THEODORE ROOSEVELT INN OF COURT
PRESENTS

Project Labor Agreements ("PLA")

Trends for Organized Labor and the Construction Industry in Public Construction Projects in New York State: An Introduction and Primer for the Bench and Bar

Nassau County Bar Association
Thursday, April 18, 2013
6:00 p.m.
(2 CLE credits in Skills)

Presented by:

Michael R. Galina, Esq.
Lois Carter Schlissel, Esq.
Hon. Angela G. Iannacci
Jess Bunshaft, Esq.
Gregory Lisi, Esq.
Andrew E. Curto, Esq.

And Law School Student Presenters:

Vayola Abraham

Jason Scott Mencher
Joseph Gagliardo
Constantine Kokinakis

WE REGRET THAT WE ARE NOT ABLE TO PROVIDE CLE CREDIT TO THOSE MEMBERS WHOSE MEMBERSHIP DUES ARE NOT CURRENT.

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www.innsofcourt.org/inns/trooseveltinn

Fact pattern 3.2 (4.12.13)

After many years of discussion the State of New York has decided to build a bridge across the Long Island Sound to connect Long Island directly to Connecticut. Connecticut readily agreed to this project since it will make it's casinos more accessible to travelers from Long Island that want to visit the State's casinos. The plan calls for a bridge to be built by extending the Seaford Oyster Bay Expressway (Route 135) north through Oyster Bay Cove until it reaches the Sound and then constructing a 8.2 mile suspension bridge across the sound ending in Stamford, Connecticut. The bridge project is scheduled to take 10 years to build at a cost of $6 billion dollars and it will create 15,000 jobs. The State has already exercised its power of eminent domain to acquire the necessary land, it has performed the requisite environmental studies and retained an architectural/engineering firm to prepare the construction plans and specifications to build the SOB Bridge. At this time all requirements have been satisfied to start the project.

The Governor has appointed Peter P. Layer as the Chairman of the newly created Seaford Oyster Bay Bridge Authority ("SOBBA") which was formed to manage the construction of the SOB Bridge. Peter knows that this is a highly visible job and his performance will either make or break his fledgling political career. He has been meeting with County and State leaders to discuss the project and has had numerous discussions with organized labor organizations about using only union labor on the project. He has recently met with Tony Tradesmen the head of the United Brotherhood of New York Bridge Builders Association to discuss the association's participation in the project. The UBNYBBA is an umbrella association of several unions that specialize in bridge building. This project will be a windfall to the group, if it can lockup all of the jobs to be created, as it will give most of its members jobs and will enable it to collect millions of dollars to replenish its badly depleted benefit funds.

Tony has been pressing Chairman Layer to negotiate a Project Labor Agreement (PLA) whereby most of the jobs created by the project will go to the UBNYBBA union members and all benefits will be paid to the union funds. In exchange, Tony is promising that all contractors working on the job will draw their labor force from the same pool of workers and that labor disputes such as strikes will be eliminated. Tony believes that the laborers of the UBNYBBA are the best qualified to do the job in a safe, efficient, timely and high quality manner. A smaller construction labor organization has been lobbying Peter to be included in any PLA that is created. Tony will not even consider the inclusion of the smaller construction labor organization claiming that they are nothing more than poorly trained thugs and his members will not work with them. Finally, a loosely affiliated group of open shop (non-union) contractors ("OSC") has been campaigning against a PLA arguing that such an agreement will limit competition and thus, increase the cost of the project. The OSC contends that non-union shops have the expertise and manpower to perform the job and that their workers are more versatile and productive because they are not subject to union work rules.

The Chairman likes the peace and certainty guaranteed by the PLA but does have some concerns about the issues being raised by a smaller union organization known as National Electrician's Local 393 ("NEL 393") and OSC. Peter considers hiring an outside consulting firm to analyze whether a PLA will result in cost savings but he decides that it will be cheaper and faster if he has some of his junior staffers perform the economic analysis. Peter's staffers do not have any experience in performing such an analysis and instead of performing an independent analysis they review the studies conducted by other authorities such as the New York City School Construction Authority and the Tappan Zee Bridge study and they conclude that SOBBA would enjoy the same economic benefits. The staffers decide to use the PLA cost analysis and conclusions from the other analysis as the basis for finding that a PLA in the SOB Bridge would result in similar savings. They also believe that by using labor unions only on the project it will increase labor harmony at the site. By encouraging labor harmony it increases the likelihood that workers will be more productive and the job would be finished on schedule. The staffers had been told by Peter that if the job was finished late it would cause labor costs to escalate as well as building materials costs to rise. They also know that if the project was finished late then SOBBA would not be able to start collecting the $15 toll on schedule. Finally, the staffers consider the qualifications of UBNYBBA members and they are duly impressed with their track record of building bridges in a timely and on-budget manner. Their members take a lot of safety classes and their accident rate is below the national average. They also review the qualifications of NEL 393 but are unable to find a lot of information on their qualifications and experience building large public projects such as the SOB Bridge.

The website for Local 393 places a lot of emphasis on its extensive training in bridge building methods as well as the mandatory safety training that it makes all of its members undertake. The literature trumpets that Local 393 workers take classroom and field training in the latest bridge building methods with the best engineers and contractors in the country. Additionally, the site proudly displays that its members enjoy the best benefit packages in the industry.

After much consideration including studying the report prepared by his Staff, Peter decides to enter into a PLA with UBNYBBA and he takes the necessary steps to have SOBBA pass a resolution mandating that all contractors that perform work on the SOB Bridge must agree to be bound by the terms of a Project Labor Agreement. Under the terms of the PLA all contractors that work on the Project must use laborers that are members of UBNYBBA only. It is important to note that Peter does not ask UBNYBBA to make any economic concessions and as such the union's customary rules regarding overtime, night differential premiums, apprenticeship ratios and other union rules apply in the PLA.

Peter is about to retain Turnip Construction as the construction manager for the SOB Bridge job so that work can start on time. Peter is on the way to a meeting with his general counsel in which he is going to discuss the PLA agreement that his office has proudly prepared.

Oscar O. Shop is the owner of O. Shop's Electrical Construction Corp. His company has been in business for 20 years and has a proud record of successfully completing over a hundred jobs on time and within budget. His workforce consists of 20 core workers many of whom have been with him for a long time. He takes great pride in the fact that his workers are very loyal and will perform multiple jobs (including jobs that an electrician customarily doesn't perform such as demolition) without ever complaining. They are very productive and work well as a team because all of their years working together on complex and dangerous jobs including several bridge projects. The company specializes in environmentally friendly LED lighting and Oscar is very aware that the Bridge project calls for the installation of 1000s of LED lights. He has contacted a friend at Turnip Construction and was told that his company would be considered for the job. Oscar's company and his workers need the job badly as the last few years has been especially hard on the construction industry. During his conversation with his contact at Turnip, Oscar was told that the SOBBA has entered into a Project Labor Agreement with UBNYBBA and that if he is the successful bidder for the LED lighting contract he will have to agree to accept the PLA. Oscar's son, a law student, helped him to obtain a copy of the economic study performed by Mr. Layer's staffers and Oscar is going to see his attorney to learn more about the PLA and how it will impact his company if he gets the job.

BIOGRAPHY

Michael Galina is a partner in the firm of Rabinowitz & Galina, Esqs. For the past 16 years he has specialized in the representation of clients engaged in all facets of the construction industry including general contractors, subcontractors, suppliers and design professionals. Michael has drafted numerous construction contracts and has successfully litigated cases in Federal and State Courts as well as before the American Arbitration Association. These matters involve mechanic's liens foreclosures, claims for delay damages and change orders and actions involving surety bonds for large complex public works projects.

Michael is presently representing both contractors and homeowners in disputes involving home improvement contracts.

Michael received a Bachelors of Science Degree in Economics from New York University and is a graduate of Hofstra Law School (Class of 1989). He is admitted to practice law in the State of New York and Eastern and Southern Districts of New York in Federal Court. He is a member of the Nassau and Suffolk County Bar Associations.

Michael R. Galina, Esq.
Rabinowitz & Galina, Esqs.
94 Willis Avenue
Mineola, New York 11501
Tel. (516) 739-8222
Fax (516) 739-8225
Email: MGalina@RandGlaw.net

Hon. Angela G. Iannacci

JUSTICE ANGELA G. IANNACCI is an Associate Justice of the Appellate Term of the Supreme Court of New York. In 2006, Justice Iannacci was elected to the New York State Supreme Court where she presently presides over all types of civil litigation including complex guardianship matters. Also, as an Associate Justice of the Appellate Term, she presides over civil and criminal appeals in the following counties: Dutchess, Rockland, Orange, Putnam, Westchester, Suffolk and Nassau.

Justice Iannacci was elected Judge of the Nassau County Family Court in 2004 and was immediately appointed as an Acting Supreme Court Judge. During that time she also served as one of the first Judges assigned to the Model Custody Court and as back-up Judge assisting families in crisis in the Integrated Domestic Violence Part. Prior to the bench, in 2002, Justice Iannacci was chosen as Principal Court Attorney to Hon. Allan Winick, Associate Justice of the Appellate Term. Upon graduation from law school Justice Iannacci worked for American International Group handling directors and officers liability and errors and omissions liability. She then entered private practice and practiced in the area of civil litigation.

She earned her Fellowship Designation in International Commercial Arbitration from the Chartered Institute of Arbitrators, her Juris Doctor degree from Pace University School of Law and her Bachelor of Arts degree from George Washington University. Justice Iannacci has been appointed as 1 of 4 members to the NYS Anti-Discrimination Panel to hear issues involving discrimination in the work place. She is a member of the NYS Domestic Violence Task Force, Nassau County Bar Association, and the Judicial Committee on Women in the Courts and has been a guest lecturer at local schools. She is President-Elect of the George Washington University's Parent Association Committee. In the Fall of 2013, she will be an Adjunct Assistant Professor at St. John's University teaching Hospitality Law & Ethics. In 2010, she was selected to participate in a forum advancing international human and women's rights hosted by the International Association of Women Judges. She is also a member of the Association of Supreme Court Justices of New York State, the National Association of Women Judges, the International Association of Women Judges, the American Bar Association, New York State Bar Association, Nassau County Bar Association, Nassau County Women's Bar Association, the Columbian Lawyers' Association, the Chartered Institute of Arbitrators and the Theodore Roosevelt Inn of Court.

Lois Carter Schlissel

Managing Attorney

990 Stewart Avenue
Garden City, New York 11530
(516) 592-5736
lschlissel@msek.com

Practice Areas

Employment Law

Litigation & Dispute Resolution

Education

University of Buffalo
J.D., 1975

State University of New York Oswego
B. A., 1972
magna cum laude

Memberships

U.S. Senator Charles Schumer's Judicial Screening Committee

Long Island Association Board of Directors

North Shore-LIJ Health System Board of Trustees

Adelphi University Board of Trustees

Touro Law Center Board of Governors

Theodore Roosevelt American Inn of Courts Master & Former President

Women's Fund of Long Island Counsel to Board of Directors

New York State Bar Foundation Fellow

Nassau County Bar Association

Admissions

New York State

U.S. District Court, Southern District

U.S. District Court, Eastern District

U.S. District Court, Northern District

U.S. Court of Appeals, Federal Circuit

Lois Carter Schlissel serves as Managing Attorney of Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. and chairs the firm's Management Committee. Under her direction, the firm has experienced significant strategic growth.

In addition to her management role, Mrs. Schlissel heads the firm's Employment Law practice and is an active member of the Litigation & Dispute Resolution department. She counsels clients with respect to federal and state employment laws, compliance issues, and personnel matters and litigates claims arising under Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Family Medical Leave Act.

Mrs. Schlissel is rated "AV Preeminent" by Martindale-Hubbell, the highest level of professional excellence. She was honored for her "extraordinary service to the community and superb lawyering" by the Nassau County Bar Association, We Care Fund in 2012. She was also recognized by *Long Island Pulse Magazine* in 2010 and 2011 as one of the region's "Top Legal Eagles". In 2007 she was recognized as one of the Best Attorneys on Long Island by the *Long Island Press*. From 2002-2004, Mrs. Schlissel was named by *Long Island Business News (LIBN)* as one of Long Island's Top 50 Most Influential Women. Subsequently in 2004, Mrs. Schlissel was admitted into the *LIBN* Top 50 Hall of Fame. The Long Island Center for Business & Professional Women conferred its Achievers' Award in the Field of Law on Mrs. Schlissel in May 2003. In 2002, Mrs. Schlissel was named a "Woman Achiever Against the Odds" by the Long Island Fund for Women and Girls.

Notable experience includes:

- Tried and won several jury trials in commercial and employment cases in state and federal courts.
- Conducted internal investigations in various industries including insurance, professional services and non-profits, concerning allegations of bribery, administrative misconduct, discrimination and sexual improprieties and worked with upper management to deal with attendant legal and personnel issues.

Lois Carter Schlissel

- Successfully litigated charges of gender discrimination and retaliation between a large university and a high level administrator.

- Mediated and favorably resolved breach of contract claims between a major financial institution and a former senior executive.

- Negotiated separation issues between employees and companies engaged in various industries including aviation, financial services, law, healthcare and education.

- Successfully arbitrated commercial breach of contract claims between owners of a technology company and its business partner.

- Resolved through mediation a sexual harassment, gender discrimination and retaliation case in which a young woman employee of a major financial institution alleged that she was raped by her manager after a social event sponsored by the company.

- Regularly consults with clients concerning employment issues, statutory and regulatory requirements and workplace policies.

Mrs. Schlissel has written and lectured extensively before bar associations, employment groups and professional organizations. She has given numerous media interviews and provided commentary relating to Federal civil practice, employment law issues, workplace discrimination and sexual harassment.

