Comments

PROJECT LABOR AGREEMENTS AND COMPETITIVE BIDDING STATUTES

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I. INTRODUCTION

In this comment, I will examine the nature of project labor agreements and the situations where developers, particularly public developers, seek to require adherence to a project labor agreement. Since the Supreme Court held, in the landmark Boston Harbor case,[1] that federal law does not preempt project labor agreements, I will constrain my analysis to the state law issue of whether these project labor agreements violate state competitive bidding laws.

I will first explain what a project labor agreement is, when it is desirable, and why such an agreement can be valuable. Next, I will analyze the broad, general and more express, narrow statutory purposes behind various state competitive bidding statutes. I will also highlight why project labor agreements are seen as being pro-labor union. In the second section, I will review several cases in which state courts have spoken on the legality of project labor agreements. Through this review, I will demonstrate the current state of the law. In addition, I will highlight the issues on which the courts are split.

Finally, in the third section, I will analyze the different approaches in the law today. I will show that project labor agreements are not only valid under competitive bidding statutes, but are often desirable because of the

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1. Building & Constr. Trades Council of the Metro. Dist. v. Ass'd Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 231 (1993) (the "Boston Harbor" case).

benefits that they confer. At the same time, I will argue that these agreements should only be allowed when the nature of the project is such that an agreement will further the goals of the competitive bidding statutes—timely, efficient, high quality, and inexpensive construction. In the course of this analysis, while showing why project labor agreements are useful and desirable, I will also demonstrate the risks that they present. I will discuss how these agreements, though often labeled pro-labor, actually allow non-union contractors to bid freely on public construction projects. Then I will examine the public policy and public interest benefits that project labor agreements confer. Lastly, I will attempt, through predictive analysis, to suggest where I believe the law will go in the future.

II. BACKGROUND INFORMATION

A. Project Labor Agreements

A project labor agreement ("PLA") is a pre-hire agreement negotiated by the developer of a project and a local union that governs the particular construction project in question.[2] PLAs are "designed to eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor on the project, and to provide a contractually binding means of resolving worker grievances."[3] The primary advantage of this type of agreement, as opposed to any other pre-hire agreement, is that a PLA provides for grievance resolution procedures that last for the duration of the project and do not delay the project.[4] PLAs are particular to the construction industry because they address industry-specific issues, including "the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a longstanding custom of prehire bargaining in the industry."[5]

A developer generally seeks a PLA because it serves to systematize the terms under which the construction project proceeds. Therefore, these agreements are most commonly used in large, complex, and time-sensitive

2. Kevin G. Martin & William J. Cardamone, *Employment Law*, 47 SYRACUSE L. REV. 507, 525-26 (1997); Vincent E. McGeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 SETON HALL LEGIS. J. 423, 426 (1995).

3. Ass'd Builders & Contractors v. S.F. Airports Comm'n, 981 P.2d 499, 502 (Cal. 1999).

4. Henry H. Perritt, Jr., *Keeping the Government Out of the Way: Project Labor Agreements Under the Supreme Court's Boston Harbor Decision*, 12 LAB. LAW. 69, 72-74 (1996).

5. *Building & Constr. Trades Council of the Metro. Dist.*, 507 U.S. at 231.

construction projects.[6] One great value of these agreements is that they save the developer from having to negotiate terms of employment and project orchestration with each contractor or employee that he hires. This is particularly valuable with terms relating to grievance resolution.[7] By systematizing these terms, these agreements often serve to facilitate members of different trades working side by side because they tell each employee that he labors under the same terms as any other worker.[8] Also, by setting the terms of the project, these agreements coordinate how the different trades and contractors will work together in order to complete not only their individual tasks, but also the larger project.[9] This is particularly important when the project is such that work on one aspect of the larger project may not begin until work on another aspect has been completed. Developers prefer to have these agreements on projects where timing is critical because they ensure that isolated conflicts and grievances will not slow down or halt the project as a whole.[10]

Under the terms of a typical PLA, an employer recognizes a particular union or group of unions as the exclusive collective bargaining agent for all employees on the project. The employer promises to hire exclusively from union hiring halls, though the union controlling this employee referral system may not discriminate on the basis of a worker's union or non-union status.[11] Under the agreement, in general, employers must make appropriate contributions to employee benefit plans.[12] PLAs also typically set grievance procedures, wages, hours, and working conditions and determine schedules, including whether work will continue over weekends and holidays.[13] Each of these requirements is designed to represent the

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6. *See, e.g.*, Ass'd Builders & Contractors v. S. Nev. Water Auth., 979 P.2d 224, 228 (Nev. 1999) (analyzing the importance of PLAs in large projects and their effect on competitive bidding laws); N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth., 666 N.E.2d 185, 191-92 (N.Y. 1996) (discussing the validity of using PLAs in large projects and their relationship to competitive bidding requirements).

7. Perritt, *supra* note 4, at 73-74.

8. *Id.* at 74.

9. *Id.*

10. *E.g.*, Powers, Kinder & Keeney, *Local Contractors' Suit Challenges Union Labor Rule in State Building Project*, 3 No. 12 R.I. EMPL. LAW LETTER 1 (1999) (discussing a Rhode Island suit in which the state mandates that contractors bidding on a state construction project must hire union workers).

11. John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955, 958 (Mass. 1999) ("The PLA mandates that this referral system be operated in a manner that is nondiscriminatory to nonunion workers . . . ."); Perritt, *supra* note 4, at 87; *see generally* Harms Constr. v. N.J. Tpk. Auth., 644 A.2d 76, 84 (N.J. 1994) (stating that under a PLA an employer recognizes a particular union as the bargaining representative and that any hired workers must join relevant union).

12. Laborers Local No. 942 v. Lampkin, 956 P.2d 422, 428 (Alaska 1998); *John T. Callahan & Sons, Inc.*, 713 N.E.2d at 958.

13. *Lampkin*, 956 P.2d at 428.

ideal bargain between the interests of the contractors and employees and the developer and the owner of the project. However, the most significant term in most PLAs is one that requires all contractors and employees to agree to a total ban on strikes, work slow downs, and other disruptive activities for the life of the agreement.[14]

B. Competitive Bidding Laws

Competitive bidding laws are municipal and state statutes that govern the way that a public entity, namely a city, town, or state, can select contractors for publicly funded construction jobs. The typical state competitive bidding statute follows the model of California Public Contract Code section 20128 which requires that contracts for public jobs be awarded to the "lowest responsible bidder."[15] In addition, these statutes typically require that the bidding process be free and open to competition.[16] The "lowest responsible bidder" is one who has the requisite skill, ability, and integrity to perform the work to the proper standard and who can certify that he can work in harmony with all other aspects of the job, including all others at work on the project.[17] Clearly, price is not the only consideration.[18] Instead, the bid solicitor may consider "any requirements reasonably relating to the 'quality, fitness and capacity of a bidder to satisfactorily perform the proposed work.'"[19] Therefore, though competitive bidding laws ordinarily require that a bid go to the lowest

14. *See id.* (listing terms agreed to in the disputed PLA as including "no strikes, pickets, work stoppages, slowdowns or other disruptive activity against signatory contractors during the term of the PLA"); *John T. Callahan & Sons, Inc.*, 713 N.E.2d at 958 (noting that the discussed PLA "prohibit[ed] strikes, lockouts, and any other disruptive activity during the life of the project"); Util. Contractors Ass'n of New England v. Comm'rs of the Mass. Dep't. of Pub. Works, No. CIV.A.90-3035, 1996 WL 106983, at *5 (Mass. Super. Ct. Mar. 12, 1996).

15. *See also* MASS. ANN. LAWS ch. 30, § 39M(c) (Law. Co-op 1995) (defining the terms "lowest responsible" and "eligible bidder"); *id.* ch. 149, § 44A(2) (1999) ("Every contract for construction . . . shall be awarded to the lowest responsible and eligible general bidder . . . ."); N.Y. GEN. MUN. LAW § 100-a (McKinney 1999) (declaring it state policy to strive in contracts for public projects, using public monies to achieve the highest quality of work at the lowest possible cost).

16. *See* Perritt, *supra* note 4, at 79 (citing MASS. GEN. LAWS ch. 30, § 39M (Law. Co-op. 1995)).

17. *See* MASS. ANN. LAWS ch. 149, § 44A(1) (Law. Co-op. 1999) (defining responsible to also include integrity, ability to work in harmony with all other elements of labor employed, and financial soundness); *see also Util. Contractors Ass'n of New England*, 1996 WL 106983, at *7 (citing the characteristics specified by "lowest responsible" and "eligible bidder").

18. Perritt, *supra* note 4, at 87.

19. Ass'd Builders & Contractors v. S.F. Airports Comm'n, 981 P.2d 499, 507 (Cal. 1999) (citing City of Inglewood - L.A. County Civic Ctr. Auth. v. Super. Ct., 500 P.2d 601 (Cal. 1972)).

monetary bid, there are situations where "a public entity may . . . impose certain requirements upon bidders as part of bid specifications for a project."[20] A PLA may be a valid additional requirement.[21]

Under competitive bidding laws, because a public developer or public entity may reject a low bidder based on the finding that the bidder is not sufficiently "responsible," there is the opportunity to reject bidders for a variety of improper reasons.[22] For example, it would seem to be improper for a government official charged with awarding bids to reject a low bidder because the official stands to receive some benefit by favoring another bidder or because of an existing personal grievance between him and the low bidder. Clearly, the purpose of competitive bidding laws is seen as being broader than its simple, express statutory purpose. In *Associated Builders & Contractors v. San Francisco Airports Commission*,[23] the court enumerated the following purposes of competitive bidding: "'to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public' . . . and to stimulate advantageous market place competition."[24] There are two underlying objectives of competitive bidding statutes.[25] First, these statutes are designed to obtain the lowest possible price after competition among responsible contractors with full knowledge of the bid requirements.[26] Second, they are meant to establish an open and honest procedure for competition which serves to put all bidders, both general contractors and sub-bidders, on equal footing in the competition to gain contracts.[27] Competitive bidding laws are enacted for the "benefit of

20. Ass'd Builders & Contractors v. Metro. Water, 69 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1997) (noting that the "lowest responsible bidder does not mean 'lowest cost bidder'"); Domar Elec. v. City of Los Angeles, 885 P.2d 934, 943 (Cal. 1994).

