
rsabo@szd.com

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> *The determination to use a Project Labor Agreement in order to avoid the cost associated with such activity smacks at capitulation to extortion. It is no less antithetical to the interests embodied in competitive bidding statutes and would be a disqualification of an otherwise responsible bidder in order to assuage a threat of vandalism by an unsuccessful bidder.*

The above harsh denunciation of the Project Labor Agreement by a New York judge was short-lived as the Appellate Division of New York reversed his opinion, as we note below.

At last year's Labor and Employment Law Council, James Watson provided information as to the status of an absolute prohibition on Project Labor Agreements (PLAs). The dispute centers on whether PLAs could be prohibited on all public projects in the public sector.

The Watson memorandum dealt with the prohibition of PLAs by (1) the Presidential Executive order and (2) the State of Ohio. There were two court decisions:

1. A District Court decision striking down the Presidential Executive Order.
2. An Ohio Appellate Court decision upholding the Ohio statute.

One year, the tables have turned. Both decisions have been reversed. This article examines these competing philosophies and contradictory positions.

A. Recap.

The PLA is the agreement negotiated at the outset of the construction contract between the Owner or Construction Manager and the unions representing the workers who will be employed on the project. It establishes wages, working conditions, work rules and dispute resolution procedures.

The legality of PLAs on public construction projects, occurred in *Building & Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993). That decision was limited to the issue of federal labor law preemption. The Court ruled that the Massachusetts Water Resource Authority could, as a market participant, put into place a Project Labor Agreement that was not preempted by the National Labor Relations Act. That decision was dealt with at length in the Watson article. See pp. 1-5.

There were several important points in that decision, particularly as to who was an employer in the construction industry that could execute a pre-hire agreement. The agreement itself was with Kaiser and the MWRA, which permitted the Court to state:

> It is undisputed that the agreement between Kaiser and BCTA is a valid labor contract under §§8(e) and (f). As noted above, those sections explicitly authorize this type of contract between a union and an employer like Kaiser which is engaged primarily in the construction industry.

A hiring hall and mandatory union membership were included.

Following that Decision, courts went their own ways on whether to validate or invalidate PLAs. The primary theme behind the decisions invalidating PLAs had to do with the potential harm to state competitive bidding laws.

Some examples of invalidity:

- New Jersey
  George Harms Construction Co. v. New Jersey Turnpike Authority, 644 A.2d 76 (N.J. 1994).
- New Jersey
  Tormee Construction, Inc. v. Mercer County Improvement Authority, 669 A.2d 1369 (N.J. 1996).
- New York
  Empire State of Associated Builders & Contractors, Inc. v. County of Niagara, 615 N.Y.S.2d 841 (1994).
- New York
  New York State Chapter, Inc. Associated General Contractors v. New York Thruway Authority, 666 N.E.2d 185 (N.Y. 1996). (Reversing the trial court opinion noted above).

Other decisions have routinely upheld the use of PLAs based upon the lack of harm to competitive bidding.

- Alaska
  Laborers' Local No. 942 v. Lampkin, 956 P.2d 422 (Alaska 1998).

- California
  Associated Builders & Contractors v. San Francisco Airport Commission, 21 Cal. 4th 352, 981 F.2d 499.
- Connecticut
  Connecticut Associated Builders & Contractors v. Anson, 1998 Conn. Super LEXIS 3022, *aff'd on other grounds*, 251 Conn. 202, 1999 Conn. LEXIS 390 (1999).
- Massachusetts
  Utility Contractors Ass'n of New England, Inc. v. Massachusetts Dept. of Public Works, 5 Mass. L. Rep. 17, 1996 Mass. Super. LEXIS 687 (Mass. Super. 1996).
- Minnesota
  Minnesota Chapter of Associated Builders & Contractors,. Inc. v. County of St. Louis, 825 F. Supp. 238 (D. Minn. 1993).
- Missouri
  Hanten School District of Riverview Gardens, 13 F. Supp.2d 971 (E.D. Mo. 1998), *aff'd* 183 F.3d 799 (8th Cir. 1999) (rejecting assertion that LA violated state freedom of association, competitive bidding and collusion laws.
- Nevada
  Associated Builders & Contractors, Inc. v. Southern Nevada Water Auth., 979 P.2d 224 (Nev. 1999) (rejecting assertions that PLA violated freedom of association or competitive bidding).
- New York
  New York State Chapter, Inc. v. New York State Thruway Auth., 666 N.E.2d 185 (N.Y. 1996).
- Ohio
  State ex rel., Associated Builders & Contractors v. Jefferson County Bd. Of Comm'rs, 665 N.E.2d 723 (Ohio App. 1995).
- Oregon
  Associated Building & Contractors, Inc. v. Tri-County Metro. Transp. Dist. Of Oregon, 12 P.3d 62 (Or. App. 2000).
- Pennsylvania
  A. Pickett Constr., Inc. v. Luzerne Cty. Convention Ctr. Auth., 738 A.2d 20 (Pa. Commw. 1999).
- Federal
  Enertech Electrical, Inc. v. Mahoning County Comm'rs, 85 F.3d 257 (6th Cir. 1996), 74 Ohio St.3d 499 (1974) (PLA did not violate due process clause) .
- Federal
  Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co., 966 F.2d 1513 (6th Cir. 1992).