Prior to joining Meyer Suozzi, Mrs. Schlissel was a law clerk at the New York State Court of Appeals and, thereafter, a litigation associate in the New York City office of Skadden, Arps, Slate, Meagher & Flom, LLP.

Jess Bunshaft is the Vice President for Labor & Employee Relations for Catholic Health Services of Long Island, a network of six hospitals, three nursing homes and affiliated operations, staffed by over 17,500 employees. Jess has been admitted to practice in New York for over 21 years and began his career as a Deputy County Attorney for Nassau County, becoming the Senior Trial Attorney in Tort & Civil Rights Litigation.

His extensive HR experience includes a broad range of disciplines, including labor negotiations with a diverse array of labor organizations, most recently having negotiated a three-year collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

Jess obtained his undergraduate degree from the Johns Hopkins University, his law degree from Hofstra Law School and graduate education in HR Administration from the School of Management at NYIT, where he remains a part of the Advisory Council. He has served as a member of the Theodore Roosevelt Inn of Court's Board for many years, is the past president of the Association of Healthcare HR Administrators of Greater New York and has lectured on a variety of legal and HR-related topics over the years.

FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO & TERRANA, LLP
COUNSELORS AT LAW

THE OMNI
333 EARLE OVINGTON BLVD., SUITE 1010
UNIONDALE, NEW YORK 11553
TELEPHONE: (516) 248-1700
FACSIMILE: 866-786-3783

WEBSITE: WWW.FORCHELLILAW.COM

GREGORY S. LISI
PARTNER

GREGORY S. LISI, Esq.

Chairman of the Employment and Labor Law Departments at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana

Gregory S. Lisi, Esq. is a General Practice attorney and litigator concentrating in the areas of Labor and Employment Law, Sexual Harassment and Discrimination Law, Overtime and Failure to Pay Wages Law, Management/Union Labor Law, Immigration Law, General Corporate and Commercial Transaction Law and Real Estate Law. He is head of the Labor & Employment Law Departments at Forchelli, Curto, Deegan, Schwartz, Mineo & Terrana, LLP, a full service firm that provides counsel to a broad range of clients, including national, regional and local businesses, major real estate developers and organizations, banks, insurance companies, municipalities, educational institutions, and individuals from all walks of life. Mr. Lisi has represented Defendants, Plaintiffs, publicly traded and private companies, United States and New York State government entities. He received his Juris Doctorate from the Georgetown University Law Center where he was the Justice (President) of the Phi Alpha Delta Law Fraternity and Projects Editor of the Georgetown Immigration Law Journal.

Mr. Lisi has been recognized by the New York Times as a "Super Lawyer," awarded to only the top 5% of attorneys in New York; by the Long Island Business News as "Who's Who in Labor Law;" by Martindale-Hubbell with the "Client Distinction Award;" and the Nassau County Bar Association's Labor and Employment Law Committee for "Distinguished Professional Achievement," among other honors. Mr. Lisi was a contributing author to the treatise, Sex Discrimination and Sexual Harassment in the Work Place, Solotoff and Kramer, Law Journal Press, and authored a note published in the Georgetown Immigration Law Journal entitled, Intracircuit Nonacquiescence by the INS, 5 G.I.L.J. 325 (1991). Further, Mr. Lisi has lectured extensively on Labor and Employment, Sexual Harassment, Discrimination, Wage and Hour, Equal Employment Law, Immigration and Federal Litigation topics.

Mr. Lisi is a past member of the Board of Directors of the Nassau County Bar Association and is the past Chair of the Nassau County Bar Association's Labor and Employment Law Committee. He is a former Regional Counsel of the United States Customs Service where he defended the United States Government before the Equal Employment Opportunity Commission as well as in labor/union matters. He is currently a member of the New York State Bar, Washington, D.C. Bar, New York State Bar Association, National Employment Lawyers Association, New York State Bar Association's Labor and Employment Law Committee, Nassau County Bar Association's Labor and Employment Law Committee and Immigration Committee, and the Anti-Defamation League's Civil Rights Committee.

Mr. Lisi is admitted to practice law before the courts of New York State and Washington, D.C., the United State Court of Appeals for the Second Circuit, and the federal courts of the Eastern and Southern Districts of the State of New York. He has further practiced before the National Labor Relations Board, the Equal Employment Opportunity Commission, New York State, New York City and Nassau County Divisions of Human Rights, labor and corporate arbitrations and mediations and the Courts of New York City, Nassau, Suffolk and Westchester Counties. He received his Bachelors, *Magna Cum Laude*, from the State University of New York at Buffalo.

Andrew E. Curto, Esq.

Andrew E. Curto (Hofstra University School of Law, 1990) concentrates his practice in complicated commercial and employment litigation. Prior to joining the Firm in 1999, Mr. Curto was a partner in a Melville, New York law firm. He routinely litigates claims in both federal and state courts in a wide variety of commercial claims, such as corporate dissolution and derivative actions, contract and real estate disputes, employment and discrimination claims, estate litigations, regulatory claims and compliance issues arising out of municipal zoning and code enforcement proceedings.

Mr. Curto has been quoted in various news media including the *Wall Street Journal* and *Long Island Business News* for his representation of more than 10,000 business owners in a suit against the State of New York challenging the constitutionality of new license fee legislation. He has published articles and has lectured on various aspects of litigation and labor law

Mr. Curto has substantial experience in appellate practice, and has gained valuable experience from prior employment with the United States Environmental Protection Agency, the Suffolk County District Attorney's office and Matthew Bender Co., a well-known legal publisher.

Mr. Curto is admitted to practice before the New York State Bar, the United States District Court for the Eastern and Southern Districts of New York, and the Second Circuit Court of Appeals. He is a member of the Nassau County, Suffolk County and New York State Bar Associations. He is also a member of the Theodore Roosevelt American Inn of Court. In 2012, he was elected to the Board of Trustees of the Huntington Yacht Club. Prior to the appointment, Mr. Curto has been on the Legal Committee for the past year.

Constantine Kokinakis

158 Old Courthouse Road
Manhasset Hills, NY 11040
(646) 256-0918 constantine.kokinakis@gmail.com

EDUCATION

Hofstra University, Maurice A. Deane School of Law, Hempstead, NY **May, 2014**
Juris Doctor Candidate

Honors and Awards

- Dean's Scholarship; 2011 -
- American College of Trust and Estate Counsel Law Journal; 2012 -

Activities

- Theodore Roosevelt American Inn of Court; 2012 -
- Long Island Real Estate Group, Real Estate @Work Program; 2012
- Sports and Entertainment Law Society, Charity Committee; 2011 -

Fordham University, Fordham College at Lincoln Center-New York, NY **May, 2011**
Bachelor of Arts - Major: Philosophy Secondary Major: Theology

Honors and Awards

- Dean's Scholarship – 2007-2011
- Phi Sigma Tau, National Honor Society in Philosophy
- Theta Alpha Kappa, National Honor Society in Theology

Activities

- The Observer school newspaper – Staff writer and artist
- Secretary and founding member of Hellenic Society

PROFESSIONAL EXPERIENCE

Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. **New York, NY**
Intern **Summer 2012**

- Coordinating and moderating real estate closings for transfers and refinancing of cooperative and condominium units and commercial properties; drafting contracts and closing documents for clients and adversaries; conducting legal research.

Nassau County Comptroller's Office **Mineola, NY**
Legal Intern **Summer 2011**

- Conducted research and analysis on legal ramifications of privatizing Long Island Bus transportation system; updated county-wide payroll schedules; assisted in audit of salaries and benefits for executives of county funded non-profit organizations.

McElroy, Deutsch, Mulvaney & Carpenter, LLP **New York, NY; Newark, NJ**
Administrative Assistant **Summers 2005-2010**

- Completed day-to-day clerical activities relating to insurance defense, probate, labor, bankruptcy, and commercial law; drafted correspondence to adversaries requesting further discovery relating to case depositions; filed and obtained documents in Surrogate, Civil and Federal divisions of New York, Bronx, Kings and Nassau County Courts as well as Essex and Hudson County Courts in New Jersey; assembled and created comprehensive spreadsheets detailing contents of discovery documents; created spreadsheets utilized in World Trade Center asbestos litigation.

JASON SCOTT MENCHER

600 Pine Hollow Road Apt. 17-6B, East Norwich, NY 11732
jasonmencher@gmail.com, (631) 805-4294

EDUCATION

Hofstra University School of Law, Hempstead, NY
J.D. anticipated, May 2014
GPA: 3.62, **Rank:** 24/331, **Top 7.5%**
Honors: ***Hofstra Law Review***, Staff Member, Volume 41
Full Honors Scholarship
Dean's List: Fall 2011, Fall 2012
Activities: The Theodore Roosevelt American Inn of Court, Student-Member

Yale University, New Haven, CT
B.A. in Architecture, concentration in Urban Studies, May 2008
GPA: 3.52, **Architecture GPA:** 3.75
Honors: Bryent P. Wilkins Award, 2006 Writing Competition Winner

EXPERIENCE

Hon. Dorothy T. Eisenberg, U.S. Bankruptcy Court for the Eastern District of New York, Central Islip, NY
Judicial Intern, June 2012 to August 2012
Drafted bench memoranda for law clerks and Judge on attorney-client privilege in bankruptcy. Conducted extensive legal research of bankruptcy case law on issues including secondary mortgage strip off, automatic relief from stay, excusable neglect, recharacterization, secured and unsecured creditor status, preferential and fraudulent transfers, and avoidance of judicial liens. Observed Court hearings, status conferences, pre-trial conferences and depositions.

Elite Tutoring, Long Island, NY
Founder of Personal Tutoring Business, June 2005 to Present
Manage and operate a profitable tutoring business, working one on one with up to 8 clients each season providing SAT, ACT, English, Math, Writing and LSAT tutoring as well as college application and essay development. Develop student-specific learning tracks and offer personalized lessons, assignments, assessments and study materials.

NYC Department of Parks and Recreation, New York, NY
Grants Manager – Planning Division, February 2010 to May 2010
Worked directly under the Director of Planning, managing all NYC DPR grant funds, totaling $87,500,000 in FY11. Corresponded with all divisions of Agency, assisting with grant applications, procurement, management and reimbursement, while maintaining open and continuous dialogue with city, state and federal grantors regarding grant requirements, deadlines, submittals and oversight.

NYC Department of Parks and Recreation, Flushing, NY
City Planning Technician – Capital Projects Division, January 2009 to February 2010
Produced reports and generated analysis for Chief and Deputy Chief of Capital Project Management who jointly oversaw Capital Division FY10 Budget of $530,000,000. Generated, coordinated and managed Quarterly Forecast which tracked and predicted progress and completion of all DPR projects included in FY10 Budget, a document utilized as the template for the Division. Created and presented biweekly reports on critical issues to Division Commissioner under firm deadlines.

The Baldassano Architecture Group, Ronkonkoma, NY
Junior Architecture Intern, June 2007 to August 2007
Constructed finely crafted, scaled architectural models for presentation to clients and in-house design development, and edited computer-based construction documents, blueprints and elevations for compliance with project specifications.

Parsons Brinckerhoff, New York, NY
Civil Engineering Intern, June 2006 to August 2006
Assisted with creation and editing of construction documents for civil engineering projects while under strict deadlines.

Rubin and Rothman LLC, Islandia, NY
Legal Intern, Summers 2002 to 2005
Assisted owner, Keith Rothman, with specialized projects researching and evaluating potential clients in banking industry.

Vayola Abraham is a 2008 graduate of Queens College. For three years after college, she worked as a Case Planner for Edwin Gould Services for Children and Families in Brooklyn, NY. Vayola is currently in her second year of law school at Touro College Jacob D. Fuchsberg Law Center. She was selected to participate in her school's Honors Program. This is a program that offers twenty-five exceptional students showing high academic achievement an enriched comprehensive law school experience. Vayola was also selected as a 2013 University of Michigan Bergstrom Child Welfare Law Fellow. The Bergstrom Fellowship provides training intended to prepare its recipients for summer child welfare law work. The training will take place at the University of Michigan Law School on May 20-22, 2013. In her spare time, Vayola serves as the Historian of the Black Law Students Association and is a member of the Family Law Society.

West Reporter Image (PDF)

507 U.S. 218, 113 S.Ct. 1190, 142 L.R.R.M. (BNA) 2649, 122 L.Ed.2d 565, 61 USLW 4221, 124 Lab.Cas. P 10,564

Briefs and Other Related Documents
Judges and Attorneys
Oral Argument Transcripts with Streaming Media

Supreme Court of the United States
BUILDING AND CONSTRUCTION TRADES COUNCIL OF the METROPOLITAN DISTRICT, Petitioner
v.
ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., Et Al.
MASSACHUSETTS WATER RESOURCES AUTHORITY, Et Al., Petitioners
v.
ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., Et Al.

Nos. 91-261, 91-274.
Argued Dec. 9, 1992.
Decided March 8, 1993.

Organization representing nonunion construction industry employers filed suit to enjoin Massachusetts Water Resources Authority's (MWRA's) bid specification directing that each successful bidder agree to abide by terms of labor agreement designed to assure labor stability over the length of the project. The United States District Court for the District of Massachusetts, A. David Mazzone, J., denied preliminary injunction. On appeal, the Court of Appeals for the First Circuit, 935 F.2d 345, reversed, and certiorari was granted. The Supreme Court, Justice Blackmun, held that National Labor Relations Act (NLRA) did not preempt enforcement by MWRA, acting as owner of construction project, of otherwise lawful prehire collective-bargaining agreement negotiated by private parties.

Reversed and remanded.