21. *Metro. Water*, 69 Cal. Rptr. at 888.

22. *See generally* Ass'd Builders & Contractors v. S. Nev. Water Auth., 979 P.2d 224, 228 (Nev. 1999) (noting the court's reasonable basis standard in allowing the adoption of PLAs); Ohio *ex rel* Ass'd Builders & Contractors v. Jefferson County Bd. of Comm'rs, 665 N.E.2d 723, 727 (Ohio Ct. App. 1995) (referring to county board's authority to select the "lowest and best bid for their construction projects").

23. 981 P.2d 499 (Cal. 1999).

24. 981 P.2d at 506 (quoting Domar Elec. V. City of Los Angeles, 885 P.2d 934, 940 (Cal. 1994)).

25. John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955, 959 (Mass. 1999).

26. *Id.*; *see also* George Harms Constr. Co. v. N.J. Tpk. Auth., 644 A.2d 76, 91 (N.J. 1994)(asserting that an objective of bidding statutes are "to secure for the public the benefits of unfettered competition"). *See generally* N.Y. State Chapter v. N.Y. State Thruway Auth., 666 N.E.2d 185, 187-88 (N.Y. 1996) (citing PLAs' impact on construction contract competition as having an "anti competitive impact on the bidding process").

27. *John T. Callahan & Sons, Inc.*, 713 N.E.2d at 959; *see also N.Y. State Chapter*, 666 N.E.2d at 189-90 (citing various court decisions in N.Y. and N.J. where court said that the state's public bidding statutes foster unfettered competition); *George Harms Const. Co.* 644

property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered . . . with sole reference to the public interest."[28]

Contractors, generally non-union contractors, who choose not to bid on a project requiring adherence to a PLA often sue developers, claiming that the PLA conflicts with the state's competitive bidding law. They claim that where a PLA is required, a bidder must not only be the lowest responsible bidder, but the lowest responsible bidder who will sign onto the PLA. By adding this requirement, a PLA could appear to be in conflict with a competitive bidding statute.

A PLA could also violate a competitive bidding statute where the agreement, by its terms or nature as a bid specification, goes against one of the principles underlying the statute. A violation of this sort could occur in a case where the agreement functionally prevented certain potential bidders, for example, non-union contractors, from bidding, or a case where certain bidders were at an automatic disadvantage in bidding simply based on their non-union status. In evaluating these cases, state courts follow the presumption set out in *Building & Construction Trades Council v. Associated Builders & Contractors of Mass. / R.I. Inc.*,[29] that a PLA is not per se invalid. As a result, they assess whether the PLA serves or conflicts with the purposes and objectives underlying the given state's competitive bidding statute. In these state cases, many of which will be discussed *infra*, some courts have found PLAs to be valid while others have found them to be in conflict with state competitive bidding statutes and therefore invalid.

C. How Project Labor Agreements Are Seen As Pro-Labor

Those who oppose the use of PLAs argue that these agreements are pro-labor. They assert that because these agreements require all bidders to abide by union terms and to hire all workers out of union hiring halls, the agreements favor union contractors over non-union, open-shop contractors. According to this theory, even though the bidding process does not expressly block any potential bidders from competing for the bid solicited, the fact that a non-union contractor will have to base his estimates on union terms is seen to make these agreements pro-labor. Further, though the hiring halls are expressly prevented from discriminating on the basis of union status in making referrals, proponents of this argument claim that the requirement itself makes it more difficult for non-union workers to gain

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A.2d at 91 (noting that the aim of competitive bidding laws is to secure for the public the benefits of unfettered competition).

28. Ass'd Builders & Contractors v. S.F. Airports Comm'n, 981 P.2d 499, 507 (Cal. 1999).

29. 507 U.S. 218, 231-32 (1993) (discussing the "Boston Harbor" case).

employment. In addition, the requirement makes it more difficult for non-union contractors to rely on the workers that they typically employ because those employees may not be the workers referred by the union hiring hall.[30] Each of these situations show according to the proponents of this argument, how PLAs are pro-labor. In the review of cases *infra*, this argument becomes the central claim in suits over the legality and validity of PLAs for public development projects.

Calling PLAs pro-labor has a significant impact on how these agreements are viewed and on the public policy that surrounds them, especially in the face of state competitive bidding statutes. If one were to assume that these agreements are in fact pro-labor, then one could not genuinely believe that these agreements place all bidders on equal footing in the bidding process. In addition, one could see the hiring restrictions as having a disproportionately negative effect on non-union contractors as compared to union contractors. Therefore, if this argument has merit, it is easy to see that if these agreements have an unbalanced impact on non-union contractors and employees, they do not serve public policy interests. Fairness, labor harmony, and the minimization of cost are the central public policy concerns underlying competitive bidding statutes.[31]

III. REVIEW OF CURRENT LAW BY STATE

A. *States that have Upheld Project Labor Agreements*

1. Alaska

In *Laborers Local No. 942 v. Lampkin*,[32], the court upheld a PLA required by a public developer for bids on a school renovation project in the Fairbanks North Star Borough ("Borough"). This project, at a cost of $20 million, was the "largest construction project ever undertaken by the Borough."[33] Here, the Borough Assembly and the Mayor approved the use of a PLA for a complex project involving a large number of contractors from a variety of different trades. One significant challenge involved in

30. *See, e.g.*, A. Pickett Constr. v. Luzerne County Convention Ctr. Auth., 738 A.2d 20, 23 (Pa. Commw. Ct. 1999) (noting that the requirement to employ union members causes non-union contractors to have to make drastic revisions in the structure of their working relationships with their employees).

31. *See generally* George Harms Constr. Co. v. N.J. Tpk. Auth., 644 A.2d 76 (N.J. 1994) (holding that a particularly restrictive project labor agreement with an imbalanced effect on non-union contractors was in violation of the state's competitive bidding law).

32. 956 P.2d 422 (Alaska 1998).

33. *Id.* at 428.

this project was the requirement that the school remain open during much of the construction.[34]

This PLA forced the contractors to recognize the unions as the "'sole and exclusive bargaining representatives with respect to rates of pay, hours and other conditions of employment.'"[35] It also required that the employers only hire employees referred out of non-discriminatory union hiring halls. Further, employees were required to become members of the union upon employment if they were not already union members. This agreement set grievance procedures, eliminated shift differentials and double pay on Sundays as well as certain other premium pay situations, permitted flexible scheduling, and required employers to make contributions to "'established fringe benefit funds in the amounts designated by the appropriate Local Union.'"[36] Finally, the agreement prevented work stoppages, picketing, slowdowns, or other disruptive measures for the life of the agreement.[37]

The court recognized that where the Borough had a significant interest in the timely and cost efficient completion of this project, a PLA may be appropriate.[38] Further, the provisions of the PLA did effectively serve to lower costs and coordinate the large number of contractors involved in this project, clearly demonstrating the usefulness of the agreement.[39] Therefore, the court held that where the agreement supported cost efficiency and open competition, the purposes of the procurement code (the competitive bidding statute here at issue), the agreement is valid.[40] This holding rested in part on the recognition that the statute's requirement of "maximum practicable competition"[41] did not require unfettered competition. The court stated that so long as the Borough had a "reasonable basis to determine that the PLA furthered the interests underlying the Borough's procurement code," the agreement was justified and therefore valid.[42] Here, the highly complex nature of the project and the resulting requirement of flexible scheduling so as to prevent construction from interfering with classes were sufficient to make the PLA accord with the procurement code.[43]

34. *Id.* at 427 n.2.
35. *Id.* at 428 (quoting the requirements of the PLA at question in the suit).
36. *Id.*
37. *Id.*
38. *Id.* at 431.
39. *Id.*
40. *Id.* at 434-35.
41. FAIRBANKS N. STAR BOROUGH CODE § 16.35.010 (1993).
42. *Lampkin*, 956 P.2d at 435.
43. *Id.*

2. California

In *Associated Builder & Contractors v. San Francisco Airports Commission*,[44] the court upheld a PLA related to the $2.4 billion expansion and renovation of the San Francisco airport. The PLA required for this project set out that, over the expected ten-year life of the project, there would be no strikes, jurisdictional disputes between crafts would be resolved through arbitration, and work would continue even if collective bargaining agreements expired. In exchange, the agreement required that employers hire exclusively through union hiring halls and pay union wages and benefits.[45]

The court held that since the PLA did not bar or substantially discriminate against a class of contractors, it was valid.[46] In reaching this decision, the court stated that the PLA must be "consistent with the general principles underlying the competitive bidding law."[47] The court's list of these underlying purposes included the desire to guard against favoritism, fraud, and corruption, the desire to get the best work at the lowest cost, and the desire to stimulate marketplace competition.[48]

The court also emphasized that these statutes are enacted for the benefit of property holders and taxpayers, not for the bidders.[49] Therefore, the terms of these agreements must be viewed in light of how they serve the public interest and not in light of what might be best for the bidders as a whole or for a particular bidder.[50] Further, the court said that a responsible bidder is one who responds to and satisfies all terms of a bid solicitation, including a requirement to sign onto a PLA.[51]

The plaintiff here claimed that the agreement was anti-competitive because it deterred non-union contractors from bidding because of the agreement's provisions that allegedly required hiring of union workers, paying of union wages, and contributing into union benefit funds. The court disagreed with this argument, noting instead that all prospective bidders are required to follow these uniform terms and further that the state's prevailing wage law placed all bidders on equal footing. Therefore, the fact that some contractors "may be disinclined to accept the terms of the P[L]A does not imply any favoritism . . . toward those bidders that do not share that disinclination."[52] Since the agreement, by its express terms, did

44. 981 P.2d 499 (Cal. 1999).
45. *Id.* at 502.
46. *Id.* at 506.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 507.
52. *Id.* (using the term PSA, or project stabilization agreement, which is equivalent to a

not exclude any contractor, whether union or non-union, it was not anti-competitive.[53] Further, the requirement of using a union hiring hall was not a preference for union workers since federal law requires these hiring halls to refer workers without regard to their union status.[54] In addition, the agreement here allowed a contractor to continue to employ workers who had been on the contractor's active payroll for sixty of the preceding one hundred days before forcing him to resort to union hiring halls.[55] The court stated that the plaintiff had failed to demonstrate that any of the provisions in the PLA placed any bidder at a competitive disadvantage. Further, the court held that the agreement is not anti-competitive merely because some bidders would see some of its features as "less attractive" and would therefore choose not to bid.[56] Finally, the court stated that where other states invalidate PLAs in the face of competitive bidding statutes, they tend to do so because the jurisdiction's governing statute requires "unfettered competition" over the "more generalized public interest considerations" which govern in California.[57] As a result, the court held that the PLA was valid and not a violation of the competitive bidding law.

