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Federal Court of Appeals Signals an End to Project Labor Agreement Requirements Linked to Development Tax Credits

What Action Should Owners, Developers and Contractors Take in Anticipation of Successful Challenges to PLA Requirements?

Recently, a federal court in New Jersey issued a decision which very well may invalidate all Project Labor Agreements ("PLA's") entered into as a condition to receipt of tax incentives for private development. Tax incentives utilized to promote private development are different, according to the court, than typical public works projects where PLA requirements have generally been held valid. Owners, developers, contractors and governmental entities must assess the consequences of this decision upon contracts already and to be awarded in the future where tax benefits may be linked to a PLA requirement.

In 1993, in what has become known as the Boston Harbor Case, the United States Supreme Court held that state and local governmental entities may condition the award of public works contracts on the contractor's agreement to enter into PLA's.

That decision has been followed nationwide since then to uphold the validity of various state and local law bidding conditions requiring successful bidders to negotiate and enter into project labor agreements as a condition to the award of public works contracts. The rationale is that when the government, like any other private party, is participating in an economic market, it may exercise its discretion in setting terms and conditions it believes best suit its interests in the efficient procurement of goods and services in that market. Therefore, a PLA requirement by a governmental entity engaged in market activity is no more or less valid than a PLA requirement on a purely private project.

In contrast, if a governmental entity is acting as a "market regulator" rather than a "market participant" it may be prohibited under federal labor laws from imposing a PLA requirement on a contractor because federal labor laws prohibit a state or local government from regulating labor policy pertaining to PLA's.

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Last month, a Federal Court of Appeals, ruling on a decision in a New Jersey matter held that a municipality was prohibited from conditioning the receipt of property tax credits on the Owner or Developer's execution of a PLA with the local building trades unions because, in that context, it was not acting as a true market participant, but rather as a market regulator.

In an effort to stimulate economic development, Jersey City, New Jersey offers tax exemptions and abatements to privately funded developers; however, those tax benefits are conditioned upon the developers' entry into project labor agreements containing specific provisions. For example, to satisfy the conditions set by the City, the PLA must include a requirement that all construction contractors utilize union labor pursuant to a collective bargaining agreement, even if the contractors do not ordinarily employ unionized labor. It also required among other things the utilization of apprentices enrolled in a state or federally registered apprenticeship training programs, typically available only through union hiring hall referrals through an agreement with the unions.

The Associated Builders and Contractors Inc. and other parties sued, claiming that the City was prohibited under federal labor statutes and constitutional law principles from imposing those conditions on a tax benefit. Applying the analysis set forth in *Boston Harbor* and subsequent cases, the court determined that if the City was acting as a market participant in imposing the condition, the condition would not be prohibited. The Court applied a two part market participant analysis: 1) does the ordinance serve to advance or preserve the public entity's proprietary interest in a project or transaction as an investor, owner, or financier; and 2) is the condition specifically tailored to the proprietary interest or, put another way, whether the action is so broad as to be considered in effect regulatory. If both conditions were met, the City would be acting in a market participant capacity and the PLA requirement would be valid.

In applying the above test, the Third Circuit Court of Appeals concluded that Jersey City lacked any proprietary interest in tax abated projects. The City would not own or manage the constructed properties; it would not hire, pay or direct contractors to complete the project; was not purchasing or selling goods or services; and would not have an investment interest in or finance the projects. It rejected the City's argument that it had a proprietary interest in the increased property value of surrounding properties which would theoretically lead to an increased tax base. Although the Appellate Court sent the case back to the lower court for further analysis of related legal and factual issues, it all but ensured that the requirement would not survive legal challenge.

PLA requirements connected with public contracting or public benefits are frequently the subject of successful legal challenges. As a developer or contractor, anticipatory action should be taken to account for the potential that the PLA requirement may be declared invalid at any time during the contracting process or even in the midst of construction. Issues to be addressed in advance include which party should bear the burden of defending a legal challenge to the PLA and the cost, schedule and other performance implications of the PLA being deemed unenforceable, which

may extend to exercising termination rights. Of course, the most appropriate measures depend upon the specific circumstances surrounding the PLA requirement and its implementation.

Throughout the US, attitudes are mixed regarding the benefits or detriments of PLAs associated with public benefits, thereby increasing the difficulty of determining where they they may be challenged and potentially declared invalid. All parties should understand and anticipate the potential risks involved with the use of PLAs associated with public contracting, public funding or public benefits and allocate the risks accordingly.

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