West Headnotes

[1] KeyCite Citing References for this Headnote

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.5 k. Conflicting or conforming laws or regulations. Most Cited Cases

360 States KeyCite Citing References for this Headnote
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.7 k. Occupation of field. Most Cited Cases

Where federal statute contains no express preemption provision, local regulation will be sustained unless it conflicts with federal law or would frustrate federal scheme, or unless court discerns from totality of circumstances that Congress sought to occupy the field to exclusion of the state's. U.S.C.A. Const. Art. 6, cl. 2.

[2] KeyCite Citing References for this Headnote

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in general. Most Cited Cases

The Supreme Court is reluctant to infer preemption. U.S.C.A. Const. Art. 6, cl. 2.

[3] KeyCite Citing References for this Headnote

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional intent. Most Cited Cases

Consideration under supremacy clause starts with basic assumption that Congress did not intend to displace state law. U.S.C.A. Const. Art. 6, cl. 2.

[4] KeyCite Citing References for this Headnote

231H Labor and Employment
231HXII Labor Relations
231HXII(I) Labor Relations Boards and Proceedings
231HXII(I)1 In General
231Hk1669 Exclusive, Concurrent, and Conflicting Jurisdiction
231Hk1670 k. In general. Most Cited Cases
(Formerly 232Ak45 Labor Relations)

268 Municipal Corporations KeyCite Citing References for this Headnote
268II Governmental Powers and Functions in General
268k52 Political Status and Relations
268k53 k. In general. Most Cited Cases

360 States KeyCite Citing References for this Headnote
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.55 k. Disputes and concerted activities. Most Cited Cases

" *Garmon* pre-emption" forbids state and local regulation of activities that are protected by NLRA, or constitute unfair labor practice; *Garmon* preemption prohibits regulation even of activities that NRLA only arguably protects or prohibits. National Labor Relations Act, §§ 7, 8, as amended, 29 U.S.C.A. §§ 157, 158; U.S.C.A. Const. Art. 6, cl. 2.

[5] KeyCite Citing References for this Headnote

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk968 k. Preemption. Most Cited Cases
(Formerly 232Ak45 Labor Relations)

268 Municipal Corporations KeyCite Citing References for this Headnote
268II Governmental Powers and Functions in General

268k52 Political Status and Relations
268k53 k. In general. Most Cited Cases

360 States KeyCite Citing References for this Headnote
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.55 k. Disputes and concerted activities. Most Cited Cases

" *Machinists* pre-emption" prohibits state and municipal regulation of areas that have been left to be controlled by free play of economic forces; *Machinists* preemption preserves Congress' intentional balance between uncontrolled power of management and labor to further their respective interests. U.S.C.A. Const. Art. 6, cl. 2; National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

[6] KeyCite Citing References for this Headnote

231H Labor and Employment
231HXII Labor Relations
231HXII(A) In General
231Hk968 k. Preemption. Most Cited Cases
(Formerly 232Ak45 Labor Relations)

360 States KeyCite Citing References for this Headnote
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.46 k. In general. Most Cited Cases
(Formerly 360k18.45)

360 States KeyCite Citing References for this Headnote
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.55 k. Disputes and concerted activities. Most Cited Cases

Since NLRA preemption doctrine applies only to state regulation, state is not subject to preemption when it interacts with private participants in the market place. U.S.C.A. Const. Art. 6, cl. 2; National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

[7] KeyCite Citing References for this Headnote

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1244 k. Prehire agreements. Most Cited Cases
(Formerly 232Ak244 Labor Relations)

"Prehire agreement", permitted by NRLA in the construction industry, provides for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring laws, prior to hiring of any employees. National Labor Relations Act, § 8(e, f), as amended, 29 U.S.C.A. § 158(e, f).

[8] KeyCite Citing References for this Headnote

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.45 Labor and Employment
360k18.46 k. In general. Most Cited Cases
(Formerly 360k18.15)

231H Labor and Employment ☑ KeyCite Citing References for this Headnote
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1243 k. Preemption. Most Cited Cases
(Formerly 360k98)

NLRA did not preempt enforcement by Massachusetts Water Resources Authority (MWRA), acting as owner of construction project, of otherwise lawful prehire collective-bargaining agreement negotiated by project manager and exclusive bargaining agent for all craft employees, assuring labor stability over the life of the project. National Labor Relations Act, § 8(e, f), as amended, 29 U.S.C.A. § 158(e, f); U.S.C.A. Const. Art. 6, cl. 2.

***1191 *218** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Following a lawsuit over its failure to prevent the pollution of Boston Harbor, petitioner Massachusetts Water Resources Authority (MWRA)-the state agency that provides, *inter alia,* sewage services for eastern Massachusetts-was ordered to clean up the harbor. Under state law, MWRA provides the funds for construction, owns the sewage-treatment facilities to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally supervises the project. Petitioner Kaiser Engineers, Inc., the project manager selected by MWRA, negotiated an agreement with petitioner Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project, and MWRA directed in Specification 13.1 of its solicitation for project bids that each successful bidder must agree to abide by the labor agreement's terms. Respondent organization, which represents nonunion construction industry employers, filed suit against petitioners, seeking, among other things, to enjoin enforcement of Bid Specification 13.1 on the grounds that it is pre-empted under the National Labor Relations Act (NLRA). The District Court denied the organization's motion for a preliminary injunction, but the Court of Appeals reversed, holding that MWRA's intrusion into the bargaining process was pervasive and not the sort of peripheral regulation that would be permissible under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775, and that Bid Specification 13.1 was pre-empted under ***1192** *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 because MWRA was regulating activities that Congress intended to be unrestricted by governmental power.

Held: The NLRA does not pre-empt enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful ***219** prehire collective-bargaining agreement negotiated by private parties. This Court has articulated two distinct NLRA pre-emption principles: "*Garmon* pre-emption" forbids state and local regulation of activities that are protected by § 7 of the NLRA or constitute an unfair labor practice under § 8, while "*Machinists* pre-emption" prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces. These pre-emption doctrines apply only to state labor *regulation,* see, *e.g.*, *Machinists*, 427 U.S., at 144, 96 S.Ct. at 2555. A State may act without offending them when it acts as a proprietor and its acts therefore are not tantamount to regulation or policymaking. Permitting States to participate

freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in this case, promotes the legislative goals that animated the passage of the NLRA's §§ 8(e) and 8(f) exceptions regarding prehire agreements in the construction industry. It is undisputed that the agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). In enacting the exceptions, Congress intended to accommodate conditions specific to the construction industry, and there is no reason to expect the industry's defining features to depend upon the public or private nature of the entity purchasing contracting services. Absent any express or implied indication by Congress that a State may not manage its own property when pursuing a purely proprietary interest such as MWRA's interest here, and where analogous private conduct would be permitted, this Court will not infer such a restriction. Pp. 1194-1199.

935 F.2d 345 (CA1 1991), reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Charles Fried, Cambridge, MA, for petitioners.

Maureen E. Mahoney, Washington, DC, for U.S. as amicus curiae by special leave of the Court.

***220** Maurice Baskin, Washington, DC, for respondents.

Justice BLACKMUN delivered the opinion of the Court.

The issue in this litigation is whether the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U.S.C. § 151 *et seq.*, pre-empts enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement negotiated by private parties.

I

The Massachusetts Water Resources Authority (MWRA) is an independent government agency charged by the Massachusetts Legislature with providing water-supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts. Mass.Gen.Laws Ann., ch. 92 App., § 1-1 *et seq.* (1993). Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, in alleged violation of the Federal Water Pollution Control Act, 86 Stat. 816, as amended, 33 U.S.C. § 1251 *et seq.*, ***221** MWRA was ordered to clean up the harbor. See *United States v. Metropolitan Dist. Comm'n*, 757 F.Supp. 121, 123 (Mass.1991). The cleanup project was expected to cost $6.1 billion over 10 years. 935 F.2d 345, 347 (CA1 1991). The District Court required construction to proceed without interruption, making no allowance for delays from causes such as labor disputes. App. 71 (Affidavit of Richard D. Fox, Director of the Program Management Division of MWRA). MWRA has primary responsibility for the project. Under its enabling statute and the Commonwealth's public-bidding laws, MWRA provides the funds for construction (assisted by state and federal grants), owns the sewage-treatment facilities***1193** to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally supervises the project. See 935 F.2d, at 347 (citing Mass.Gen.Laws Ann., ch. 92 App. § 1-1 *et seq.* (1993) Mass.Gen.Laws §§ 149:44A to 149:44I, and 30:39M (1990)).

In the spring of 1988, MWRA selected Kaiser Engineers, Inc., as its **project** manager. Kaiser was to be primarily in charge of managing and supervising construction activity. Kaiser also was to advise MWRA on the development of a **labor**-relations policy that would maintain worksite harmony, **labor**-management peace, and overall stability throughout the duration of the **project**. To that end, Kaiser suggested to MWRA that Kaiser be permitted to negotiate an **agreement** with the Building and Construction Trades Council and affiliated organizations (BCTC) that would assure **labor** stability over the life of the **project**. App. to Pet. for Cert. in No. 91-274, p. 75a (MWRA Pet.App.). MWRA accepted Kaiser's suggestion, and Kaiser accordingly proceeded to negotiate the Boston Harbor Wastewater Treatment Facilities **Project Labor Agreement (Agreement)**. *Ibid.* The **Agreement** included: recognition of BCTC as the exclusive bargaining agent for all craft employees; use of specified methods for resolving all **labor**-related disputes; a requirement that all employees be subject to union-security provisions***222** compelling them to become union members within seven days of their

employment; the primary use of BCTC's hiring halls to supply the **project's** craft **labor** force; a 10-year no-strike commitment; and a requirement that all contractors and subcontractors agree to be bound by the **Agreement**. 935 F.2d, at 348. See generally MWRA Pet.App. 107a (full text of **Agreement**). MWRA's board of directors approved and adopted the **Agreement** in May 1989 and directed that Bid Specification 13.1 be incorporated into its solicitation of bids for work on the **project**.[FN1] 935 F.2d, at 347. Bid Specification 13.1 provides in pertinent part:

> FN1. Massachusetts competitive-bidding laws require MWRA to state its preference for a contract term, such as a **project labor agreement**, in the form of a bid specification. These laws, which MWRA's Enabling Act explicitly incorporates, see Mass.Gen.Laws Ann., ch. 92 App., § 1-8(g) (1993) (incorporating Mass.Gen.Laws §§ 30:39M, and 149:44A to 149:44H), require that the competitive-bidding process be carried out by the awarding authority. See *Modern Continental Constr. Co. v. Lowell*, 391 Mass. 829, 836, 465 N.E.2d 1173, 1177-1178 (1984).

> "[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities **Project Labor Agreement** as executed and effective May 22, 1989, by and between Kaiser ... on behalf of [MWRA] and [BCTC] ... and will be bound by the provisions of that **agreement** in the same manner as any other provision of the contract."
> MWRA Pet.App. 141a-142a.

In March 1990, a contractors' association not a party to this litigation filed a charge with the National **Labor** Relations Board (NLRB) contending that the **Agreement** violated the NLRA. The NLRB General Counsel refused to issue a complaint, finding: (1) that the **Agreement** is a valid prehire **agreement** under § 8(f) of the NLRA, 29 U.S.C. § 158(f), which authorizes such **agreements** in the construction industry; ***223*** and (2) that the **Agreement's** provisions limiting work on the **project** to contractors who agree to abide by the **Agreement** are lawful under the construction-industry proviso to § 8(e), 29 U.S.C. § 158(e). This proviso sets forth an exception from § 8(e)'s prohibition against "hot cargo" **agreements** that require an employer to refrain from doing business with any person not agreeing to be bound by a prehire **agreement**. *Building & Trades Council (Kaiser Engineers, Inc.)*, Case 1-CE-71, NLRB Advice Memo, June 25, 1990, MWRA Pet.App. 88a.

Also in March 1990, respondent Associated Builders and Contractors of Massachusetts***1194*** /Rhode Island, Inc. (ABC), an organization representing nonunion construction-industry employers, brought this suit against MWRA, Kaiser, and BCTC, seeking, among other things, to enjoin enforcement of Bid Specification 13.1. ABC alleged pre-emption under the NLRA, pre-emption under § 514(c) of the Employee Retirement Income Security Act of 1974, 88 Stat. 897, 29 U.S.C. § 1144(c) (ERISA), violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, conspiracy to reduce competition in violation of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, and various state-law claims. Only NLRA pre-emption is at issue here.

The United States District Court for the District of Massachusetts rejected each of ABC's claims and denied its motion for a preliminary injunction. MWRA Pet.App. 76a-83a. The Court of Appeals for the First Circuit reversed and directed entry of a preliminary injunction restraining the use of Bid Specification 13.1, reaching only the issue of NLRA pre-emption. 135 LRRM 2713 (1990). The Court of Appeals subsequently granted a petition for rehearing en banc, vacating the panel opinion. MWRA Pet.App. 84a. Upon rehearing en banc, the Court of Appeals, by a 3-2 vote, again reversed the judgment of the District Court, once more reaching only the pre-emption issue. 935 F.2d, at 359-360. The court held that MWRA's intrusion into the ***224*** bargaining process was pervasive and not the sort of peripheral regulation that would be permissible under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). See 935 F.2d, at 353. It also held that Bid Specification 13.1 was pre-empted under *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), because MWRA was regulating activities that Congress intended to be unrestricted by governmental power. Because of the importance of the issue,

we granted certiorari, 504 U.S. 908, 112 S.Ct. 1935, 118 L.Ed.2d 541 (1992).