3. Massachusetts

In *Utility Contractors Ass'n of New England v. Commissioners of the Massachusetts Department of Public Works*("UCANE"),[58] the court upheld a PLA for work on the Central Artery/Third Harbor Tunnel Project.[59] This project is a multi-billion dollar, multi-year project.[60] It is the largest, most ambitious public works project ever attempted in New England.[61] Not only is this project complex because of its sheer scope, but it is further complicated by the fact that three-quarters of the construction will take place underground in densely populated, urban areas in downtown Boston, Massachusetts.[62] In addition, this construction must be orchestrated so that all major roads remain open during its course.[63] The completion of this project is vital to improving the quality of life in Boston and

PLA, in the actual case).

53. *Id.*

54. *Id.* at 508. (citing Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 664-65 (1982) and 29 U.S.C. § 158(a)(3), (b)(2) (2000)).

55. *Id.*

56. *Id.* at 509.

57. *Id.*

58. No. CIV.A.90-3035, 1996 WL 106983, at *1 (Mass. Super. Ct. Mar. 12, 1996).

59. *Id.* at *18.

60. *Id.* at *2.

61. *Id.*

62. *Id.*

63. *Id.*

correspondingly to maintaining the Boston economy.[64] Facing a project of this nature, and aware of the huge cost of any delays, the construction manager determined that a PLA was necessary to ensure that the project would proceed in an efficient manner.[65]

This PLA aimed to eliminate the possibility of delay by prohibiting labor slowdowns or strikes. The agreement set work rules, schedules, and conditions, recognized a union as the collective bargaining agent, and required use of union hiring halls. In addition, it mandated contributions to union benefit funds and established arbitration procedures to resolve grievances and jurisdictional disputes.[66]

In evaluating the validity of a PLA under the state's competitive bidding law, the court referred to statutory language stating that "the awarding authority may reject any and all bids if it is in the public interest to do so."[67] The court reasoned that according to the intended meaning of the statutory language, the "awarding authority" does have discretion to require a PLA when so doing serves the "public interest" by enhancing "labor harmony."[68] The court found that the PLA was reasonably related to the statutory purposes, and, therefore, the agreement was held to be valid.[69]

The court however pointed out that not every construction project merits a PLA. Instead, one must consider the "size, complexity, timing, or anticipated duration of the particular project."[70] Here, the court determined that since "labor harmony" and the resulting lack of delays were crucial to the "public interest" in timely, successful, efficient completion, a PLA was reasonable.[71] Also, the court was persuaded by the fact that any delay or dispute would have a "domino effect" on the rest of this vast project.[72]

The court also determined that the PLA does not create a preference in favor of unions and union workers simply by requiring hiring through union hiring halls because union referrals may not discriminate on the basis of union status.[73] Finally, the court recognized that "[s]o long as bidders have the opportunity to bid in the same way, on the same information, and to bear the same risk of rejection, fairness and equality are preserved."[74] As a result, the court reasoned that the fact that some number of contractors

64. *Id.*
65. *Id.* at *4.
66. *Id.* at *5.
67. *Id.* at *7 (quoting MASS. GEN. LAWS ch. 30, § 39M(a)(2000)) (noting code used by court in 1996 is still in force today).
68. *Id.*
69. *Id.* at *8.
70. *Id.* at *9.
71. *Id.*
72. *Id.*
73. *Id.* at *12.
74. *Id.* at *13 (quoting Dep't of Labor & Indus. v. Boston Water & Sewer Comm'n, 18 Mass. App. Ct. 621, 626 (1984)).

chose not to bid did not establish that the PLA excluded these non-bidders from the bidding process.[75] The court went so far as to suggest that if a potential bidder finds a PLA so unacceptable as to be unwilling to bid, then that contractor should "seize other opportunities created by the lack of available contractors due to the Central Artery Project."[76] The court ultimately concluded that "public bidding statutes do not prohibit any bid specification for a public construction project that requires successful bidders to execute a project labor agreement."[77]

In the more recent case of *John T. Callahan & Sons, Inc. v. City of Malden*,[78] the Massachusetts Supreme Judicial Court held that where a construction project was of sufficient size, duration, timing, and complexity, and where the agreement furthered the purposes of competitive bidding law, then a PLA was valid. The PLA in this case was required for all contractors who bid successfully on portions of a $100 million school construction project. Through this construction, the city of Malden planned to close nine existing schools and build five new ones.[79]

The PLA for this project required contractors to recognize the union as the sole collective bargaining agent of all craft employees and to hire all employees through non-discriminatory union hiring halls. The agreement stated that the Massachusetts Department of Labor and Industries would determine wages and that wages would remain consistent throughout the project. Contractors would also have to contribute to union benefit funds and comply with all uniform work schedules, holidays, work assignments, and overtime provisions. Finally, the agreement included a no-strike provision that covered all disruptions throughout the life of the project.[80]

The court held that though PLAs may have some anti-competitive effect, they are not absolutely prohibited.[81] In limited circumstances, where the project is sufficiently complex, the use of a PLA is "consistent with the purposes of the competitive bidding statute, notwithstanding the resulting interference with competition."[82] The court expressed its support for the reasoning in *New York State Chapter, Inc. v. New York State Thruway Authority*,[83] where the New York court held that the PLA was acceptable where the agreement served the purposes of the competitive bidding statute, namely getting the best work at the lowest price and preventing

75. *Id.*
76. *Id.* at *14.
77. *Id.*
78. 713 N.E.2d 955 (Mass. 1999).
79. *Id.* at 957.
80. *Id.* at 958.
81. *Id.* at 961.
82. *Id.*
83. 666 N.E.2d 185 (N.Y. 1996).

fraud, favoritism, and corruption.[84] Similar to the New York court, the *Callahan* court placed the burden of establishing that an agreement serves the purposes of the competitive bidding law, which include promoting labor harmony and placing all bidders on equal footing, on the authority seeking to require the agreement.[85] The court then set out a test for determining when a PLA may be valid, stating that an agreement will not be upheld unless (1) it is of such complexity, size, or duration that the goals of competitive bidding will not otherwise be realized and (2) "the record demonstrates that the awarding authority undertook a careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals."[86]

Finally, the *Callahan* court stated that in the case at bar, where the project was sufficiently complex and where the city clearly reasoned that a PLA would further the purposes of the competitive bidding statute, this agreement was valid.[87] Significantly, where even a slight delay at any stage of the Malden school construction project would have "severe consequences" because the project was a "carefully choreographed dance" requiring careful coordination so as to minimize disruption, the agreement was a reasonable solution.[88] This finding was of particular significance because there were at least twenty-five labor contracts that would expire over the course of the project, making the city and the project "particularly vulnerable to delays from labor unrest."[89] Additionally, the court emphasized that a delay would cause significant cost increases, forcing the city to give up needed aspects of the project just to stay within its budget.[90]

In the end, the court refused to state that PLAs are always justified. Instead, the court noted that where circumstances merited such an agreement, it should be upheld. The court also pointed out that though an agreement may make a bid look less attractive to a non-union contractor, it does not prevent any potential bidder from bidding. Therefore, the Malden PLA was a valid means of achieving the broad purposes of the Massachusetts competitive bidding law.[91]

4. Minnesota

In *Queen City Construction, Inc. v. City of Rochester*,[92] the court

84. *Id.* at 190.
85. *John T. Callahan & Sons, Inc.*, 713 N.E.2d at 961.
86. *Id.*
87. *Id.* at 962.
88. *Id.*
89. *Id.* at 963.
90. *Id.* at 962.
91. *Id.* at 964.
92. 604 N.W.2d 368 (Minn. Ct. App. 1999).

upheld the public authority's right to require adherence to a PLA. There, the court, observing judicial decisions in jurisdictions across the country, stated that PLAs do not violate Minnesota's competitive bidding law.

Under the court's analysis, a PLA was justified for this construction project—improvement and expansion of the civic center—for several reasons. The court relied on factors such as the need to complete the project on time so that prescheduled conventions could go on, the lack of funds to cover increased costs due to delays, the need to coordinate all members of the workforce, the tight labor market, and the difficulty due to "space and safety concerns . . . to establish separate gates for union and non-union personnel."[93] Here, the plaintiff argued that the Minnesota competitive bidding statutes require "'full,' 'free,' and 'unrestricted' competition."[94] However, the court disagreed, stating that "[i]n Minnesota, fostering competition is only one of the purposes of competitive bidding laws, which are designed 'to promote honesty, economy, and aboveboard dealing' and guard against 'fraud, favoritism, extravagance, and improvidence.'"[95] Consequently, not believing that Minnesota's laws require unfettered competition as required in New Jersey, and believing that this PLA served the underlying objectives of the competitive bidding statutes, the court upheld the PLA for this project.