Some of the rationale was suspect. In one case, a court noted the following parameters that, in its view, allowed non-union competition.

> The PLA provided that, as a condition to being engaged to perform work on the project, successful bidders were required to execute applicable local collective bargaining agreements for work on the project. These would expire immediately following the last day of work on the project. For contractors that were not signatory to collective bargaining agreements prior to commencing work on the jail project, the bargaining agreements entered into thereunder were not to be applied to other works in progress or to jobs which were bid prior to execution of the bargaining agreements.

State, ex rel. Associated Builders & Contractors, Central Ohio Chapter v. Jefferson County Bd. Of Comm'rs, (Jefferson App. 1955*),* 106 Ohio App.3d 176, *appeal denied* (1996), 74 Ohio St.3d 1499. Query: What happens to other projects bid during the duration of the PLA?

An interesting analysis was the *New York Chapter Associated General Contractors State Thruway* decision, *supra,* which involved consolidated appeals of two separate projects using PLAs. One PLA was thrown out, one was upheld.

According to that court, there must be a sufficient record supporting the determination to enter into such an agreement to establish that it was justified under the competitive bidding laws and would protect against favoritism and corruption. The standard it set forth include the following:

> As applied particularly to PLAs which are clearly different from typical prebid specifications in their comprehensive scope, more than a rational basis must be shown. The public authority's decision to adopt such an agreement for a specific project must be supported by the record; the authority bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes.

The Court also stated that attempting to bring in a rationalization for a PLA after it was adopted could not substitute for an advance showing that the Owner considered the goals of competitive bidding when it adopted that PLA.

With the advent of more and more PLAs and rulings as to legality, efforts began at outright prohibition. Some earlier court decisions followed the New York rationale in *Boston Harbor* as to an individual choice:

> As the high court observed, 'Indeed, there is some force to petitioners' argument . . . that denying an option to public owner-developers that is available to private owner-

> developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists.*'

Associated Builders & Contractors, Inc., Golden Gate Chapter, 21 Cal.4th 352, 379, 87 Cal.Rptr.2d 654 (citations omitted). *See also Roundout Elec., Inc. v. County of Orange* (N.Y. Sup. Ct. 1995), 151 LRRM 2254, 2257 (the court recognized that any interpretation of the state constitution as prohibiting project labor agreements on public works was preempted because PLA signatories and contractors thereunder are subject to the NLRA, and thus the Court believes that state jurisdiction must yield."); Perritt, *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's Boston Harbor Decision* (1996), 12 Lab. Law 69, 88 ("[A]n interpretation of state procurement statutes that does not allow project managers to consider project labor agreements on specific projects on their merits is preempted."), Coupe, 19 J. Lab Res. at 101 (The paramount federal scheme of labor regulation would override any state provision making [PLAs] invalid in that state. 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 states from acting.) (footnote and citation omitted).

The efforts at striking down all PLAs continued nonetheless.

B. The Bush Executive Order Program.

As noted in Watson's 2002 article, the President issued Executive Order 13202 with regard to projects which the Federal Government was funding as a market participant.

Executive Order 13202 is the third of a series issued by different presidents. Executive Order 12818 was issued by former president George Bush in 1992 prohibiting PLAs in contracts to which federal agencies were the parties. When Clinton came into office, he issued Executive Order 12836 on February 1, 1993 as well as a memorandum regarding their use in 1997, authorizing a federal agency to use a PLA on a project by project basis if the agency determined it would advance the government's procurement interests and costs, efficiency and quality and would promote labor management stability.

The district court had struck down the Executive Order on the basis of lack of authority as well as NLRA preemption. 160 F. Supp.2d 90 (D.D.C. 1992). (Sets a blanket rule and does not require government agencies to act on a project-by-project basis.)

The expected appeal followed. The argument of the proponents for the Executive Order opposing preemption was rather straightforward and simplistic based upon *Boston Harbor.*

> Surely, if a government may freely choose to impose PLAs on private parties without fear of NLRA preemption, then the government may choose *not* to impose PLAs on work funded by that government. Nothing in *Boston Harbor* authorizes or compels a different result.