II

[1] [2] [3] The NLRA contains no express pre-emption provision. Therefore, in accordance with settled pre-emption principles, we should not find MWRA's bid specification pre-empted " ' "... unless it conflicts with federal law or would frustrate the federal scheme, or unless [we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." ' " *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-748, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728 (1985) (citations omitted). We are reluctant to infer pre-emption. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981). With these general principles in mind, we turn to the particular pre-emption doctrines that have developed around the NLRA.

[4] In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S., at 748, 105 S.Ct., at 2394, we noted: "The Court has articulated two distinct NLRA pre-emption principles." The first, " *Garmon* pre-emption," see *San Diego Building Trades Council v. Garmon, supra*, forbids state and local regulation of activities that are "protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." 359 U.S., at 244, 79 S.Ct., at 779. See also *Garner v. Teamsters*, 346 U.S. 485, 498-499, 74 S.Ct. 161, 170, 98 L.Ed. 228 (1953) ("[W]hen ***225** two separate remedies are brought to bear on the same activity, a conflict is imminent"). *Garmon* pre-emption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits. See *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057, 1060, 89 L.Ed.2d 223 (1986). This rule of pre-****1195** emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' "integrated scheme of regulation," *Garmon*, 359 U.S., at 247, 79 S.Ct., at 781, embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the Act. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S., at 748-749, and n. 26, 105 S.Ct., at 2393-2394 and n. 26.

In *Garmon*, this Court held that a state court was precluded from awarding damages to employers for economic injuries resulting from peaceful picketing by labor unions that had not been selected by a majority of employees as their bargaining agent. 359 U.S., at 246, 79 S.Ct., at 780. The Court said: "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Ibid.* In *Gould*, we held that the NLRA pre-empts a statute that disqualifies from doing business with the State persons who have violated the NLRA three times within a 5-year period. We emphasized there that "the *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." 475 U.S., at 286, 106 S.Ct., at 1061 (citing 359 U.S., at 247, 79 S.Ct., at 780).

[5] A second pre-emption principle, " *Machinists* pre-emption," see *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S., at 147, 96 S.Ct., at 2556, prohibits state and municipal regulation of areas that have been left " 'to be controlled by the free play of economic forces.' " *Id.*, at 140, 96 S.Ct., at 2553 (citation omitted). See also ***226** *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 614, 106 S.Ct. 1395, 1398, 89 L.Ed.2d 616 (1986) (*Golden State I*); *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 111, 110 S.Ct. 444, 451, 107 L.Ed.2d 420 (1989) (*Golden State II*). *Machinists* pre-emption preserves Congress' "intentional balance ' "between the uncontrolled power of management and labor to further their respective interests." ' " *Golden State I*, 475 U.S., at 614, 106 S.Ct., at 1399 (citations omitted).

In *Machinists*, we held that the Wisconsin Employment Relations Commission could not designate as an unfair labor practice under state law a concerted refusal by a union and its members to work overtime, because Congress did not mean such self-help activity to be regulable by the States. 427

U.S., at 148-150, 96 S.Ct., at 2557-2558. We said that it would frustrate Congress' intent to "sanction state regulation of such economic pressure deemed by the federal Act 'desirabl[y] ... left for the free play of contending economic forces....' " *Id.*, at 150, 96 S.Ct., at 2558 (citation omitted). In *Golden State I,* we applied the *Machinists* doctrine to hold that the city of Los Angeles was pre-empted from conditioning renewal of a taxicab operating license upon the settlement of a labor dispute. 475 U.S., at 618, 106 S.Ct., at 1400. We reiterated the principle that a "local government ... lacks the authority to ' "introduce some standard of properly 'balanced' bargaining power" ... or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." ' " *Id.*, at 619, 106 S.Ct., at 1401 (quoting *Machinists,* 427 U.S., at 149-150, 96 S.Ct., at 2557) (internal citation omitted). In *Golden State II, supra,* we determined that the taxicab employer who was challenging the city's conduct in *Golden State I* was entitled to maintain an action under 42 U.S.C. § 1983 for compensatory damages against the city. In so holding, we stated that the *Machinists* rule created a zone free from all regulations, whether state or federal. 493 U.S., at 112, 110 S.Ct., at 451-452.

****1196** III

[6] When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating ***227** within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists,* or for NLRB jurisdiction, see *Garmon.* A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation.*

Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation,* not all legitimate state activity that affects labor. In *Machinists,* for example, we referred to Congress' pre-emptive intent to "leave some activities *unregulated,*" 427 U.S., at 144, 96 S.Ct., at 2555 (emphasis added), and held that the activities at issue-workers deciding together to refuse overtime work-were not " *regulable* by States," *id.*, at 149, 96 S.Ct., at 2557 (emphasis added). In *Golden State I,* we held that the reason Los Angeles could not condition renewal of a taxicab franchise upon settlement of a labor dispute was that " *Machinists* pre-emption ... precludes state and municipal *regulation* 'concerning conduct that Congress intended to be *unregulated.*' " 475 U.S., at 614, 106 S.Ct., at 1398 (emphasis added) (quoting *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S., at 749, 105 S.Ct., at 2394). We refused to permit the city's exercise of its regulatory power of license nonrenewal to restrict Golden State's right to use lawful economic weapons in its dispute with its union. See 475 U.S., at 615-619, 106 S.Ct., at 1398-1401. As petitioners point out, a very different case would have been presented had the city of Los Angeles purchased taxi services from Golden State in order to transport city employees. Brief for Petitioners 35. In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if ***228** the labor dispute were not resolved and services resumed by a specific deadline.

In *Gould,* we rejected the argument that the State was acting as proprietor rather than regulator for purposes of *Garmon* pre-emption when the State refused to do business with persons who had violated the NLRA three times within five years. We noted in doing so that *in that case,* "debarment ... serves plainly as a means of enforcing the NLRA." 475 U.S., at 287, 106 S.Ct., at 1061. We said there that "[t]he State concedes, as we think it must, that the point of the statute is to deter labor law violations"; we concluded that "[n]o other purpose could credibly be ascribed." *Ibid.*

Respondents quote the following passage from *Gould,* arguing that it stands for the proposition that the State as proprietor is subject to the same pre-emption limitations as the State as regulator:

"Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it

is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties.... The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference.... The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." *Id.*, at 290, 106 S.Ct., at 1063.

****1197** The above passage does not bear the weight that respondents would have it support. The conduct at issue in *Gould* was a state agency's attempt to compel conformity with the NLRA. Because the statute at issue in *Gould* addressed ***229** employer conduct unrelated to the employer's performance of contractual obligations to the State, and because the State's reason for such conduct was to deter NLRA violations, we concluded: "Wisconsin 'simply is not functioning as a private purchaser of services,' ... [and therefore,] for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.*, at 289, 106 S.Ct., at 1062. We emphasized that we were "not say [ing] that state purchasing decisions may never be influenced by labor considerations." *Id.*, at 291, 106 S.Ct., at 1063.

The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. See *id.*, at 290, 106 S.Ct., at 1063. The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor. The fact that a private actor may "regulate" does not mean, of course, that the private actor may be "pre-empted" by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may "regulate" as they please, as long as their conduct does not violate the law. As the above passage in *Gould* makes clear, however, States have a qualitatively different role to play from private parties. *Ibid.* When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.

In *Gould*, we did not address fully the implications of these distinctions. We left open the question whether a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not "tantamount to regulation" or policymaking. As explained***230** more fully below, we now answer this question in the affirmative.

IV

[7] Permitting the States to participate freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in these cases, promotes the legislative goals that animated the passage of the §§ 8(e) and (f) exceptions for the construction industry. In 1959, Congress amended the NLRA to add § 8(f) and modify § 8(e). Section 8(f) explicitly permits employers in the construction industry-but no other employers-to enter into prehire agreements. Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees. 935 F.2d, at 356; *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-266, 103 S.Ct. 1753, 1756-1757, 75 L.Ed.2d 830 (1983). The 1959 amendment adding a proviso to subsection (e) permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657, 102 S.Ct. 2071, 2078, 72 L.Ed.2d 398 (1982). Section 8(f) contains a final proviso that permits employees, once hired, to utilize the NLRB election process under §§ 9(c) and (e) of the Act, 29 U.S.C. §§ 159(c) and (e), if they wish to reject the bargaining representative or to cancel the union security provisions of the prehire agreement. See *NLRB v. Iron Workers*, 434 U.S. 335, 345, 98 S.Ct. 651, 657, 54 L.Ed.2d 586 (1978).

****1198** [8] It is undisputed that the Agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). As noted above, those sections explicitly authorize this type of

contract between a union and an employer like Kaiser, which is engaged primarily in the construction industry, covering employees engaged in that industry.

Of course, the exceptions provided for the construction industry in §§ 8(e) and (f), like the prohibitions from which ***231** they provide relief, are not made specifically applicable to the State. This is because the State is excluded from the definition of the term "employer" under the NLRA, see 29 U.S.C. § 152(2), and because the State, in any event, is acting not as an employer but as a purchaser in this case. Nevertheless, the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the **agreements** authorized by these sections.

It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of **project labor agreements** in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, 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 long-standing custom of prehire bargaining in the industry. See S.Rep. No. 187, 86th Cong., 1st Sess., 28, 55-56 (1959); H.R.Rep. No. 741, 86th Cong., 1st Sess., 19-20 (1959) U.S.Code Cong. & Admin.News p. 2318.

There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire **agreement**, a public entity *as purchaser* should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such **agreements** are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a **project labor agreement**. In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a ***232** restriction. See, *e.g.*, *Maryland v. Louisiana*, 451 U.S., at 746, 101 S.Ct., at 2129 ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").[FN2] Indeed, there is some force to petitioners' argument, Brief for Petitioners 25, that denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*.

FN2. Respondents suggest in their brief, Brief for Respondents 22, n. 12, that under *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103, 90 S.Ct. 821, 823, 25 L.Ed.2d 146 (1970), § 8(d) of the NLRA expressly prohibits the conduct of MWRA at issue in this case. The Court of Appeals did not rely on this section of the statute, nor did we grant certiorari on this question. We therefore decline the invitation to address the application, if any, of § 8(d) to Bid Specification 13.1.

V

In the instant case, MWRA acted on the advice of a manager hired to organize performance of a cleanup job over which, under Massachusetts law, MWRA is the proprietor. There is no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost. As petitioners note, moreover, Brief for Petitioners 26, the challenged action in this litigation was specifically tailored to one particular job, the Boston Harbor cleanup project. There is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as ***1199** legitimate. See *Woelke & Romero Framing Co. v. NLRB*, 456 U.S., at 662, and n. 14, 102 S.Ct., at 2081, and n. 14.

We hold today that Bid Specification 13.1 is not government regulation and that it is therefore subject to neither *Garmon* nor *Machinists* pre-emption. Bid Specification 13.1 constitutes proprietary conduct on the part of the Commonwealth of Massachusetts, which legally has enforced a valid

project labor agreement. As Chief Judge Breyer aptly ***233** noted in his dissent in the Court of Appeals, "when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them." 935 F.2d, at 361.

Because we find that Bid Specification 13.1 is not pre-empted by the NLRA, it follows that a preliminary injunction against enforcement of this bid specification was improper. We therefore reverse the judgment of the Court of Appeals and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

U.S.Mass.,1993.
Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Isl and, Inc.
507 U.S. 218, 113 S.Ct. 1190, 142 L.R.R.M. (BNA) 2649, 122 L.Ed.2d 565, 61 USLW 4221, 124 Lab.Cas. P 10,564

Briefs and Other Related Documents (Back to top)

- 1993 WL 13010923 (Appellate Petition, Motion and Filing) Motion of the United States for Leave to File Post-Argument Brief and Post-Argument Brief for the United States as Amicus Curiae Supporting Petitioners (Feb. 03, 1993) Original Image of this Document (PDF)
- 1992 WL 511841 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Nov. 12, 1992)
- 1992 WL 12012036 (Appellate Petition, Motion and Filing) Motion of the United States for Leave to File Supplemental Brief and Supplemental Brief for the United States as Amicus Curiae Supporting Petitioners (Nov. 01, 1992) Original Image of this Document (PDF)
- 1992 WL 511840 (Appellate Brief) REPLY BRIEF FOR PETITIONERS (Oct. 09, 1992)
- 1992 WL 511838 (Appellate Brief) BRIEF FOR RESPONDENTS (Sep. 08, 1992)
- 1992 WL 12012037 (Appellate Petition, Motion and Filing) Brief for the United States as Amicus Curiae Supporting Petitioners (Jul. 22, 1992) Original Image of this Document (PDF)
- 1992 WL 511837 (Appellate Brief) BRIEF FOR PETITIONERS (Jul. 22, 1992)

Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Blackmun, Hon. Harry A.**
Supreme Court of the United States
Washington, District of Columbia 20543
Litigation History Report | Profiler

- **Mazzone, Hon. A. David**
United States District Court, Massachusetts
Boston, Massachusetts 02210
Litigation History Report | Judicial Reversal Report | Profiler

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Attorneys

Attorneys for Amicus Curiae

- **Mahoney, Maureen E.**
Washington, District of Columbia 20004
Litigation History Report | Profiler

Attorneys for Petitioner

- **Fried, Charles**
Cambridge, Massachusetts 02138
Litigation History Report | Profiler

Attorneys for Respondent

- **Baskin, Maurice**
Washington, District of Columbia 20004
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Oral Argument Transcripts with Streaming Media (Back to top)

- 1992 WL 687902 (Oral Argument) Oral Argument (Dec. 9, 1992)

END OF DOCUMENT

88 N.Y.2d 56, 666 N.E.2d 185, 643 N.Y.S.2d 480, 151 L.R.R.M. (BNA) 2891, 64 USLW 2638

In the Matter of New York State Chapter, Inc., Associated General Contractors of America, et al., Appellants,
v.
New York State Thruway Authority et al., Respondents. Local 40, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, et al., Intervenors-Respondents.
In the Matter of General Building Contractors of New York State, Inc., et al., Appellants,
v.
Dormitory Authority of the State of New York et al., Respondents.
Court of Appeals of New York
Argued January 10, 1996;
Decided March 28, 1996

CITE TITLE AS: Matter of New York State Ch., Inc., Associated Gen. Contrs. of Am. v New York State Thruway Auth.