5. Nevada

In *Associated Builders & Contractors, Inc. v. Southern Nevada Water Authority*,[96] the court held that where the PLA

involved did comply with the objectives of the state's competitive bidding law, then the agreement was valid.[97] The project at the center of this case was a capital improvement plan, spread over thirty years, aimed at developing a demand-responsive municipal water system to supplement the existing system.[98] The immediate work involved construction on several water distribution facilities.[99] A PLA seemed particularly important here where the defendant, in other projects under its control, had suffered delays due to work stoppages and labor strikes.[100] For the current project, officials understood that it was of "paramount importance that each phase of the [p]lan be completed in a timely manner to ensure uninterrupted water

93. *Id.* at 370.
94. *Id.* at 376.
95. *Id.*
96. 979 P.2d 224 (Nev. 1999).
97. *Id.* at 320.
98. *Id.* at 226.
99. *Id.*
100. *Id.*

delivery to southern Nevada."[101]

The PLA for this project included provisions that prevented labor disruptions, made the union the collective bargaining agent for all craft employees, set uniform work hours, wages, and conditions, and opened the project up to both union and non-union contractors.[102] Further, under the agreement, a non-union contractor could use up to "seven of their core employees selected on a one-to-one basis with employees referred by the union."[103] The agreement provided that no non-union workers were required to join the union and that hiring halls would be non-discriminatory on the basis of union status.

After examining decisions by the high courts in New Jersey, New York, and Alaska, this court held that PLAs are not absolutely prohibited under Nevada law, and may be upheld if they conform to the principles behind the state's competitive bidding law.[104] The court stated that the purpose of the competitive bidding law is to "secure competition, save public funds, and to guard against favoritism, improvidence and corruption."[105] The court held that since the agreement allowed both union and non-union contractors to bid, did not require any workers to join the union, and allowed non-union contractors to continue to employ core workers, it "maintain[ed] competition among bidders and guard[ed] against favoritism."[106] Further, the court found that the agreement indirectly saved public funds by avoiding additional costs caused by labor unrest.[107] Here, the court stated that since the authority sought this agreement primarily because of a reasonable fear of labor strikes, based on the occurrence of two such stoppages in other recent projects, the agreement was valid under the competitive bidding law.[108]

6. New York

In *New York State Chapter, Inc. v. New York State Thruway Authority*,[109] the court upheld one PLA (the Thruway/Tappan Zee Bridge project) and overturned another (the Dormitory/Roswell Park Cancer Institute project).[110] The court stated that PLAs are neither absolutely

101. *Id.*
102. *Id.* at 227.
103. *Id.*
104. *Id.* at 228.
105. *Id.* at 229 (quoting Gulf Oil Corp. v. Clark County, 575 P.2d 1332, 1333 (Nev. 1978)).
106. *Id.*
107. *Id.*
108. *Id.* at 230.
109. 666 N.E.2d 185 (N.Y. 1996).
110. *Id.* at 191-92, 194.

prohibited nor absolutely permitted in public construction under New York procurement law.[111] Rather, such agreements are valid "where the record supporting the determination to enter into such an agreement establishes that the PLA was justified by the interests underlying the competitive bidding laws."[112]

The court read the general purposes of New York procurement law to require that public money be used in a prudent manner and to facilitate the acquisition or construction of high quality goods at the lowest possible cost.[113] The court also recognized that these statutes require that there is fair and honest competition for all bids.[114] However, the court concluded that this requirement does not demand "unfettered competition."[115] Instead, bid specifications that exclude some potential bidders must be "both rational and essential to the public interest."[116] The court concluded that the overall objectives of the competitive bidding laws are "(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts."[117] The court then went further, saying that in the context of PLAs, the "public authority's decision to adopt such an agreement . . . must be supported by the record."[118] Further, the burden is on the authority to demonstrate that the decision to enter into a PLA corresponded to the purposes of the competitive bidding statutes.[119]

In the Thruway case, the project involved was a four-year refurbishment of the bridge, including deck replacement, necessitating lane closures during construction.[120] Considering the amount of revenue that the bridge generated, as well as the number of vehicles that traveled over the bridge daily, completing the project in a timely manner had significant financial, as well as commuter-related, implications.[121]

In order to complete this complex project without a PLA, the Thruway Authority would have had to coordinate several different craft unions, each with its own agreement, terms, schedule, conditions, and wages.[122] Further, the Thruway Authority would not have any protections against slowdowns or strikes due to worker grievances or jurisdictional disputes.[123] In

111. *Id.* at 187.
112. *Id.* at 187-88.
113. *Id.* at 189.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 190.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *See id.*

addition, in the past, when a contract was last granted to a non-union contractor, there were labor disputes and pickets.[124]

Upon consideration of a PLA, the Thruway Authority estimated that it would save over six million dollars, or 13.51% of the project's anticipated labor cost, simply by adopting such an agreement.[125] In addition, a PLA would allow the Authority to maintain toll revenues during the project.[126] The agreement required for this project required recognition of the union as the collective bargaining agent, hiring of eighty-eight percent of workers from non-discriminatory union hiring halls, and payment of union dues by workers and of union fringe benefits by employers.[127] Further, the agreement set uniform work rules and required adoption of dispute resolution procedures and prohibited strikes or other labor disruptions.[128]

The court upheld the agreement because of the Authority's concentration on the public fisc (notable in measures designed to cut costs and prevent the interruption of revenues), the complexity of the project, and the history of labor disputes.[129] The court stated that the PLA was "adopted in conformity with the competitive bidding statutes" and that the Authority had demonstrated that connection.[130] Further, the court recognized that the agreement did not favor any bidder because it applied whether the selected bidder was union or non-union.[131] Also, the court noted that the fact that some potential bidders would not bid because of the required adherence to the agreement did not mean that the agreement favored any one group over another or precluded bidding by any group in violation of the statute's requirement of competition.[132] Here, though there was a reduction in competition, it was justified because the agreement served the goals of the competitive bidding laws.[133]

In the Dormitory case, the project to modernize the facility was already underway when a PLA was first discussed.[134] Here, the reaction was mixed, with some people wondering whether such an agreement might in fact raise costs.[135] In addition, there were worries that skilled labor needed for the project might not be available through the agreement and that at least half of public construction in upstate New York, the location of

124. *Id.*
125. *Id.* at 191.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 193.
134. *Id.* at 192.
135. *Id.*

the project, was non-union.[136] In seeking to implement a PLA, the Dormitory Authority was not focused on reducing costs.[137]

The PLA negotiated here made the union the collective bargaining agent of all successful bidders and craft employees and required hiring through the union's job referral system (though contractors could retain one "core" employee for every ten hired through the hiring hall).[138] In addition, it required employees to pay union dues and employers to pay into union benefit funds.[139] The agreement also set uniform work rules, standardized work hours and schedules, and set forth mandatory dispute resolution measures for cases of worker grievances, preventing the possibility of labor strikes.[140]

The court stated, "What is dispositive is that the record fails to show that [the Dormitory Authority's] decision to enter into the PLA had as its purpose the advancement of the interests underlying the competitive bidding statutes."[141] The court, noting that no part of the agreement was particularly targeted at cost savings, that there was no prediction of increased costs due to possible labor issues, and that no aspect of the project was of such a nature as to necessitate a PLA, held that the agreement was not justified under competitive bidding laws.[142] In addition, the court found the absence of labor unrest surrounding this project persuasive.[143] The court went so far as to state that "post hoc rationalization for the agency's adoption of a PLA cannot substitute for a showing that, prior to deciding in favor of a PLA the agency considered the goals of competitive bidding."[144] To allow a PLA here simply because it could possibly promote labor stability would suggest that these agreements are always appropriate—a stance this court clearly did not take. Instead, the Dormitory Authority would have had to have shown some basis for needing such an agreement for the court to have approved it.[145]

In this consolidated case, the court set out a standard by which to measure PLAs. So long as an agreement clearly served the objectives underlying the competitive bidding statutes, for example, reducing costs or

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 193.
142. *Id. See generally* 89 N.Y. JUR. 2D *Public Works & Contracts* § 25.5 (Gene A. Noland ed., Supp. 2000) (discussing Dormitory Authority's improper adoption of the PLA); Martin & Cardamone, *supra* note 2, at 525-27 (analyzing New York's PLA standards in light of its Thruway Authority and Dormitory Authority decisions).
143. *N.Y. State Chapter, Inc.*, 666 N.E.2d at 193.
144. *Id.*
145. *Id.* at 193-94.

preventing labor unrest, then it would be upheld.[146] However, where there was no basis for the agreement other than the general prospect that it might be advantageous, the agreement would not be allowed.[147] Further, the court set out that the authority advancing a PLA has the burden of showing that a decision to enter into such an agreement has "as its purpose and likely effect advancement of interests embodied in competitive bidding statutes."[148] The court's approach aims to ensure that contracting authorities can respond to the challenges of their construction projects, while still remaining faithful to the public protections embodied in competitive bidding laws.[149]

7. Ohio

In *Ohio ex rel Associated Builders & Contractors v. Jefferson County Board of Commissioners*,[150] the court upheld a PLA required for bidders on a county jail facility.[151] The Board of Commissioners sought a PLA for the "express purpose of facilitating the orderly performance of work on the jail project by eliminating work stoppages, slowdowns, and other interferences."[152]

The agreement for this project set out a uniform work schedule, mandated procedures for dealing with labor disputes, contained a comprehensive no-strike clause, and created uniform working conditions for all contractors and workers.[153] This agreement was required of all successful bidders and was designed to expire on the last day of work on the project.[154] Further, the agreement only applied to this particular project.[155] Under the agreement, selection of applicants was to be through referral systems operated by the unions, though these referrals would be non-discriminatory on the basis of one's union membership status.[156] In addition, employers retained the right to refuse a referred employee.[157]