(Jt. Brief of *Amicus Curiae* In Support of Defendants/Appellants Federal Emergency Management Agency, et al., Case No. 01-5436, Court of Appeals, District of Columbia at p. 19) (Italics in original).

As noted above, court precedent had suggested a case-by-case analysis. Interestingly, both sides cited the decision in *Chamber of Commerce of the U.S. v. Reich,, 74 F.3d 1322, 1336-37 (D.C. Cir. 1996)* in support of their proposition. The Court in *Chamber of Commerce* struck down the President's Executive Order barring the government from contracting with employers that permanently replaced their employees. It stated in language applicable to PLAs:

> Surely, the result would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an Executive order requiring all construction contractors doing business with the state to enter into collective bargaining agreements with the BCTC or its Massachusetts-wide counterpart containing re-hire agreements. Accordingly, we very much doubt the legality of President Bush's Executive order 12,818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements . . . .

Other courts had similar language in upholding a project labor agreement adopted by an Illinois state agency, the United States Court of Appeals for the Seventh Circuit discussed the distinction between the state as a *regulator* and the state as a *purchaser.*

> The case before us . . . is much more like *Boston Harbor. Illinois has not enacted a statute*. The *Authority* has not passed a general rule. The Authority was contracting for services on a specific project. *** As we stated, the [Supreme] Court made clear that when acting as a proprietor, a state may do what a private contractor would do.

Colfax Corp. v. Illinois State Toll Highway Authority, 79 F.3d 631, 634 (7th Cir. 1998). (emphasis added). The United States Court of Appeals for the Ninth Circuit also elucidated this distinction:

> [The Supreme Court's] determination [in *Boston Harbor*] was based upon the distinction between a public entity which acts like a regulator and one which acts like any other participant in the market, and which happens to have the economic power to exact the provisions it desires when it contracts. *** The PLAs in question do reflect the action of [the district], but they do not reflect anything remotely like rules, regulations or laws. They only reflect an owner's desire to contractually assure peace and prosperity on particular projects. *** Again, we deal here with contracts, not with rules, regulations, agency manuals, agency handbooks, or executive orders.

Associated Builders & Contractors v. San Francisco Airport Commission, 21 Cal. 4th 352, 981 P.2d 499 (9th Cir. 1998).

The District of Columbia Court of Appeals in *Building & Construction Trades Dept. AFL-CIO v. Allbaugh,* 295 F.3d 28 (D.C. Cir. 2002) (*cert. denied* U.S. _____) found that the Executive Order was a validly ordered government document not preempted by the National Labor Relations Act. The Court, citing *Boston Harbor* that the construction industry proviso permits employers in the construction industry to enter into provisos noting that "nothing in that proviso prevents an employer from refusing to enter into such agreements." The Court found no distinction between federally owned and federally funded projects.

In *Allbaugh* the Court specifically held that the Executive Order constitutes proprietary action rather than regulation. It so concluded not only for direct federal grants but federally assisted contracts as well on the basis that "a private lender or benefactor also would be concerned that its financial backing be used efficiently."

The Court next turned to the argument that only activity on an *ad hoc* basis could be proprietary. It first turned to the aforementioned *Chamber of Commerce* case relied upon by the Building Trades and stated:

> In *Chamber of Commerce,* we held that Executive Order No. 12,954 was regulatory not because it decreed a policy of general application, as opposed to a case-by-case regime, but because it disqualified companies from contracting with the government on the basis of conduct unrelated to any work they were doing for the Government. *See* 74 F.3d at 1338 (executive order "ha[d] the effect of forcing corporations wishing to do business with the federal government not to hire permanent replacements even if the strikers are not the employees who provide the goods or services to the government").

Continuing, the Court found no justification why a blanket rule was inconsistent with the action of a proprietor. Instead, it stated:

> A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor,* it "addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." 507 U.S. at 228-29, 113 C.Ct. 1190. Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the government." Because the executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory."

C. <u>The State of Ohio Statute</u>.

The Watson memo also dealt with the decision of the Court of Appeals in Cuyahoga County over the State of Ohio prohibition against PLAs. Amended H.B. 101, enacting Ohio Revised Code 4116. *Ohio State Building & Construction Trades Council v. Cuyahoga County Board of Commissioners,* 201 WL 1152900, 2001 Ohio App. LEXIS 4345 (2001).

The Court of Appeals had upheld the statute on the basis that a public authority was not prohibited from entering into the PLA, but only from entering into a PLA with objectionable terms, to wit, requiring the contractor to enter into an agreement with a labor organization.