SUMMARY

Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 22, 1994, which (1) reversed, on the law, a judgment of the Supreme Court (Harold J. Hughes, Jr., J.), entered in Albany County in a combined proceeding pursuant to CPLR article 78 and for a declaratory judgment, granting the petition, declaring that respondent New York State Thruway Authority's inclusion of the prehire Project Labor Agreement into the bid specifications of the subject public improvement projects violates the competitive bidding requirement of Public Authorities Law § 359 (1), and annulling Resolution Number 4445 adopted by respondent New York State Thruway Authority on May 17, 1994, (2) dismissed that portion of the petition which seeks article 78 relief, and (3) declared that the actions of respondent regarding the Project Labor Agreement do not violate Public Authorities Law § 359.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered December 22, 1994, which (1) reversed, on the law, a judgment of the Supreme Court (Harold J. Hughes, Jr., J.), entered in Albany County in a combined proceeding pursuant to CPLR article 78 and action for a declaratory judgment, granting the petition, declaring the Project Labor Agreement contained in bid specifications adopted by respondent State Dormitory Authority to be in violation of the competitive bidding requirements of State Finance Law § 135 and Public Buildings Law § 8, and annulling Addendum Number 1 to the bid specifications, (2) dismissed that portion of the petitionwhich*57 seeks article 78 relief, and (3) declared that the actions of respondent regarding the Project Labor Agreement do not violate State Finance Law § 135.

Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth., 207 AD2d 26, affirmed.

Matter of General Bldg. Contrs. v Dormitory Auth., 210 AD2d 788, reversed.

HEADNOTES

State--Bids and Bidders--Validity of Bid Specification Requiring Compliance with Project Labor Agreement

(1) A public authority governed by New York's competitive bidding laws can lawfully adopt prebid Project Labor Agreements (PLAs) for construction projects between the public authority and a labor union, which establish the union as the collective bargaining representative for all persons who will perform work on the project and provide that only contractors and subcontractors who sign a

prenegotiated agreement with the union can perform project work. PLAs are neither absolutely prohibited nor absolutely permitted in public construction projects. New York's competitive bidding statutes do not compel unfettered competition, but do demand that specifications that exclude a class of would-be bidders be both rational and essential to the public interest. Thus, a PLA will be sustained for a particular project 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.

State--Bids and Bidders--Validity of Project Labor Agreement

(2) The record supporting a determination by respondent New York State Thruway Authority, a public benefit corporation, to enter into a Project Labor Agreement (PLA) in connection with a bridge improvement project establishes that the PLA was justified by the interests underlying the competitive bidding laws and, therefore, the determination is sustained. Apart from a measure of independence explicitly delegated to the Thruway Authority *(see,* Public Authorities Law § 359 [1]), in adopting a PLA the Authority assessed specific project needs and demonstrated that a PLA was directly tied to competitive bidding goals. The PLA cannot be said to promote favoritism or cronyism because the PLA applies whether the successful bidder is a union or nonunion contractor and discrimination against employees on the basis of union membership is prohibited. The fact that certain nonunion contractors may be disinclined to submit bids does not amount to the preclusion of competition that would be violative of the competitive bidding mandate.

State--Bids and Bidders--Validity of Project Labor Agreement

(3) The record supporting a decision by respondent Dormitory Authority of the State of New York (DASNY), a public benefit corporation, to enter into a Project Labor Agreement (PLA) in connection with a project for the modernization of the Roswell Park Cancer Institute, which is operated by the Department of Health, fails to show that DASNY's decision had as its purpose the advancement of the interests underlying the competitive bidding statutes and, therefore, the decision cannot be sustained. Glaringly absent ***58** from the record is DASNY's contemporaneous projection of cost savings as a result of a PLA or any unique feature of the project which necessitated a PLA, an exceptional specification in all events. Nor does the record demonstrate labor unrest threatening the project. Further, *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. Moreover, DASNY's emphasis on its goals of promoting women and minority hiring through the PLA, although surely laudable, is unrelated to the goals of the competitive bidding statutes and cannot support its adoption of the PLA for this project.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Public Works and Contracts, §§ 34, 54, 58, 73, 82, 88.
Carmody-Wait 2d, Proceeding Against a Body or Officer § 145:551.
Public Authorities Law § 359 (1).
NY Jur 2d, Declaratory Judgments and Agreed Case, § 85; Public Works and Contracts, §§ 17, 30, 34.

ANNOTATION REFERENCES

See ALR Index under Public Works and Contracts.

POINTS OF COUNSEL

Bryant, O'Dell & Basso, LLP, Syracuse *(Robert H. Basso, Vic J. Kopnitsky, Jr.,* and *Linda E. Alario* of counsel), for appellants in the first above-entitled proceeding.

I. The project specifications violate the lowest responsible bidder standard. *(Matter of AT/Comm, Inc. v Tufo,* 86 NY2d 1; *Matter of Corbett v New York State Thruway Auth.,* 204 AD2d 542; *Matter of New York State Assn. of Plumbing-Heating-Cooling Contrs. v Egan,* 60 NY2d 882; *Albion Indus. Ctr. v Town of Albion,* 62 AD2d 478, 45 NY2d 710; *Elia Bldg. Co. v New York State Urban Dev. Corp.,* 54 AD2d 337; *Matter of Signacon Controls v Mulroy,* 39 AD2d 1013, 32 NY2d 410; *Matter of Warren Bros. Co. v Craner,* 30 AD2d 437; *Matter of Olean Std. Equip. Co. v Cattaraugus County Bd. of Supervisors,* 30 AD2d 758; *S. T. Grand, Inc. v City of New York,* 32 NY2d 300; *Gerzof v Sweeney,* 22 NY2d 297.)

II. The project specifications create illegal conditions precedent to award of contract. *(Matter of Long Is. Signal Corp. v County of Nassau,* 51 Misc 2d 320; *Matter of M. Cristo, Inc. v State of New York Off. of Gen. Servs.,* 42 AD2d 481; ***59** *Apex Indus. Constr. Corp. v Village of Lake George,* 31 AD2d

670, 23 NY2d 647; Davenport v Walker, 57 App Div 221; People ex rel. Single Paper Co. v Edgcomb, 112 App Div 604; Case Co. v Town Bd., 105 AD2d 1077; Matter of Resco Equip. & Supply Corp. v City Council, 34 AD2d 1088; Meyers v Pennsylvania Steel Co., 77 App Div 307; Meyers v City of New York, 58 App Div 534; Matter of Margrove, Inc. v Office of Gen. Servs., 27 AD2d 321.)

III. State public policy regarding competitive bidding is not preempted by Federal law. (Building & Constr. Trades Council v Associated Bldrs. & Contrs. of Mass./R. I., 507 US 218.)

IV. The Project Labor Agreement (PLA) violates Labor Law §§ 160 and 220. (Matter of American Broadcasting Cos. v Roberts, 61 NY2d 244; Matter of Manning v Joseph, 304 NY 278; Ryan v City of New York, 177 NY 271; DeLury v City of New York, 83 Misc 2d 202, 51 AD2d 288; Evadan Realty Corp. v Patterson, 192 Misc 850, 276 App Div 751; Matter of Dinan v Patterson, 193 Misc 92, 275 App Div 801; Matter of John F. Cadwallader, Inc. v New York State Dept. of Labor, 112 AD2d 577.)

V. The project specifications violate NY Constitution, article I, §§ 1, 6 and 11. (Salla v County of Monroe, 48 NY2d 514, cert denied sub nom. Abrams v Salla, 446 US 909; Lefkowitz v C. D. R. Enters., 412 F Supp 1164, 429 US 1031; Hauser v North British & Mercantile Ins. Co., 206 NY 455; People v Crane, 214 NY 154, 239 US 195; Schrager v City of Albany, 197 Misc 903.)

VI. The project specifications violate NY Constitution, article I, § 17. (Matter of Sloat v Board of Examiners, 274 NY 367; 52 Flavors v Baker & Confectionery Salesclerks Union, 46 AD2d 875; Matter of New York State Labor Relations Bd. v Holland Laundry, 294 NY 480, 295 NY 568; Lincoln Union v Northwestern Co., 335 US 525; American Fedn. of Labor v American Sash Co., 335 US 538; Retail Clerks v Schermerhorn, 373 US 746.)

VII. Petitioners have standing to challenge the bid documents. (Elia Bldg. Co. v New York State Urban Dev. Corp., 54 AD2d 337; Matter of Association of Empl. Plumbing Contrs. v Gaynor, 48 AD2d 892; Matter of General Bldg. Contrs. v City of Syracuse, 40 AD2d 584, 32 NY2d 780; Empire State Ch. of Associated Bldrs. & Contrs. v Rome Hous. Auth., 72 Misc 2d 910; Matter of General Bldg. Contrs. v County of Oneida, 54 Misc 2d 260; Semple v Miller, 38 AD2d 174; Empire Elec. Contrs. Assn. v Fabber, 71 Misc 2d 167; Matter of Dental Socy. v Carey, 61 NY2d 330; Matter of McDonough v Board of Educ., 20 Misc 2d 98; Matter of Lakeland Water Dist. v Onondaga County Water Auth., 24 NY2d 400.)

VIII. Petitioners exclusive of Richard L. Doyle have standing to make a constitutional challenge. ***60** (Matter of L & M Co. v New York State Dept. of Labor, 171 AD2d 795; Matter of Roosevelt Raceway v County of Nassau, 25 AD2d 535, 18 NY2d 30; Matter of Taylor v Sise, 33 NY2d 357; Matter of Dairylea Coop. v Walkley, 38 NY2d 6; Matter of New York State Nurses Assn. v Axelrod, 152 AD2d 888; New York Foreign Trade Zone Operators v State Liq. Auth., 285 NY 272; Matter of Dental Socy. v Carey, 61 NY2d 330.)

IX. Richard L. Doyle has standing to make a constitutional challenge. (Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth., 207 AD2d 26; Matter of Axelrod v Sobol, 78 NY2d 112; Matter of Schulz v State of New York, 81 NY2d 336; Boryszewski v Brydges, 37 NY2d 361.)

X.There are no other necessary parties. (Matter of Sagamore Auto Body v County of Nassau, 104 AD2d 818; Matter of Progressive Dietary Consultants v Wyoming County, 90 AD2d 214; Matter of General Bldg. Contrs. v County of Oneida, 54 Misc 2d 260; Matter of General Bldg. Contrs. v City of Syracuse, 32 NY2d 780; Matter of Consolidated Sheet Metal Works v Board of Educ., 62 Misc 2d 445; Matter of Wiltom Coach Co. v Central High School, 36 Misc 2d 637.)

Bond, Schoeneck & King, Syracuse (*Robert W. Kopp* and *John Gaal* of counsel), and *Dennis C. Vacco, Attorney-General,* New York City (*Peter H. Schiff, Daniel F. De Vita* and *M. Patricia Smith* of counsel), for respondents in the first above-entitled proceeding.

I. The PLA is not inconsistent with the competitive bidding provisions of Public Authorities Law § 359. (Edenwald Contr. Co. v City of New York, 86 Misc 2d 711; Matter of Southern Steel Co. v County of Suffolk, 51 Misc 2d 198; Matter of Paccione v Board of Educ., 20 Misc 2d 896; Kings Bay Buses v Aiello, 100 Misc 2d 1; Meyers v Pennsylvania Steel Co., 77 App Div 307; American Inst. for Imported Steel v Office of Gen. Servs., 47 AD2d 118; Matter of Salle v Office of Gen. Servs., 134 AD2d 809; Matter of Atlantic Tug & Equip. Co. v Town of Tonawanda, 45 AD2d 916; Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187; Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth., 66 NY2d 144.)

II. New York State Chapter Associated General Contractor's interpretation would have the undesirable effect of rendering New York's competitive bidding, and other, laws preeempted by Federal Labor Law and therefore should be avoided. (Machinists v Wisconsin Empl. Relations Commn., 427 US 132; Allis-Chalmers Corp. v Lueck, 471 US 202; Golden State Tr. Corp. v Los Angeles, 475 US 608.)

III. None of appellants has standing to raise the constitutional or Labor Law challenges. *(Matter of Dental Socy. v Carey, 61 NY2d 330; ***61** Matter of City of New York v City Civ. Serv. Commn., 60 NY2d 436; Hoxie's Painting Co. v Cato-Meridian Cent. School Dist., 76 NY2d 207; Baker v Carr, 369 US 186; St. Clair v Yonkers Raceway, 13 NY2d 72; Matter of Schulz v State of New York, 81 NY2d 336; Matter of Axelrod v Sobol, 78 NY2d 112.)*

IV. The PLA does not violate the New York State Constitution. *(Matter of Trustees of Columbia Univ. v Herzog,* 269 App Div 24, 295 NY 605.)

V. The PLA does not violate section 220 of the New York Labor Law. *(Ryan v City of New York, 177 NY 271; Matter of Manning v Joseph, 304 NY 278; Matter of Didnan v Patterson,* 193 Misc 92, 275 App Div 801; *Matter of American Broadcasting Cos. v Roberts, 61 NY2d 244; Bucci v Village of Port Chester, 22 NY2d 195; Matter of Action Elec. Contrs. Co. v Goldin, 64 NY2d 213; Matter of John F. Cadwallader, Inc. v New York State Dept. of Labor, 112 AD2d 577.)*

Colleran, O'Hara & Mills, Garden City *(Edward J. Groarke* and *John F. Mills* of counsel), for Local 40, International Association of Bridge, Structural and Ornamental Iron Workers, intervenor-respondent in the first above-entitled proceeding.