The court here upheld the PLA because it did not distinguish between union and non-union contractors in the bidding process.[158] It simply required that any selected bidder sign onto the PLA and abide by its

146. *Id.* at 193.
147. *Id.* at 193-94.
148. *Id.* at 190.
149. *Id.* at 194-95.
150. 665 N.E.2d 723 (Ohio Ct. App. 1995).
151. *Id.* at 728.
152. *Id.* at 725.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 726

terms.[159] The agreement did not require that any contractor become a union employer, nor did it apply beyond the project involved.[160] Further, the requirement of using union hiring halls did not demonstrate any preference for union labor because federal law mandates that union hiring halls be non-discriminatory on the basis of union membership.[161]

The court also held that the agreement did not conflict with the purpose underlying Ohio's competitive bidding statutes, stated as enabling a "public contracting authority to obtain the best work at the lowest possible price while guarding against favoritism and fraud."[162] The court noted that a contracting authority has the discretion to select the "lowest and best bid" for its construction projects.[163] Further, since state law requires that all contractors pay the prevailing wage, "the statutes' goal of fostering competition among bidders is not negated by the PLA."[164] Since the agreement neither excluded any potential bidders, nor manifested a preference for any class of bidders, it was valid.[165]

In *Enertech Electric, Inc. v. Mahoning County Commissioners*,[166] a federal case decided under Ohio law, the court held that the PLA at issue did not violate the state's competitive bidding law.[167] There, the court stated that the underlying goals of the competitive bidding laws are to "provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms."[168] The court determined that the awarding authority did not abuse its discretion by finding that the "best" bidder was one who would sign onto the PLA because such a requirement was consistent with Ohio's competitive bidding law.[169] Further, the fact that the agreement sought to maintain labor harmony was sufficient to show that the purpose of the agreement was in accord with the objectives of the competitive bidding law.[170]

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159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 727; *see also* Cedar Bay Constr., Inc. v. Fremont, 552 N.E.2d 202, 205 (Ohio 1990) (detailing the discretion the city may use in accepting bids).
163. *Ohio ex rel Ass'd Builders & Contractors*, 665 N.E.2d at 727.
164. *Id.* (referring to OHIO REV. CODE ANN. §§ 4115.032-4115.05 (West 1995)).
165. *Id.* at 726-727.
166. 85 F.3d 257 (6th Cir. 1996).
167. *Id.* at 260.
168. Ass'd Builders & Contractors v. S.F. Airports Comm'n, 981 P.2d 499, 509 (Cal. 1999) (citing *Enertech Elec., Inc.*, 85 F.3d at 260).
169. *Id.*
170. *Id.*

8. Pennsylvania

In *A. Pickett Construction, Inc. v. Luzerne County Convention Center Authority*,[171] the court held that since there were critical timing issues involved in the project at hand, a PLA was permissible under the competitive bidding laws.[172] The project here involved the construction of a new convention center.

The terms of this PLA correspond to the terms commonly found in such agreements. In addition, under this PLA, every selected contractor was required to hire a certain number of union workers and pay them union wages.[173] The proffered justifications for this PLA included:

> 1) the avoidance of costly delays occasioned by labor disruption in a heavily unionized labor environment of Northeastern Pennsylvania, if the PLA were not included, 2) the promotion of labor harmony for the duration of the Project, 3) the necessity to adhere to a tight inflexible construction deadline, given the loss of an anchor tenant and significant state funding if construction were not completed by a certain date, 4) significant cost savings and management flexibility for the Project and 5) the assurance of a large pool of skilled and experienced labor for the Project.[174]

Of these, the report prepared for the awarding authority discussing why a PLA might be useful for this project most emphasized the inflexible deadline.[175] This report also noted that given the size, complexity, timing issues, and scope of this project, especially in comparison to other projects where PLAs have been upheld, a PLA seemed appropriate.[176]

The court held that determining the lowest responsible bidder, as required by the competitive bidding law, is a choice within the discretion of the awarding authority.[177] Further, this determination does not solely center on an evaluation of the lowest bidder in terms of dollars.[178] The court then stated that in its determination of responsibility, a bidder's willingness to sign onto a PLA may be a relevant factor because it relates to an assessment of the "need for promptness and timely completion of the project."[179] Further, the existence of a significant, firm deadline served to

171. 738 A.2d 20 (Pa. Commw. Ct. 1999).
172. *Id.* at 24.
173. *Id.* at 22.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 24.
178. *Id.*; *see also* Kratz v. City of Allentown, 155 A. 116, 117 (Pa. 1931); Hibbs v. Arensburg, 119 A. 727, 729 (Pa. 1923) (holding that choosing the lowest responsible bidder requires the careful study of a variety of factors).
179. *A. Pickett Constr., Inc.*, 738 A.2d at 24.

make a PLA more appropriate here than on other projects where such deadlines do not exist.[180] The court concluded that "the Authority acted fully within its discretion by including as a necessary component in its assessment of the 'responsibility' of the lowest bidder, the ability to assure prompt completion of the Project and in furtherance of that goal to require bidders to agree to sign the PLA."[181]

The court further noted that the PLA did not favor union contractors over non-union contractors.[182] Not only did the agreement allow contractors to employ previous core employees, but it required that hiring through union hiring halls be non-discriminatory.[183] Also, bidding was open to all contractors, regardless of union affiliation.[184] The court stated that just because "it may be difficult or distasteful for Plaintiffs to accept the provisions of the PLA does not mean that it is anticompetitive."[185] Further, the court stated that "the mere inclusion of a PLA does not constitute illegal discrimination."[186] Therefore, in this case, where the PLA was narrowly tailored to serve the underlying purposes of the competitive bidding laws while still accounting for the challenges inherent in the construction industry and the particular non-anticompetitive project, it was valid.[187]

B. States That Have Struck Down Project Labor Agreements

1. New Jersey

In *George Harms Construction Co. v. New Jersey Turnpike Authority*,[188] the New Jersey Supreme Court held that the PLA adopted and required by the Turnpike Authority was not consistent with the policies of the state's competitive bidding law.[189] The court's primary objection focused on the fact that the policies of the state's laws do not support requiring "contractors to hire members of only certain designated labor organizations to the exclusion of all others."[190] The project at issue here was an effort to widen a portion of the Turnpike. The Turnpike Authority

180. *Id.*
181. *Id.*
182. *Id.* at 25.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 26.
187. *Id.*
188. 644 A.2d 76 (N.J. 1994).
189. *Id.* at 79.
190. *Id.*

favored the requirement of a PLA because it had recently had to deal with labor disturbances in the form of work stoppages.[191] These potential delays would be particularly costly because they would have "hampered New Jersey's efforts to comply with federal clean-air requirements by 1996 to obtain federal transportation funds, and certain permits from the Army Corps of Engineers might have expired if work had been interrupted."[192] In addition, there had also been several jurisdictional disputes over which unions would do which kinds of work.[193]

The New Jersey competitive bidding law provides that the Turnpike Authority "in the exercise of its authority to make and enter into contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers, . . . shall award . . . contract[s] to the lowest responsible bidder . . . ."[194] Responsibility "embraces moral integrity just as surely as it embraces a capacity to supply labor and materials."[195] Further, consideration of whether a contractor employs union workers is not appropriate within a determination of a contractor's responsibility.[196] According to the New Jersey Supreme Court, the purposes of the competitive bidding laws are to serve the public good by providing the best work at the lowest cost, while preventing corruption, fraud, extravagance, improvidence, and favoritism.[197] In short, they are meant to "secure for the public the benefits of unfettered competition."[198] Another goal of these laws is to place all bidders on equal footing and to ensure competition.[199] As a result, a bid specification "cannot be so precise as to knowingly exclude all but one prospective bidder."[200]

The court held that since the PLA as drafted required that all contractors enter into a contract with a particular union and that all contractors hire only from that union, the agreement was not consistent with the state's competitive bidding statutes.[201] The court stated that the

191. *Id.*

192. *Id.* at 80.

193. *Id.*

194. N.J. STAT. ANN. § 27:23-6.1(a) (West 1991).

195. *George Harms Constr. Co.*, 644 A.2d at 92 (quoting Trap Rock Indus. v. Kohl, 284 A.2d 161 (1979), *cert. denied*, 92 S.Ct. 1500 (1972)).

196. *Id.* (citing 24 Op. Att'y Gen. N.J. 123 (1975) (explaining union affiliation is not a necessary criteria for choosing bids)).

197. *Id.* at 90-91 (citing Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 341 A.2d 327, 330 (N.J. 1975)).

198. *Id.* at 91 (citing *Terminal Constr. Corp.*, 341 A.2d at 330).

199. *Id.* at 93 (citing Utilimatic, Inc. v. Brick Township Mun. Util. Auth., 630 A.2d 862, 864-65 (N.J. Super. Ct. Law. Div. 1993)).

200. *Id.* (citing *Utilimatic, Inc.*, 630 A.2d at 865); *see also* N.J. STAT. ANN. § 40A:11-13 (West 1991) (requiring specifications be drafted in a manner encouraging free, open, and competitive bidding).

201. *See George Harms Constr. Co.*, 644 A.2d at 95.

problem with PLAs is that they allow the state, at least initially, to select the bargaining representative for its employees, something only the employees should be allowed to select.[202] While the court recognized that PLAs can often have useful effects, here the court held that the current competitive bidding statutes could not encompass this agreement.[203] The primary problem with the agreement for this project was that it designated a "sole source of construction services and the exclusive organization with which a construction contractor might enter an acceptable project-labor agreement."[204] The court, noting that PLAs do clearly limit competition to a certain degree, found this agreement to be inconsistent with the New Jersey competitive bidding law's requirement of "unfettered competition."[205] Here, where the bid specification, requiring adherence to the PLA, had not been "drafted in a manner to encourage free, open and competitive bidding," it was not valid.[206] Significantly, the concurrence points out that a properly drafted PLA could be valid under the New Jersey competitive bidding laws.[207] Also, had the court not read New Jersey's competitive bidding law as requiring unfettered competition, but rather as requiring open competition, then this agreement may well have been found to be valid.