The Ohio Supreme Court did not agree. Rather, it ruled that the Ohio statute flatly prohibited public authorities from entering into or enforcing PLAs and, in such a capacity, the statute was preempted by the National Labor Relations Act. In support of its decision, the Court noted:

> A state would be acting as a regulator or policymaker, rather than as a *purchaser*, *proprietor*, or market participant, to impose an across the board rule that either requires or prohibits the use of PLAs on all public construction projects.

Ohio State Building and Construction Trades Council v. Cuyahoga County Board of Commissioners, 98 Ohio St.3d 7213 (2002) (emphasis added). This opinion issued several months after the *Building Construction Trades Department v. Allbaugh* decision. The Court ruled that the government acted in a proprietary capacity despite the "blanket across the board prohibition of the Executive Order against all Project Labor Agreements." According to that Ohio Court:

> This reasoning, we believe, places the proverbial cart before the horse . . . . [T]he gist of *Boston Harbor* is that a state may act as a private contractor would act *when it acts as a market participant*.

The Court recognized that it would be permissible for a private corporation, in its market participant capacity, to issue a bylaw or regulation that did preclude *all* PLAs. Hence, the argument ran, the state should be able to do the same. To this, the Ohio Court states:

> [A] private corporate or other legal entity may make such a policy decision without violating the NLRA because the NLRA does not preclude a private actor from attempting to regulate in an area reserved for market freedom or NLRB jurisdiction.

D. Other Decisions.

An arbitration decision that a supervisory contractor violated a PLA by failing to pay union scale wages to non-union workers who performed off-site sheet metal work does not violate federal labor policy, the Court of Appeals for the 6th Circuit ruled in *Eisenmann Corp. v. Sheetmetal Workers International Association,* 323 F.3d 375 (6th Cir. 2003).

The PLA in that case was by General Motors with seventeen building trades to rebuild paint facilities. There was a work preservation prohibiting subcontracting to another company unless that company's workers enjoyed the same or greater wages and benefits. The federal district court had vacated the arbitration ruling holding that it violated the Taft-Hartley Act by extending the PLA to off-site the PLA to off-site workers who had not chosen union representation. The appeals court decided that the arbitration ruling did not extend to off-site workers. Rather, it protected the interests of Local 24's on-site workers by enforcing a legitimate "disincentive to outsource work within the Local 24's jurisdiction."

The Court of Appeals in *Huber, Hunt & Nichols, Inc. v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 38,* 282 F.3d 746 (9th Cir. 2002) dealt with the controversy over which three possible routes should be taken to resolve a work jurisdiction dispute. The Pipefitters claimed that Huber Hunt had improperly permitted a subcontractor to assign certain work to carpenters rather than Local 38's fitters. The General Contractor filed a grievance against Local 38 claiming the Union's grievance violated dispute resolution procedures in the PLA which overrides collective bargaining agreements. Two arbitrators decided the grievance in a conflicting manner.

Reversing the district court, the appellate court ruled that the PLA dispute resolution procedure gave the arbitrator the authority to decide what type of substantive dispute is at issue and therefore which dispute resolution route must be taken. The

actual merits of the assignment were to be resolved by the leaders of the unions involved.

E. The Guidance Provided.

Activity involving PLAs continues. Legislation to either permit or prohibit PLAs is pending in several states. Given the two opinions on a blanket prohibition, both proponent and opponents have the legal firepower for their cause. Both sides have the basis for a lawsuit on any overall permitting or prohibiting the PLA. It would also be possible for either side to enact legislation on a more limited basis. If, as an example, the Legislature enacted a statute that prohibited only union membership, hiring halls or a continuing obligation to an agreement while also working on a PLA project in order to preserve competitive bidding and have a "playing field" to accommodate the non-union builder, it would appear to fit within the confines of the Court of Appeals rationale in the Ohio statute case. Conceivably, legislation could be passed that would require a PLA but for inclusion of the above two requirements.

Scant legal activity has occurred with respect to terms in the agreements themselves. Yet certain of the agreements could be challenged as facially invalid. In *Boston Harbor*, the Court properly noted that §8(f) pre-hire agreements could only be lawfully entered into between employers in the construction industry. Consider the following:

> This Project Labor Agreement is made and entered into by and between the City of Lorain, Ohio (hereinafter referred to as "City") on its own behalf and on behalf of all contractors and subcontractors who may become signatory hereto. (hereinafter generally referred to as "Contractor(s)") and the Local Unions signatory hereto (hereinafter generally referred to as the "Union") that will participate in the construction of The _____ Project (hereinafter referred to as "Project".

In any event, it would appear the PLA will continue to serve as the basis for an update on AGC Labor Lawyer Council presentations.