I. An interpretation of Public Authorities Law § 359 (1) so as to preclude the use of this PLA is preempted by the National Labor Relations Act. *(Building & Constr. Trades Council v Associated Bldrs. & Contrs. of Mass./R. I., 507 US 218; San Diego Unions v Garmon, 359 US 236; Woelke & Romero Framing v NLRB,* 456 US 645, 459 US 899; *NLRB v Iron Workers, 434 US 335; Plumbers' Union v Borden, 373 US 690; Machinists v Wisconsin Empl. Relations Commn., 427 US 132.)*

II. The PLA does not violate the New York State Constitution. *(52 Flavors v Baker & Confectionery Salesclerks Union, 46 AD2d 875; Retail Clerks v Schermerhorn, 373 US 746.)*

Plunkett & Jaffe, P. C., Albany *(Patrick E. Brown* and *John S. Harris* of counsel), for New York State Building and Construction Trades Council, AFL-CIO, intervenor-respondent in the first above-entitled proceeding.

I. The National Labor Relations Act authorizes a State authority, when acting in its proprietary capacity, to require contractors to enter into a PLA as a condition of contract award. *(Woelke & Romero Framing v NLRB, 456 US 645; NLRB v Iron Workers, 434 US 335; Building & Constr. Trades Council v Associated Bldrs. & Contrs. of Mass./R. I., 507 US 218; Jim McNeff, Inc. v Todd, 461 US 260.)*

II. The National Labor Relations Act grants the building trades the right to enter into PLAs and any interpretation of New York law that has the effect of depriving the building ***62** trades of this right is preempted by Federal Labor Law and policy. *(Matter of Conduit & Found Corp. v Metropolitan Transp. Auth., 66 NY2d 144; Meyers v Pennsylvania Steel Co., 77 App Div 307; Edenwald Contr. Co. v City of New York, 86 Misc 2d 711; Phoenix Eng'g v MK-Ferguson of Oak Ridge Co., 966 F2d 1513; Minnesota Ch. of Associated Bldrs. & Contrs. v County of St. Louis, 825 F Supp 238; Gerzof v Sweeney, 16 NY2d 206; McMillen v Browne, 14 NY2d 326; Machinists v Wisconsin Empl. Relations Commn., 427 US 132; National Labor Relations Bd. v Metallic Bldg. Co., 204 F2d 826, 347 US 911; Southeast La. Bldg. & Constr. Trades Council v Scheyd, Brennan, 334 F Supp 720.)*

Murphy Smith & Polk (Charles E. Murphy and *Robert P. Casey,* of the Illinois Bar, admitted *pro hac vice,* of counsel), for Associated General Contractors of America, Inc., *amicus curiae* in the first above-entitled proceeding.

I. Use of the PLA as a bid specification is contrary to the State competitive bid statutes. *(Depot Constr. Corp. v City of New York, 46 NY2d 859; Matter of Long Is. Signal Corp. v County of Nassau, 51 Misc 2d 320.)*

II. Use of the PLA as a bid specification effectively eliminates potential low bidders based solely on their "union status" and mandates use of "building trades union only labor" on the job. *(Labor Bd. v General Motors, 373 US 734.)*

III. Federal Labor Law does not preempt the State competitive bid laws with respect to the Thruway Authority's inability to impose bid specifications mandating compliance with the PLA. *(Maryland v Louisiana, 451 US 725; Metropolitan Life Ins. Co. v Massachusetts, 471 US 724; San Diego Unions v Garmon, 359 US 236.)*

Sherman, Dunn, Cohen, Leifer & Yellig (Laurence J. Cohen and *Victoria L. Bor,* of the District of Columbia Bar, admitted *pro hac vice,* of counsel), for Building and Construction Trades Department, AFL-CIO, *amicus curiae* in the first and second above-entitled proceedings.

New York's competitive bidding laws, which permit State agencies to award contracts to the "lowest responsible bidder," grant the authorities discretion to condition award of the construction contracts on the bidder's execution of the applicable PLAs. *(San Diego Unions v Garmon, 359 US 236; Jered*

Contr. Corp. v New York City Tr. Auth., 22 NY2d 187; Matter of Construction Contrs. Assn. v Board of Trustees, 192 AD2d 265; Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth., 66 NY2d 144; Varsity Tr. v Saporita, 71 AD2d 643, 48 NY2d 767; ***63** Gerzof v Sweeney, 16 NY2d206; Associated Bldrs. & Contrs. v City of Rochester, 67 NY2d 854; American Inst. for Imported Steel v Office of Gen. Servs., 47 AD2d 118, 38 NY2d 991; American Inst. for Imported Steel v County of Erie, 32 AD2d 231.)

Gates & Adams, Rochester (*Anthony J. Adams, Jr.*, of counsel), for appellants in the second above-entitled proceeding.

I. Compulsory PLAs in public works offend New York's competitive bidding laws. (Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187; Associated Bldrs. & Contrs. v City of Rochester, 67 NY2d 854; Gerzof v Sweeney, 16 NY2d 206; American Inst. for Imported Steel v Office of Gen. Servs., 47 AD2d 118, 38 NY2d 991; Warren Bros. Co. v Craner, 30 AD2d 437; Case Co. v Town Bd., 105 AD2d 1077; American Inst. for Imported Steel v County of Erie, 32 AD2d 231; American LaFrance & Foamite Corp. v City of New York, 156 Misc 2, 246 App Div 699; Matter of General Bldg. Contrs. v City of Syracuse, 40 AD2d 584, 32 NY2d 780; Matter of Signacon Controls v Mulroy, 32 NY2d 410.)

II. The Roswell Park PLA is unjustified by any essential "public interest". (American Inst. for Imported Steel v Office of Gen. Servs., 47 AD2d 118, 38 NY2d 991; Matter of Action Elec. Contrs. v Goldin, 64 NY2d 213; Gerzof v Sweeney, 16 NY2d 206; Matter of New York State Assn. of Plumbing-Heating-Cooling Contrs. v Egan, 60 NY2d 882; 52 Flavors v Baker & Confectionary Salesclerks Union, 46 AD2d 875; Apex Indus. Constr. Corp. v Village of Lake George, 31 AD2d 670, 23 NY2d 647; Matter of M. Cristo, Inc. v State of New York Off. of Gen. Servs., 42 AD2d 481; Kings Bay Buses v Aiello, 100 Misc 2d 1.)

III. The "separation of powers" doctrine forecloses Dormitory Authority's attempt to legislate a PLA. (Subcontractors Trade Assn. v Koch, 62 NY2d 422; Matter of Fullilove v Beame, 48 NY2d 376; Matter of Brodrick v Lindsay, 39 NY2d 641; American Inst. for Imported Steel v Office of Gen. Servs., 47 AD2d 118, 38 NY2d 991; Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398; Associated Bldrs. & Contrs. v City of Rochester, 67 NY2d 854.)

Morgan, Lewis & Bockius LLP, New York City (*Bradford W. Coupe* and *James P. Philbin III* of counsel), and *Dennis C. Vacco, Attorney-General*, New York City (*Victoria A. Graffeo, Peter H. Schiff, Daniel F. De Vita* and *M. Patricia Smith* of counsel), for respondents in the second above-entitled proceeding.

I. The PLA requirement is permissible because it is rationally related to a legitimate State purpose and does not exclude any bidders from the competition. ***64** (Edenwald Contr. Co. v City of New York, 86 Misc 2d 711, 47 AD2d 610; Meyers v Pennsylvania Steel Co., 77 App Div 307; Matter of Kaelber, 281 App Div 980, 305 NY 858; Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth., 66 NY2d 144; Matter of Construction Contrs. Assn. v Board of Trustees, 192 AD2d 265; Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187; Matter of McNutt Co. v Eckert, 257 NY 100; Matter of Paccione v Board of Educ., 20 Misc 2d 896; Kings Bay Buses v Aiello, 100 Misc 2d 1.)

II. The record below reveals that the Roswell Park specifications do not exclude any bidder. (Matter of Atlantic Tug & Equip. Co. v City of Tonawanda, 45 AD2d 916; Varsity Tr. v Saporita, 71 AD2d 643; Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth., 66 NY2d 144; Matter of Southern Steel Co. v County of Suffolk, 51 Misc 2d 198, 29 AD2d 662.)

III. There is no evidence that nonunion bidders will be indirectly excluded from competition for Roswell Park contracts. (Matter of Conduit & Found Corp. v Metropolitan Transp. Auth., 66 NY2d 144; Matter of Atlantic Tug & Equip. Co. v City of Tonawanda, 45 AD2d 916.)

IV. Contractors' reliance on the County of Niagara decision is misplaced. (Varsity Tr. v Saporita, 71 AD2d 643; Associated Bldrs. & Contrs. v City of Rochester, 67 NY2d 854.)

V. The PLA requirement does not exceed Dormitory Authority of the State of New York's authority under its enabling statutes. (Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398; Subcontractors Trade Assn. v Koch, 62 NY2d 422; Matter of Fullilove v Beame, 48 NY2d 376; Rex Paving Corp. v White, 139 AD2d 176.)

Venable, Baetjer, Howard & Civiletti, LLP (*Maurice Baskin*, of the District of Columbia Bar, admitted *pro hac vice*, of counsel), for Associated Builders and Contractors, Inc., *amicus curiae* in the second above-entitled proceeding.

I. The challenged union-only bid specifications contravene the policy in favor of "maximum competition" which underlies the State's competitive bidding law. (*Matter of New York State Assn. of Plumbing-Heating-Cooling Contrs. v Egan*, 86 AD2d 100, 60 NY2d 882; Jered Contr. Corp. v New York City Tr. Auth., 22 NY2d 187; Gerzof v Sweeney, 16 NY2d 206.)

II. The decision of the court below contains significant errors of fact and law which should be reversed

on appeal. (Case Co. v Labor Bd., 321 US 332.)

OPINION OF THE COURT

Chief Judge Kaye.

(1-3) Can public authorities governed by New York's competitive bidding laws lawfully adopt prebid specifications knownas***65*** Project Labor Agreements (PLAs) for construction projects? We conclude that PLAs are neither absolutely prohibited nor absolutely permitted in public construction contracts. A PLA will be sustained for a particular project 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. Here, that burden was satisfied by the Thruway Authority but not the Dormitory Authority (DASNY).

PROJECT LABOR AGREEMENTS

By way of background, a PLA is a prebid contract between a construction project owner and a labor union (or unions) establishing the union as the collective bargaining representative for all persons who will perform work on the project. The PLA provides that only contractors and subcontractors who sign a prenegotiated agreement with the union can perform project work. A PLA thus generally requires all bidders on the project to hire workers through the union hiring halls; follow specified dispute resolution procedures; comply with union wage, benefit, seniority, apprenticeship and other rules; and contribute to the union benefit funds. In return for a project owner's promise to insist in its specifications that all successful bidders agree to be covered by a PLA, the union promises labor peace through the life of the contract (*see,* Associated Bldrs. & Contrs. v Massachusetts Water Resources Auth., 935 F2d 345, 360 [Breyer, Ch. J., dissenting], *revd sub nom.* Building & Constr. Trades Council v Associated Bldrs. & Contrs. of Mass./R. I., 507 US 218 [the *Boston Harbor* case]).

By comprehensively requiring all bidders to conform to a variety of union practices and limiting their autonomy to negotiate employment terms with a labor pool that includes nonunion workers--attributes that, by their scope, set these agreements apart from more common specifications, like construction materials or design criteria--PLAs have an anticompetitive impact on the bidding process (see, 207 AD2d 26, 30; Harms Constr. Co. v New Jersey Turnpike Auth., 137 NJ 8, 44, 644 A2d 76). Because in particular instances there are, however, also efficiencies to be gained, PLAs have been utilized in major construction projects such as the Boston Harbor (Boston Harbor, 507 US 218, *supra),* the ***66*** Cleveland sports complex (Northern Ohio Ch. of Associated Bldrs. & Contrs. v Gateway Economic Dev. Corp., 1992 WL 119375 [US Dist Ct, ND Ohio]) and the Massachusetts Central Artery/Third Harbor Tunnel (Utility Contrs. Assn. v Department of Pub. Works, 29 Mass App Ct 726, 565 NE2d 459 [1991]).

The backdrop for the present appeals is the United States Supreme Court decision in *Boston Harbor.* Recognizing the uniqueness of the construction industry, Congress in 1959 amended the National Labor Relations Act (NLRA) to permit prehire agreements in private construction contracts (29 USC § 158 [f]). At issue in *Boston Harbor* was whether the NLRA permitted a public authority to require as a prerequisite to the award of a public contract that the winning bidder and its subcontractors abide by a PLA previously negotiated between a labor consultant and the Boston Metropolitan District Building and Construction Trades Council. The Court concluded:

"It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, 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. ...

"There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same." (Boston Harbor, 507 US at 231 [citations omitted].)

While *Boston Harbor* stimulated local and State interest in PLAs, that decision held only that Federal labor law does not prohibit a public entity from using the same NLRA exception as is available to private purchasers of construction services. The decision did not go further to resolve the question before us: whether in light of competitive bidding mandates a public entity can enter into a PLA.