In addition to this discord with the state competitive bidding statute, the court also seemed bothered by the apparent political motivations behind this PLA that made it look more like a back room deal than a necessary agreement.[208] Particularly, then-Governor Florio was in the midst of seeking reelection when he signed an Executive Order directing public agencies to use PLAs on public projects.[209] Unsurprisingly, the union endorsed the Governor in his reelection bid after he signed this order.[210] In addition, not only did Harms have a long running dispute with the union involved in the agreement, but the awarding authority did not seek a PLA until after Harms became the apparent low bidder.[211]

In a subsequent case, *Tormee Construction, Inc. v. Mercer County Improvement Authority*,[212] the court held that the PLA at issue impermissibly restricted contractors to a union-only work force and

202. *Id.* at 94.
203. *Id.* at 95.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 96 (Hadler, J., concurring).
208. McGeary & Pellegrino, *supra* note 2, at 437.
209. *Id.*
210. *Id.*
211. *Id.*
212. 669 A.2d 1369 (N.J. 1995).

therefore conflicted with the New Jersey competitive bidding statute.[213] The project involved additions and alterations to library buildings within the county.[214] The awarding authority required successful bidders to enter into a PLA with "appropriate labor organizations."[215] The bid specification defined an "appropriate labor organization" as:

> an organization representing journeymen in one or more crafts or trades listed in N.J.A.C. 12:60-3.2, for purposes of collective bargaining and which has (1) entered into a labor agreement with an employer in the building and construction industry, (2) has represented journeymen, mechanics and apprentices employed in projects similar to the contracted work, and (3) has the present ability to refer, provide or represent sufficient numbers of qualified journeymen in the crafts or trades required by the contract to perform the contracted work.[216]

This case differs from the *George Harms* case because there contractors were required to deal with a single union, whereas here, contractors must deal with "appropriate labor organizations."[217]

In analyzing this PLA, the court determined that, even though the terms in this case were less restrictive than those in the *George Harms* case, they still contravened the purposes of the competitive bidding laws because only two unions would have qualified under these specifications and definitions. The court then stated that the restriction of a project labor agreement to two unions, like the restriction to a single union, "binds too tightly to satisfy the statutory requirements for bidding on local public contracts."[218] The court recognized that:

> PLAs can contravene the goals of competitive bidding. By mandating that workers belong to certain limited labor organizations, PLAs restrict bidders to contractors with relationships with those organizations. The obvious effect of such a restriction is to lessen competition. Additionally, PLAs can increase labor costs by excluding or reducing the number of employable non-union workers.[219]

The court then highlighted a significant difference between this agreement and the PLA involved in the Tappan Zee Bridge construction project discussed in *New York State Chapter, Inc. v. New York Thruway*

213. *Id.* at 1369.
214. *Id.* at 1370.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 1371.
219. *Id.*

Authority.[220] The PLA required by the Thruway Authority in the New York case recognized that a successful bidder need not be a union contractor, stating only that the bidder must agree to comply with the terms of the agreement.[221] Therefore, though the New York PLA did lessen competition, it had a minimal effect compared to the PLA here and did so while serving the goals of the competitive bidding statute, something that the PLA here could not claim to do.

In the end, though the *Tormee* court did acknowledge that these agreements when drafted in an appropriate manner serve the public interest by preventing labor disputes and slowdowns and by resolving disputes among the different trades at work on a project, the court held that the PLA was not appropriate.[222] Not only was the drafting of the agreement such that it prohibitively limited competition, but the scope and complexity of the project, unlike that of the Tappan Zee Bridge project in New York, were not sufficient to necessitate a PLA.[223] The court noted that neither state law nor state executive policy favored using PLAs on "routine construction projects" such as the project at issue here.[224] Therefore, the court ruled that this PLA was invalid.[225]

2. New York

In *New York State Chapter, Inc. v. New York State Thruway Authority*,[226] the court struck down a PLA required by the Dormitory Authority for a construction project which was to modernize the Roswell Park Cancer Institute because it violated the principles of New York's competitive bidding statutes.[227] The court's ruling here centered on the fact that the nature and scope of this project were such that a PLA was unnecessary. Further, the court held that since the decision to adopt a PLA was unrelated to the general objectives which underlie the competitive bidding statutes, namely labor harmony, reduced costs, and avoidance of fraud and favoritism, there was no basis for allowing a PLA here.[228]

220. 666 N.E.2d 185 (N.Y. 1996).
221. *Id.* at 191.
222. *Tormee Constr., Inc.*, 669 A.2d at 1371-72.
223. *Id.* at 1372.
224. *Id.*
225. *Id.* at 1373.
226. 666 N.E.2d 185 (N.Y. 1996). *See* discussion of this case *supra* Part III.A.6.
227. *N.Y. State Chapter, Inc.*, 666 N.E.2d at 192-93.
228. *Id.*

IV. DISCUSSION

A. *Analysis of the Different Approaches in the Law*

In analyzing PLAs the various state courts tend to follow similar patterns of evaluating two areas of information. First, they consider the nature and scope of the project to determine whether the project is such that a PLA might facilitate the completion of the project at the lowest cost and with the best work. Through this evaluation, the courts seek to understand whether this is simply a routine project where a PLA might be desirable although not necessary, or whether it is a project of sufficient size, scope, complexity, or duration that a PLA is in fact needed. Second, the courts tend to evaluate the agreement itself and the process through which the awarding authority came to see the PLA as necessary. In the course of this evaluation, the courts, recognizing that these agreements by their very nature limit competition, look to see whether the PLA serves the broader objectives and purposes of the given state's competitive bidding laws. In making this evaluation, the courts tend to consider why the awarding authority sought a PLA, what goals that authority thought the PLA would serve, and whether the drafted language would serve to minimize the agreement's negative effect on competition.

In evaluating projects to determine whether a PLA is appropriate, the courts have focused on elements related to the nature and scope of the project as well as outside factors such as the coordination of and control over the labor force. Through consideration of such factors as whether the project requires the coordination of a large number of different crafts and trades and whether there are strict and tight deadlines, the courts attempt to determine whether a PLA is necessary in order to keep the project on track and within budget. The courts also evaluate whether the project is genuinely at risk for delay or work stoppage caused by labor disputes in order to determine whether a PLA is in fact necessary and not just generally desirable. Only if the authority has had past experience with labor unrest on similarly situated projects or where there are strong reasons to fear labor disruptions on the current project will the court find that a PLA is justified on the basis that it serves to prevent labor stoppages. Significantly, where the project involves critical timing issues or strictly imposed deadlines, the courts are likely to find that a PLA is justified because it will prohibit costly work stoppages.

Where the courts have upheld PLAs, they have tended to rely on a broad reading of their state's competitive bidding laws instead of a narrower reading that only allows the awarding authority to grant a bid to the lowest bidder. The courts have used discretion in determining what

makes a bidder sufficiently responsible as to be eligible to receive a bid. Within this discretion, the courts have considered willingness to sign onto a PLA to be either a part of a determination of a bidder's responsibility or an additional element that corresponds to the bidder's responsibility.[229]

In evaluating the drafting of a particular agreement, the courts must determine whether the language is so restrictive or specific as to functionally eliminate most potential bidders. Also, the courts must assess whether the language serves to prevent all non-union contractors from bidding or whether it simply makes bidding less attractive for them. Where the language restricts either reasonable competition for the bid or non-union contractors as a class, the courts will find that the PLA violates the broad purposes of the competitive bidding laws.

B. Why Public Authorities Desire PLAs

Public authorities favor PLAs because they serve to "promote efficiency, thus lowering costs."[230] Further, these agreements prevent labor stoppages during the life of the agreement, help build job site harmony, and provide for grievance procedures, all of which promote efficiency.[231] In addition, they provide the authority with significant control over the terms of the project while saving the authority from the challenge and cost of having to negotiate individually with each selected bidder. PLAs also eliminate the possibility of a labor strike or slowdown that would increase the cost and duration of the project, all of which is paid by the taxpayers.[232]

Significantly, because adherence to a PLA is a required bid specification, the authority has substantial leverage over bidding contractors because the terms are express and non-negotiable.[233] PLAs also increase labor harmony by putting all contractors and all workers on the same terms. Further, because PLAs are most common on large, complex projects, these agreements help facilitate members of different crafts and trades who are working together on the larger project and help control potential jurisdictional disputes.[234]

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229. Utility Contractors Ass'n of New England v. Comm'rs of the Mass. Dep't of Pub. Works, No. CIV.A.90-3035, 1996 WL 106983, at *15 (Mass. Super. Mar. 12, 1996) (noting that the bid specification requiring a selected contractor to sign onto the PLA "stands in addition to" other pre-qualification provisions).

230. McGeary & Pellegrino, *supra* note 2, at 447.

231. *Id.* at 446-447.

232. Robert W. Kopp & John Gaal, *The Case For Project Labor Agreements*, 19 CONSTRUCTION LAW. 5 (Jan. 1999).

233. *See id.* at 7.

234. *Id.* at 6.

C. *Why a Non-Union Contractor Might Choose Not to Bid on a Project Requiring a Project Labor Agreement*

Non-union contractors tend to prefer not to be bound by PLAs because these agreements force the non-union contractor to essentially act as a union contractor for the duration of a project.[235] Not only do non-union contractors give up substantial autonomy when they agree to a PLA because they give up the right to bargain individually for better terms, but they also lose substantial autonomy as to how the work on a project will be performed.[236] In particular, non-union contractors point to the fact that they often are not able to use their own workers and foremen but instead must employ those workers referred by the union hiring hall.[237] As a result of this process, a contractor generally is not familiar with the workers he employs.

Non-union contractors also complain that they are forced to pay union wages and contribute to union benefit plans, rather than funding their own benefit plans.[238] Finally, these non-union contractors complain that PLAs force them to be bound to, and under the direction of, unions that are traditionally hostile to them.[239] Significantly, though these are all valid factors that might dissuade a non-union contractor from bidding on a project with a PLA, the existence of a PLA does not bar any non-union contractor from bidding, and non-union contractors do tend to bid on projects that require PLAs.[240]

D. *Alleged Problems That Project Labor Agreements Present*

Those who argue against PLAs claim that these agreements limit competition, raise costs, and favor union over non-union contractors and workers. Significantly, they often call these agreements "union-only PLAs." Opponents claim that:

> union-only PLAs restrict the award of construction contracts to the minority of contractors that are willing and able to enter into collective bargaining agreements. Union-only PLAs thereby promote special interest favoritism and undermine fundamental principles of open competition for government work. Imposition of such union-only PLAs inherently reduces the number of bidders and increases the costs of construction, with no

235. *See* John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955, 960-61 n.9 (Mass. 1999).
236. *See id.*
237. *Id.*
238. *See id.*
239. *Id.*
240. *See id.* at 961.

concomitant public benefits.[241]

PLAs are anti-competitive, opponents claim, because the terms that they require are unfavorable to non-union contractors. They also note that for a non-union contractor to sign onto a PLA, the contractor must essentially agree to function as a union contractor for the duration of the project. Consequently, they claim that PLAs are really union-only requirements because to be a successful bidder, one must either be a union contractor or agree to act as a union contractor for the duration of the project.[242]

Proponents of project labor agreements, however, believe that it is improper to claim that these agreements are "union-only" agreements.[243] Instead, they point out that these agreements do not require any contractor to be a part of a union in order to be allowed to work on the project. Further, no contractor must become a part of a union in order to bid on a contract or work on a project. In addition, the PLA only controls the contractor's actions as related to the project for which it is required and it has no other effect, either outside of that project or after the project is concluded. As for project employees, they point out that because referrals for jobs are made by union hiring halls, the National Labor Relations Act ("NLRA") section 8(f) sets out that union hiring halls must be non-discriminatory on the basis of union membership. In addition, a valid PLA may not require any non-union members to become members of any union.[244]

Those who oppose PLAs argue that the terms of these agreements, prohibit them from bidding. They do not accept the argument that these agreements, in fact, allow non-union contractors to choose whether or not to bid on contracts that require PLAs.[245] Further, those who oppose PLAs claim that the true issue under competitive bidding law is not whether the agreement, as drafted, left non-union contractors with the freedom to bid, but rather whether the requirement of adherence to the PLA "effectively discourages them from bidding, to the detriment of taxpayers."[246] In support of this argument, opponents of PLAs cite, for example, that bids for the Roswell Park Cancer Institute renovations were down by thirty percent

241. Maurice Baskin, *The Case Against Union-Only Labor Project Agreements*, 19 CONSTRUCTION LAW. 14 (Jan. 1999).

242. *See id.* at 14 (explaining that prior to being allowed to begin work, among other things, the PLAs require successful bidders to sign a collective bargaining agreement mandating exclusive union representation, union wages, and union halls).

243. Kopp & Gaal, *supra* note 232, at 5, 8.

244. *Id.*

245. *See* Baskin, *supra* note 241, at 14-15 (noting that in most parts of the U.S. 80% of the construction industry is performing work on a non-union basis, discouraging many contractors from bidding).

246. *Id.*

after the requirement of the PLA.[247]

Although it is true that their terms require non-union contractors to alter the manner in which they conduct business in order to work on a project requiring a PLA, requiring a PLA does not, in fact, bar non-union contractors from bidding. Instead, "[w]hile some nonunion contractors may well be disinclined to bid on work covered by a PLA because of their own philosophy about unions, PLAs in no way limit bidders to unionized contractors."[248]

On the Boston Harbor project, where a PLA was approved, 102 of 257 successful subcontractors were non-union.[249] These numbers show that non-union contractors clearly felt that they had the choice to bid on various subcontracts. Although these numbers demonstrate that non-union contractors will still bid on desirable projects, these numbers are even more telling when one recognizes that this project maintained a high level of non-union participation in Boston where "as much as three-quarters of the Boston market consists of unionized contractors."[250]

In Nevada, where a PLA was part of the bid specification for the Southern Nevada Water Systems Improvement project, non-union contractors submitted thirty-four of ninety-three bids on work covered by the PLA.[251] Further, there were thirty-one percent more bids submitted on work covered by the PLA than on work outside the scope of the PLA.[252] In addition, the great majority of state courts that have dealt with this issue have determined that under their state's competitive bidding laws, a lessening of competition caused by a PLA may be allowed when the PLA serves the greater goals of the competitive bidding statute.[253]

Opponents of PLAs argue that these agreements actually raise the cost

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247. *Id.* (discussing a study in Roswell Park, N.Y. which showed that public-sector union-only PLAs significantly reduce the number of bidders for government work and significantly increase the cost of construction).

248. Kopp & Gaal, *supra* note 232, at 5, 9.

249. *Id.* at 10.

250. *Id.*

251. *Id.*

252. *Id.*(citing Bradford W. Coupe, *Legal Considerations Affecting the Use of Public Sector Project Labor Agreements: A Proponent's View*, XIX J. LABOR RES. 99 (1998)).

253. *E.g.*, John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955, 961 (Mass. 1999) (noting that though a PLA may have some anti-competitive effect, PLAs are not absolutely forbidden on public projects and may be valid where they serve the purposes of the competitive bidding statute); Ass'd Builders & Contractors v. S. Nev. Water Auth., 979 P.2d 224, 228 (Nev. 1999) (holding that the anti-competitive effect of a PLA may be allowed where the PLA serves the underlying objectives of the competitive bidding law); Laborers Local # 942 v. Lampkin, 956 P.2d 422, 434-35 (Alaska 1998) (noting that the PLA did not violate the state's procurement code which required "maximum practicable competition"). *But see, e.g.*, George Harms Constr., Co. v. N.J. Tpk. Auth., 644 A.2d 76, 94-95 (N.J. 1994) (asserting that where the competitive bidding law requires unfettered, free, and open competition for bids, a PLA which limits competition will be invalid).

of public projects. They claim that because awarding authorities refuse to grant projects to low bidders who will not sign onto the project's PLA, the authorities are actually choosing to spend more of the taxpayers' money than they would necessarily have to spend if they did not require adherence to the PLA. For example, in the Roswell Park Cancer Institute renovation project, one study reported that under the PLA, costs went up by more than twenty-six percent.[254] In addition, for the project at issue in *Associated Builders & Contractors v. Southern Nevada Water Authority*,[255] the awarding authority rejected a bid that was more than $200,000 lower than all others solely because the low bidder would not sign onto the PLA.[256] Rebutting the contention that projects proceed at the most efficient, lowest cost when there is a PLA in effect, opponents of PLAs argue that instead, open competition is the best means to achieve cost savings. Further, they claim that at best one could argue that:

> PLAs offer advantages over the kind of traditional highly unionized construction marketplace that has long since ceased to exist in most parts of the United States. More to the point, no legitimate study appears to support a conclusion that union-only PLAs are more cost-efficient than the competitive open shop market contractors that currently predominate in most parts of the country.[257]

Opponents also point out that many of the public projects for which PLAs are proposed are already subject to prevailing wage laws that are designed to prevent non-union contractors from undercutting union competitors in the bidding process. Since most labor costs of publicly funded projects are traced to wages established by these prevailing wage statutes, the "absence of nonunion bidders is not likely to significantly affect comparative costs."[258] Further, even in those jurisdictions, "open competition has been shown to result in cost savings, as compared to union-only requirements," such as PLAs.[259] As a result, they conclude that PLAs tend to result in higher costs than open competition and therefore they claim that PLAs are not justified under competitive bidding laws.

Those who favor PLAs instead claim that these agreements are a means of achieving the most cost-efficient labor for projects. A result of requiring a PLA will be that some authorities will turn down a low bidder who will not sign onto the PLA. In so doing, the authority trades that

254. Baskin, *supra* note 241, at 14-15.

255. 979 P.2d 224 (Nev. 1999).

256. Baskin, *supra* note 241, at 14-15 (noting as well that similar increased costs were present on the Boston Harbor project and the Tappan Zee Bridge project in New York).

257. *Id.* at 16.

258. Kopp & Gaal, *supra* note 232, at 5, 10.

259. Baskin, *supra* note 241, at 14, 16.

initial "savings" for the valuable security of knowing that the project will not be subject to labor disruptions. Since a PLA can save a project from these unexpected, unbudgeted costs, these agreements can result in significantly lower costs than a bid that came in at a lower original cost but did not have a PLA and therefore held the reasonable risk of a higher ultimate cost.[260]

Therefore, though it is clear that PLAs lessen competition to a certain degree by making bidding on a project somewhat less desirable for non-union contractors, the majority of state courts have held that they remain valid so long as they serve the underlying purposes of the competitive bidding statutes.[261] Further, where the courts have held that PLAs are not valid, they have so ruled because they have either read the competitive bidding statute to have a more narrow set of objectives[262] or because they have determined that the project and agreement in question do not make a PLA necessary.[263] Ultimately, though PLAs present certain risks, in that they might lessen or limit competition, for the most part these agreements maintain open competition among potential bidders and choice as to whether or not to bid at all.[264]

E. Public Interest Concerns Related to Project Labor Agreements

PLAs affect the public interest when they bump up against competitive bidding laws that are designed to maximize the interests of taxpayers by getting the best work at the lowest possible cost. In addition, PLAs raise public interest issues when they appear to favor union contractors over non-union contractors. On each of these fronts, the apparent public interest concern is more hype than substance.

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260. *See* Kopp & Gaal, *supra* note 232, at 5-6 (stating that "delay is synonymous with increased costs").