Recently, the New Jersey Supreme Court--the first State high court to decide the question--concluded that PLAs wereprohibited***67*** by that State's public bidding statutes, which foster "unfettered competition" in public contracts (*Harms*, 137 NJ at 44, 644 A2d at 95, *supra; but see, State ex rel. Associated Bldrs. & Contrs., Cent. Ohio Ch. v Jefferson County Bd. of Commrs.*, 106 Ohio App 3d 176, 665 NE2d 723 [Ohio Ct App 1995], *appeal dismissed* 74 Ohio St 3d 1499, 659 NE2d 314 [1996] [PLA did not violate Ohio competitive bidding statute]). Because we have never construed New York's competitive bidding statutes to be so absolute, we answer the question differently.

STATUTORY FRAMEWORK

New York has a multitude of procurement statutes applicable to public entities, but the underlying purpose is uniform: to assure prudent use of public moneys and to facilitate the acquisition of high quality goods and services at the lowest possible cost (*see, e.g.*, General Municipal Law § 100-a). This Court has several times revisited New York's requirement for competitive bidding in the disposition of public contracts.

In *Gerzof v Sweeney* (16 NY2d 206), for example, we reviewed a bid specification of the Board of Trustees of the Village of Freeport on a municipal contract that required experience constructing three generators of a specific type. The requirement had the effect of severely limiting competitive bidding for all but one manufacturer. This Court held that the specification violated General Municipal Law § 103, which provided that all contracts for public works were to be awarded to the lowest responsible bidder:

"We do not mean to suggest that specifications for public projects are illegal merely because they tend to favor one manufacturer over another. More must appear in order to render the specifications and the contract based thereon illegal ... However, an objectionable and invalidating element is introduced when specifications are drawn to the advantage of one manufacturer not for any reason in the public interest but, rather, to insure the award of the contract to that particular manufacturer. ... Such a scheme or plan is illegal in the absence of a clear showing that it is essential to the public interest." (*Id.* at 211-212.)

Thus, it is manifest from *Gerzof* that New York's competitive bidding statutes do not compel unfettered competition, but do ***68*** demand that specifications that exclude a class of would-be bidders be both rational and essential to the public interest.

In *Jered Contr. Corp. v New York City Tr. Auth.* (22 NY2d 187, 192-193), we identified the strong public policy behind the competitive bidding statutes as "fostering honest competition in order to obtain the best work or supplies at the lowest possible price. In addition, the obvious purpose of such statutes is to guard against favoritism, improvidence, extravagance, fraud and corruption." Again, in *Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.* (66 NY2d 144, 148), the Court described the purpose of the competitive bidding statutes as promotion of the public interest by "fostering honest competition in the belief that the best work and supplies might thereby be obtained at the lowest possible prices."

Most recently in *Associated Bldrs. & Contrs. v City of Rochester* (67 NY2d 854), we found a violation of General Municipal Law § 103 where approximately 50 nonunion contractors challenged a City ordinance providing preferences to bidders whose employees participated in a State-approved apprenticeship program. We struck down the apprenticeship program "precondition" as not linked to the interests embodied in the competitive bidding statutes, regardless of its furtherance of otherwise enunciated public policy (*see also, American Inst. for Imported Steel v Office of Gen. Servs.*, 47 AD2d 118, *affd* 38 NY2d 991 [requirement that bidders supply only steel manufactured in America invalid because unrelated to the goals of the bidding statutes]; *accord, American Inst. for Imported Steel v County of Erie*, 32 AD2d 231; *Matter of Warren Bros. Co. v Craner*, 30 AD2d 437 [requirement that bidders' asphalt plants be located in Onondaga County invalid]).

Read together, these cases identify two central purposes of New York's competitive bidding statutes, both falling under the rubric of promoting the public interest: (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. Generally, when a public entity adopts a specification in the letting of public work that impedes the competition to bid for such work, it must be rationally related to these twin purposes. Where it is not, it may be invalid (*Associated Bldrs.*, 67 NY2d at 855, *supra*).

(1) As applied particularly to PLAs, which are clearly different from typical prebid specifications in their comprehensivescope, ***69** more than a rational basis must be shown. The public authority's decision to adopt such an agreement for a specific project must be supported by the record; the authority bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes. Judicial review, although limited, is not without importance in that it safeguards the interests protected by the competitive bidding mandate. PLAs may not be approved in a pro forma manner.

Mindful of these principles, we turn to the facts before us.

THE THRUWAY AUTHORITY CASE

Respondent Thruway Authority is a public benefit corporation created by a special act of the Legislature (L 1950, ch 143) and responsible for constructing and maintaining the New York State Thruway (*see,* Public Authorities Law § 352). In that connection the Authority had charge of a major construction project to improve the Governor Malcolm Wilson (Tappan Zee) Bridge.

Originally opened in 1955, the Tappan Zee Bridge spans the Hudson River between Rockland County on the west and Westchester County on the east. The Bridge carries Interstate Route 87, which extends north and west from Rockland County in the direction of Albany, Canada and Buffalo, and east and south to New England and New York City. Approximately 60,000 toll-paying vehicles flow across the Bridge daily--and tolls are collected only from eastbound traffic. In 1993, 20,647,930 toll-paying vehicles crossed the Bridge, generating $45,920,519 in revenue for the Thruway Authority.

At issue is a four-year project to refurbish the Tappan Zee Bridge--the largest such construction project since the Bridge was built. A significant portion of the work involves deck replacement, which entails reducing the number of lanes available to traffic while work is in progress. Thus, the Thruway Authority determined that efficiency in completing the project, once commenced, is important to protect a major revenue-producing asset, maximize public safety, and minimize inconvenience to the traveling public.

Of the 23 major construction projects on the Tappan Zee since it was built, the successful bidder in 20 was a union contractor. In fact, union contractors had performed more than 90% of the total dollar volume of work on the Bridge. ***70**

Based on the size and complexity of the pending project, the Thruway Authority predicted that it would be subject to the jurisdiction of some 19 local unions with separate labor contracts having different starting times, scheduling restrictions, holidays, grievance resolution procedures, and other terms and conditions of employment. In 1992, the last time a contract was awarded to a nonunion contractor, the Tappan Zee's first labor dispute erupted. The dispute required the assistance of the State Police to insure the safety of the contractor's employees, and the Bridge itself was picketed.

After receiving an August 1993 memorandum from the Governor's office advising of the *Boston Harbor* decision and recommending consideration of PLAs for future projects, the Authority retained a consultant to investigate the issue for the Tappan Zee project. Based on concessions won from local unions, uniform scheduling and enhanced flexibility with work shifts, the consultant's detailed report estimated labor savings if a PLA were adopted of at least $6 million, or 13.51% of the anticipated labor cost for the project. Additionally, with a PLA, the Authority would maximize its ability to maintain toll revenues throughout the construction period. After months of negotiation, an agreement

was signed and the Thruway Authority included the PLA in the bid documents

The PLA, which binds anyone working on the project, provides that the signatory unions shall be recognized as the exclusive bargaining representatives of all craft employees working at the project. The agreement incorporates the local collective bargaining agreements of the signatory unions and makes them binding on all successful bidders. It requires that contractors secure a minimum of 88% of their labor through the labor hall referral system (thus allowing contractors to retain up to 12% of their current work force). The PLA, however, prohibits discrimination in referrals on the basis of union affiliation.

Additionally, the PLA requires every employee and contractor, regardless of union affiliation, to pay union dues and contribute to employee benefit funds. It provides uniform work rules for all trades, establishing standard hours of work per day and per week. Finally, the PLA sets forth mandatory dispute resolution procedures and expressly prohibits strikes or other labor disruptions.

Immediately after the Thruway Authority issued its specifications, including the PLA, for bridge structural steel repairs, ***71** appellants (trade organizations representing contractors and suppliers, a contractor, as well as two individuals claiming to represent the interests of taxpayers and tradespersons) commenced a CPLR article 78 proceeding seeking a declaration that the PLA was unlawful and illegal, and an order halting the bidding process. Unions representing the construction trades and an association of unionized construction employers intervened. Adopting the reasoning of New Jersey's *Harms* decision, Supreme Court concluded that the "policy of using PLA's contravenes two of the purposes of [the competitive bidding statutes] in discouraging competition by deterring nonunion bidders, and fostering favoritism by dispensing advantages to unions and union contractors."

(2) The Appellate Division reversed, dismissed the petition, and declared that the Thruway Authority did not violate competitive bidding requirements: "Assuming that the use of the PLA somehow discourages competition in the bidding process ... [w]e conclude that the Thruway Authority's decision to use the PLA at issue in this case is rationally based upon reasons in the public interest promoted by the competitive bidding statutes" (207 AD2d at 30-31). We agree.

Apart from a measure of independence explicitly delegated to the Thruway Authority (*see,* Public Authorities Law § 359 [1]; *see also, Matter of Plumbing, Heating, Piping & Air Conditioning Contrs. Assn. v New York State Thruway Auth.,* 5 NY2d 420), we note that in adopting a PLA the Authority assessed specific project needs and demonstrated that a PLA was directly tied to competitive bidding goals. Importantly, the PLA cannot be said to promote favoritism or cronyism because the PLA applies whether the successful bidder is a union or nonunion contractor and discrimination against employees on the basis of union membership is prohibited. The fact that certain nonunion contractors may be disinclined to submit bids does not amount to the preclusion of competition we identified in *Gerzof* as violative of the competitive bidding mandate.

The Thruway Authority's detailed focus on the public fisc--both cost savings and uninterrupted revenues--the demonstrated unique challenges posed by the size and complexity of the project, and the cited labor history collectively support the determination that this PLA was adopted in conformity with the competitive bidding statutes. Agreeing with the Appellate Division as to appellants' remaining contentions, we therefore affirm the order upholding the Thruway Authority's decision to use the PLA for the Tappan Zee project. ***72**

THE DORMITORY AUTHORITY CASE

At issue here is a PLA adopted by respondent DASNY, a public benefit corporation responsible for the financing and construction of facilities for State agencies and other entities for which the Legislature has given authorization (*see,* Public Authorities Law § 1677). Among its larger projects is the modernization of the Roswell Park Cancer Institute for the Department of Health, which operates the Institute. The Roswell project contemplated various public works projects on the Institute's 25-acre campus-like setting spanning a period of five years.

In August 1993, when DASNY received the Governor's office's memorandum regarding PLAs, it had

already begun renovation and in fact had let several contracts in furtherance of the Roswell project through competitive bidding. After DASNY was approached by representatives of the Buffalo Building Construction Trades Council in the fall of 1993 regarding adoption of a PLA for the Roswell project, DASNY's Board of Directors discussed the possibility of a PLA, and the reaction was mixed. Among the negative factors noted were that a PLA might raise the over-all cost of the project; the possibility that skilled labor needed in subsequent project phases might not be available through the PLA; and that upstate, 50% or more of public construction work was nonunion. Barely two months later, local unions picketed two open shop contractors working at Roswell Park. Minutes of a subsequent DASNY Board meeting on February 23, 1994 continued to reflect Board skepticism concerning the need for a PLA at Roswell Park, including the observation that a PLA may affect the price of labor adversely, and made no mention of the picketing.

The following month DASNY approached a labor consultant regarding the issue of a PLA for the Roswell Park project. Of "suggested negotiating topics," none mentioned cost savings as a goal or provided any cost savings projections. The president of the Building and Construction Trades Council of Buffalo then sent a copy of their proposed PLA to DASNY's Executive Director and requested a meeting. The Executive Director responded that the Authority had not yet made a decision regarding a PLA, noting that

"[a]ccess of minorities and women to employment and contract opportunities on this project is a high priority of the Authority. Consequently, if we decide to pursue the negotiation of a project agreement ***73** or request our construction manager to do so, you should know that our decision will be premised on an understanding that the resulting agreement will contain provisions facilitating those opportunities."

On April 14, 1994, negotiation of a PLA for the Roswell Park project commenced and weeks later the agreement at issue was concluded.

Not unlike the Thruway Authority PLA, DASNY's PLA made local collective bargaining agreements of each signatory union binding on all successful bidders; signatory unions were to be recognized as the exclusive bargaining representatives of all craft employees working at the project; contractors were required to hire employees exclusively through the local union job referral system (nonunion contractors were permitted to retain one "core" employee, up to a limit of 10, for every employee hired from the union job referral system). Additionally, all employees hired had to pay union dues and contractors were required to make contributions to union employee benefit funds. Where applicable, a contractor's choice of materials, design, tools or labor-saving devices was limited by local collective bargaining agreements, and the PLA provided uniform work rules for all trades, establishing standard hours of work per day and per week. Lastly, the PLA set forth mandatory dispute resolution procedures, expressly prohibiting strikes or other labor disruptions.

(3) Appellants (seven contractor associations and two general contractors from the Buffalo area) commenced an article 78 proceeding seeking invalidation of the PLA. Supreme Court stayed acceptance of Roswell Park bids while the merits of the petition were considered. Thereafter, the court annulled the PLA as violative of the competitive bidding requirements of State Finance Law § 135 and Public Buildings Law § 8. The Appellate Division reversed, holding that as in the *Thruway Auth.* case the PLA at issue did not violate the competitive bidding statutes because a diminution in competition was permissible, its purpose being rationally related to the public interest promoted by competitive bidding. Disagreeing with that application of the governing principles, we now reverse.

Pursuant to Public Health Law § 2420 (read in conjunction with State Finance Law § 127 [2]), contracts involving the Roswell Park project must comply with the requirement in Public Buildings Law § 8 that the awards be made to the lowest ***74** responsible and reliable bidder as will best promote the public interest. Additionally, in 1989, the Legislature amended Public Authorities Law § 1680 (2) (a) to require that:

"[A]ny contract undertaken or financed by the dormitory authority for any construction, reconstruction, rehabilitation or improvement of any building commenced after January first, nineteen hundred eighty-nine for the department of health shall comply with the provisions of section one

hundred thirty-five of the state finance law."