261. *E.g.*, John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955 (Mass. 1999) (holding that a PLA that served the goals of the competitive bidding statute is valid); N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth., 666 N.E.2d 185, 191-92 (N.Y. 1996) (holding that a PLA for the Thruway project was valid because the nature of the project and the agreement itself served the purposes of the competitive bidding statute).

262. *See e.g.*, Tormee Constr., Inc. v. Mercer County Improvement Auth., 669 A.2d 1369 (N.J. 1995) (holding that where the PLA limited the possible number of contractors who could be selected to such a minimal number, then the agreement had too strong of a negative effect on competition for it to remain valid); George Harms Constr. Co. v. N.J. Tpk. Auth., 644 A.2d 76 (N.J. 1994) (holding that where the competitive bidding law required unfettered competition, a PLA that limited competition, even minimally, was invalid).

263. *See, e.g., N.Y. State Chapter, Inc.*, 666 N.E.2d at 193-94 (holding that a PLA for the Dormitory project was not valid because not only did the agreement not serve to minimize costs, but the project itself was not of such a nature that a PLA was necessary).

264. *Id.* at 191.

Opponents of PLAs claim that these agreements limit competition and thereby disadvantage the taxpayer for whose benefit the competitive bidding laws were enacted.[265] They assert that because these agreements make it unfavorable for non-union contractors to bid on these projects, PLAs prevent the public developer, and therefore, the taxpayers from selecting a potentially lower bidder than the bidder ultimately chosen.[266] Further, they claim that PLAs functionally require union labor, thereby driving up the cost of completing the project.[267] They argue that non-union contractors are meant to serve as a check on the higher costs of union contractors.[268]

This evaluation of cost, however, is short sighted. Instead of valuing the security that PLAs provide by eliminating the possibility of costly delays, this view only considers the actual monetary value of the bids received.[269] It also fails to take into account other cost saving concessions that the public developer likely gained through the negotiation of the PLA.[270] Although the opponents of PLAs are correct that the amounts of these additional costs are speculative, the likelihood of these costs are certain enough to merit factoring them into an evaluation of the cost of proceeding without a PLA.[271]

Opponents of PLAs also criticize these agreements, claiming that they favor union contractors over non-union contractors.[272] Although proponents acknowledge that union affiliation may be a factor used in assessing a bidder's responsibility, they assert that union affiliation was not meant to be a determining factor under the competitive bidding laws.[273] In addition, a contractor's union affiliation has no bearing on his ability to perform high quality work in a timely manner.[274] Further, though the law prohibits express discrimination on the basis of union affiliation in the selection of bidders for a public project, critics claim that PLAs functionally exclude non-union contractors from the group of potential bidders by making bidding undesirable.[275] By allowing the use of a PLA,

265. Baskin, *supra* note 241, at 15.

266. *Id.*

267. McGeary & Pellegrino, *supra* note 2, at 450 (noting that union labor, instead of open shop contractors, raises costs by between twenty and sixty percent).

268. David J. Langworthy, *Project-Labor Agreements After Boston Harbor: Do They Violate Competitive Bidding Laws?*, 21 WM. MITCHELL L. REV, 1103, 1135 (1996).

269. *See* Kopp & Gaal, *supra* note 232, at 6 (noting that PLAs prevent later costs for such things as additional man-hours or delayed use of the completed project).

270. McGeary & Pellegrino, *supra* note 2, at 452.

271. *Id.* at 450.

272. Baskin, *supra* note 241, at 15.

273. Langworthy, *supra* note 268, at 1113.

274. Baskin, *supra* note 241, at 15.

275. Langworthy, *supra* note 268, at 1129 (noting that "[p]roject-labor agreement clauses, inserted into bid specifications for public construction contracts, permit public

the developer is able to deprive a non-union contractor of the award of a bid based solely on his non-union status.[276] The fact that most projects that have required PLAs have received bids from, and awarded bids to, non-union contractors undercuts this critique. Further, the fact that PLAs do not prevent any non-union contractor from bidding, leaving the choice to bid entirely up to the potential bidder, suggests that there is no real way to quantify the effect that these agreements have in preventing non-union contractors from bidding. However, the fact that in situations like the Boston Harbor project, where more than three-quarters of union labor is unionized, the fact that nearly forty percent of successful subcontracting bids were submitted by non-union contractors suggests that this perceived problem is less significant than one might theoretically imagine.[277] Therefore, though it is clear that some bidders are disinclined to bid as a result of these agreements, for the most part, PLAs do not discriminate expressly or indirectly on the basis of union status. Further, they do not favor, either expressly or implicitly, union contractors over non-union contractors because all qualified contractors are invited to bid, regardless of union status.

F. Predictive Analysis: What the Law is Likely to be in the Future

Given the general consensus in the variety of state cases explored in the earlier part of this comment, the courts in the future are likely to follow a similar pattern. To date, however, the courts have shown a general reluctance to "articulate[], in a useful sense, the factors to decide when, if ever, a state agency may use a labor requirement."[278] I believe that in the future, the factors that determine whether a PLA will be upheld will become clearer because either the courts will enunciate a more defined test or the factors at play will become more apparent as the courts decide more cases questioning the validity of PLAs.

Today, the courts follow a relatively general, standardized approach when evaluating whether to uphold a PLA, considering two different sets of factors. First, the courts consider the nature of the project to determine whether it is of sufficient scope or complexity such that a PLA would facilitate successful, on time, and low cost completion of the project. Second, the courts seek to assess whether the PLA, as drafted, serves to meet the goals underlying the given state's competitive bidding statutes. In

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authorities to do indirectly what they may not do directly.").

276. Langworthy, *supra* note 268, at 1131 (noting that a non-union contractor is either forced to "become a union contractor or to forego the opportunity to bid on the project").

277. Kopp & Gaal, *supra* note 232, at 10 (observing that 102 out of 257 subcontracting bids were awarded to non-union contractors).

278. McGeary & Pellegrino, *supra* note 2, at 438.

making this second stage analysis, the courts must develop an understanding of what the underlying purposes of the competitive bidding statutes are. Inherent in this understanding is a recognition of whose interests these laws serve. Further, the courts must determine whether open competition means completely unlimited, unfettered competition or whether the competition requirement can tolerate some limitations so long as they serve the larger purposes of the statutes.

In the future, I believe that the elements of each of these categories of inquiry will become more clearly classified, forming a more certain, more rigid test. As a result, those who wish to offer a PLA as part of a public project or those who wish to challenge a PLA through a lawsuit will have a better sense *ex ante* of the likelihood that the PLA will be upheld.

In the future, for inquiries related to the nature and scope of a project, it seems clear that the courts will weigh such factors as what kind of project is involved, how much the project will cost, how long it will take to complete, how many different types of crafts or trades will be involved, and how likely the project is to be affected by labor disruptions. Further, it seems likely that the courts will look to whether any elements of the project would make the completion of the project more difficult and whether the local construction industry is predominantly unionized or independent. Although these are the factors that the courts generally assess, they do not tend to consider these factors independently or openly. Rather, the courts tend to blend these factors together into a general pronouncement about the nature and scope of a project. By depending on a clearer list of elements, the courts will strengthen the precedents that they set because they will state more clearly when a project is of a sufficient scope that it could qualify for a PLA. In addition, the courts will be better able to discourage the use of PLAs by public developers when, given the nature of the project, they are clearly not appropriate.

In making this second category of inquiry related to the nature of the PLA as drafted, the courts can strengthen their decisions by defining when the language of a PLA is too restrictive or too narrow or when it has too strong of a limiting effect on competition. To do so, the courts must be more clear in setting out how they interpret their respective states' competitive bidding statutes, determining whether the statute allows for some limits on competition or whether they prohibit any such limit on competition. The courts should focus on clarifying how the language and form of a given PLA fits within the framework of competitive bidding statutes. In so doing, the courts should explicitly consider the exact language of the statute and the terms and requirements of the PLA. They should then explore the relationship between the two, looking to highlight whether the PLA serves the general, underlying purposes of the competitive bidding statute or whether it places too many limits on

competition. The court must determine whether the PLA either explicitly or functionally limits bidding to a single bidder or to a prohibitively small number of bidders. The court must assess whether the agreement favors one class of people over another. Finally, the court must examine whether the PLA makes it less attractive for a non-union bidder to bid or whether the agreement prohibits non-union contractors from bidding. Only by clearly delineating what the objectives of the competitive bidding statutes are can the courts strongly demonstrate whether the PLA in question ought to be upheld.

V. CONCLUSION

In the end, the courts must determine whether the limits that a PLA places on competition are outweighed by the benefits that the agreement provides. If a PLA serves to complete a project more quickly and efficiently and at a lower cost, then the agreement will serve the public interest and the competitive bidding statutes, so long as the statutes do not require unfettered competition.[279] As the opinions of the different state courts demonstrate, PLAs are generally upheld when they compensate for the limitations that they place on competition by providing some value to the public. Therefore, as long as the project is of such a scope that a PLA would aid in the project's completion and so long as the agreement is not drafted so as to favor one class over any other, then the PLA is likely to be upheld. In the future, the courts ought to set out a more straightforward test of when a PLA will be upheld in a particular jurisdiction. By so doing, not only will the courts set stronger precedents, but they will create clearer examples of valid and invalid PLAs, thereby creating a deterrent for agreements that do not serve the objectives underlying the given jurisdiction's competitive bidding statute. Therefore, though the courts have set a general rule for when PLAs will be upheld under state competitive bidding statutes, they ought to explain the reasoning behind their decisions more explicitly so that public developers can draft better PLAs in conformity with the objectives underlying the competitive bidding statutes.

279. *See* McGeary & Pellegrino, *supra* 2, at 449 (noting that due to the legislature's goal of unfettered competition, a higher degree of evidence should be required to prove that the "elimination of open shop contractors is warranted by legitimate construction concerns").