State Finance Law § 135 mandates that construction contracts be awarded to the "lowest responsible bidder."

Notwithstanding these requirements, DASNY, like the Thruway Authority, is a public benefit corporation. And as we noted in *Schulz v State of New York* (84 NY2d 231, 244) public benefit corporations were devised by the Legislature to separate their administrative and fiscal functions from those of the State in order to protect the State from liability and enable public projects to be carried out with a measure of freedom and flexibility. Thus, DASNY's status would allow it to adopt a PLA--provided it satisfied its burden of showing that adopting such an agreement was consistent with the principles underlying the competitive bidding statutes. While the range of discretionary authority granted to a public entity is a factor in determining the validity of a particular PLA, that factor is not dispositive here.

What is dispositive is that the record fails to show that DASNY's decision to enter into the PLA had as its purpose the advancement of the interests underlying the competitive bidding statutes.

Glaringly absent from this record is DASNY's contemporaneous projection of cost savings as a result of a PLA or any unique feature of the project which necessitated a PLA, an exceptional specification in all events. Although the record contains a few paragraphs identifying how costs would increase if project construction were delayed for one to three months, these projections-- apparently done by DASNY's labor consultant in response to the instant litigation--appear in an affidavit submitted to the trial court nearly four months after the PLA was approved. In fact, by the time of the PLA, DASNY had already let up to six contracts through competitive bidding on the project with no evidence of reduced efficiencies. Minutes of the DASNY Board through the winter continued to reflect the Authority's own doubt that a PLA was needed.***75**

Nor does the record demonstrate labor unrest threatening the project. DASNY's resolution and Board discussions do not even discuss labor unrest, except to mention it was not a concern. Although there is reference in the record to one incident of labor unrest--coinciding with DASNY's consideration of a PLA at Roswell Park and ending with the signing of the PLA--that activity was not claimed to have affected work performance. Rather, the record reflects that local groups used the Roswell Park project as an opportunity to lobby for or against a PLA.

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. To say that DASNY's adoption of the PLA is justified simply by its desire for labor stability so that the work will be completed on time is tantamount to wholesale approval of PLAs--every public entity wants its projects completed on time, and public projects are presumptively important to the public. The competitive bidding requirements, however, demand that something more be shown in order to justify the significant restrictions imposed by PLAs.

Moreover, DASNY's emphasis on its goals of promoting women and minority hiring through the PLA, although surely laudable, is unrelated to the goals of the competitive bidding statutes and cannot support its adoption of the PLA for this project (*see, Associated Bldrs., supra; American Inst. for Imported Steel, supra*).

Given the record, the PLA in this instance cannot be sustained.

RESPONSE TO THE DISSENT

Placing preclusive preeminence on a policy of free competition, the dissent would prohibit PLAs without specific legislative direction, however strong the showing that for a particular project such an agreement in fact served the public interest. New York law, of course, has never insisted upon unfettered competition in the letting of public contracts (*see,* at 67-68, *supra*). And even the New Jersey Supreme Court, which in *Harms* concluded that its own State's competitive bidding statutes required unfettered competition, recognized the Thruway Authority PLA as "exemplif[ying] the exceptional circumstances that could justify recourse to a PLA" (*Tormee Constr. v Mercer County*

Improvement Auth., 143 NJ 143, 149, 669 A2d 1369, 1372).***76**

Nor do PLAs generically represent a social policy favoring organized labor (dissenting opn, at 83). The Thruway Authority PLA, for example, recognized that the successful bidder need not be a union contractor; it recognized that the unions must comply with the terms of the PLA whether or not the successful bidder was a union contractor; and it prohibited discrimination against prospective employees on the basis of union membership. PLAs that do have as their purpose social policymaking, such as remedying racial and gender bias, will not be sustained (*see, e.g.*, Subcontractors Trade Assn. v Koch, 62 NY2d 422 [set-aside program for locally based enterprises]; Matter of Fullilove v Beame, 48 NY2d 376 [affirmative action plan]).

Furthermore, the dissent's claim that a PLA's anticipated cost savings are somehow illusory because "organized labor drives the cost of a project up [and] PLAs bring it back down" (dissenting opn, at 87) has no support in the record. Indeed, the Thruway Authority record shows the contrary: that over the years, under our competitive bidding laws, the successful bidders for Tappan Zee projects overwhelmingly have been union contractors. That a PLA might reduce costs as the result of negotiations with organized labor does not render such savings "illusory." And since the anticipated savings would be achieved under the PLA whether or not the successful bidder actually is a union contractor, there is no issue of favoritism.

Because PLAs do not generically constitute policymaking, because some freedom and flexibility have been delegated to public benefit corporations, and because the particular interests embodied in New York's competitive bidding statutes have long been clearly articulated as standards for agency action, the separation of powers doctrine is not implicated here (dissenting opn, at 91; *see*, Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398, 410).[FN*]

FN* The dissent observes that New York has no analog to the NLRA exemption regarding PLAs (dissenting opn, at 83). The NLRA had invalidated prehire agreements, however, and Congress thus passed an exemption explicitly allowing PLAs in the construction industry. Since New York never restricted the use of PLAs, there can be no cogent reason why the New York Legislature has to pass similar legislation.

In sum, the Court's test neither rubber-stamps nor rejects PLAs wholesale. Rather, it looks to the concerns underlying the competitive bidding statutes to ensure that contracting authorities can respond to the challenges of exceptional construction projects while remaining faithful to the protections provided to the public by the competitive bidding laws. Illustrated ***77** by two practical applications, the test should enable public project owners to continue to serve the public interest by proceeding effectively at their work sites, instead of litigating in the courts.

Accordingly, the order of the Appellate Division in *Matter of New York State Ch. v New York State Thruway Auth.* should be affirmed, with costs. The order of the Appellate Division in *Matter of General Bldg. Contrs. v Dormitory Auth. of State of N. Y.* should be reversed, with costs, and Supreme Court's judgment reinstated.

Smith, J.

(Dissenting in *Matter of New York State Ch. v New York State Thruway Auth.).* Because the Legislature should decide whether New York State's public authorities may condition awards of public works contracts upon a successful bidder's adoption of a Project Labor Agreement (PLA), I dissent, in part, and would reverse the order of the Appellate Division in the Thruway Authority case as well as in the Dormitory Authority case.

The Thruway Authority and the Dormitory Authority are public benefit corporations created by the Legislature through the Public Authorities Law (*see,* Public Authorities Law § 352 [creating the Thruway Authority]; Public Authorities Law § 1677 [creating the Dormitory Authority]). The Thruway Authority exercises jurisdiction over a section of the New York State Thruway which includes the Tappan Zee Bridge (Bridge) (Public Authorities Law § 356 [2]). The Dormitory Authority, the

contracting agency for the New York State Department of Health, is authorized by statute to act as the contracting agency for the Roswell Park Cancer Institute (Roswell Park) because the institute falls under the Department of Health (Public Authorities Law § 1680 [1], [2] [a]; Public Health Law § 2420).

In a memorandum dated August 17, 1993, the Governor's office asked all State construction agencies and authorities to consider the benefits of using prehire or project labor agreements, which "typically require all contractors and subcontractors on a [construction] project to use a designated source for all construction workforce hiring, typically union hiring halls." The memorandum had its genesis in *Building & Constr. Trades Council v Associated Bldrs. & Contrs. of Mass./R. I.* (507 US 218), the *Boston Harbor* case, decided by the United States Supreme Court in 1993.

The Governor's memo, in addition to stating that the *Boston Harbor* case permitted a State, acting as a consumer in the ***78** construction industry marketplace, to require PLAs as a condition of awarding a public works contract, also stated:

"All State agencies, authorities and other entities should consider on a case-by-case basis the possible use of such agreements when acting in the role of a market participant for construction projects. ... I ask that all State construction agencies and authorities evaluate the benefits, for appropriate projects, of negotiating a pre-hire agreement, either directly or through a construction manager or general contractor as an agent, with the State or regional Building and Construction Trades Council."

The Thruway Authority and the Dormitory Authority received copies of the Governor's memorandum and the document influenced both Authorities to consider using PLAs in pending and anticipated construction projects involving the Bridge and Roswell Park.

In 1994, the Thruway Authority authorized the negotiation of a PLA for the rehabilitation and reconstruction of the Bridge, a project expected to total approximately $130 million (*Matter of New York State Ch., Inc., Associated Gen. Contrs. v New York State Thruway Auth.*, 167 Misc 2d 572). The same year, the Dormitory Authority authorized a PLA for various construction projects involving the renovation and modernization of Roswell Park for the New York State Department of Health. The Roswell Park PLA was projected to cover approximately $170 million worth of construction. PLAs were subsequently negotiated and executed by construction managers for the Thruway Authority and the Dormitory Authority, and successful bidders were required to adopt the applicable PLA's terms as a condition of being awarded a construction contract for a Bridge or Roswell Park project.

THE BRIDGE PROJECT

Over the years, the Bridge has undergone various repairs. Specifically, during a 24-year period, 23 construction contracts were let by the Thruway Authority. Of the 23 contracts awarded, 20 of the successful bidders were union contractors. The goals for the Bridge PLA, set forth in the preamble to the agreement, seek the timely, efficient and successful completion of Bridge repairs through (1) avoidance of delays through strikes, slowdowns and other disruptions; (2) standardization of the terms and conditions governing work; (3) flexibility in work ***79** schedules; (4) negotiated adjustments to work rules and staffing requirements; (5) provisions for the settlement of work disputes, including those related to jurisdiction; (6) a reliable source of skilled and experienced labor; (7) improved opportunities for minorities, women and the economically disadvantaged; (8) minimization of lost toll revenues; and (9) expedition of the construction process and minimization of traffic inconvenience for Bridge users.

THE ROSWELL PARK PROJECTS

Roswell Park is a cancer research and treatment center consisting of 18 buildings in a 25-acre area located in downtown Buffalo. As 1 of 27 Comprehensive Cancer Centers designated by the National Cancer Institute, many of the services provided by Roswell Park have long waiting lists. The modernization and renovation effort was spurred by the need to expand existing services, create and deliver new services, and to install a more modern air handling system.

The Dormitory Authority authorized the PLA for the Roswell Park construction projects in order to

(1) obtain a reliable source of labor, (2) ensure labor harmony over the course of the projects, and (3) standardize the terms and conditions of work. The need to avoid delays in construction was cited as a primary concern because cancer patients would be at a higher risk of infection by airborne organisms during construction, and because delays would mean fewer cancer patients receive treatment.

THE PROJECT LABOR AGREEMENTS

A detailed review of the PLAs is necessary in order to fully appreciate the preference given unions and thus, the various policy issues raised by the public authorities' utilization of them. The PLAs in these two cases contain only minor differences and are alike in all material aspects. The Bridge PLA involves some 19 different labor agreements, with each expiring at least once during the period of reconstruction. The Roswell Park PLA involves some 21 agreements involving 15 different unions, with each expiring at least once during the period of the project. Both PLAs institute a mandatory labor referral system, operated by the signatory unions, which all successful bidders and their subcontractors (collectively referred to as contractors) must use in obtaining a similarly defined class of employees to directly perform construction and construction-related work. The unions must administer the referral system without offending any laws or regulations, and ***80** in a nondiscriminatory manner. The PLAs also explicitly prohibit the unions from discriminating against workers in the operation of the referral system on the basis of union or nonunion membership, or any aspect of union membership.

The PLAs require all contractors to hire the vast majority of covered employees through the union referral systems; nonunion contractors may hire some employees and apprentices outside the referral systems, but the PLAs strictly limit their ability to do so both quantitatively and procedurally. Contractors under both PLAs must recognize the signatory unions as the "sole and exclusive" bargaining representatives for the employees covered by the agreements. The contractors must also make contributions to certain employee benefit funds established and maintained by the unions. Nonunion affiliated workers hired under the PLAs must make payments to the signatory unions which union members already pay as union dues. These payments are intended to reimburse the unions for acting as the workers' bargaining agents, an assignment mandated by the PLAs since contractors may not recognize any other bargaining representative for the covered employees.[FN1] While the Bridge PLA permits employees to merely pay an agency shop fee, the Roswell Park PLA requires all employees to become union members, though they may limit their membership to "financial core membership."

FN1 Because these appeals may be resolved on other grounds, we need not address the argument of the appellants in the Thruway Authority case that the Bridge PLA violates article I, § 17 of the New York Constitution which provides, in part, "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

Both PLAs also provide that the unions will not strike, picket, conduct work stoppages, or otherwise engage in "disruptive" activity for "any reason." Failure of workers employed under the PLAs to cross a picket line by a signatory or nonsignatory union constitutes a violation of the applicable PLA. Contractors may not lock out any employees hired pursuant to the PLAs.

THE APPLICABLE COMPETITIVE BIDDING STATUTES

Unlike actors and projects in private sector construction, the Authorities and public works projects here are subject to competitive bidding statutes. The Thruway Authority is governed by Public Authorities Law § 359, which requires that contracts for construction, reconstruction and maintenance of the New York State Thruway, of which the Bridge is a part: ***81**

"be let to the lowest responsible bidder, by sealed proposals publicly opened, after public advertisement and upon such terms and conditions as the authority shall require" (359 [1]).

Because Roswell Park falls under the jurisdiction of the Department of Health, all contracts for the construction, alteration, repair or improvement of Roswell Park facilities must comply with Public

Buildings Law § 8 (State Finance Law §§ 125, 127). Section 8 (6) of the Public Buildings Law requires that:

"All contracts for amounts in excess of five thousand dollars for the work of construction, reconstruction, alteration, repair or improvement of any state building, whether constructed or to be constructed must be offered for public bidding and may be awarded to the lowest responsible and reliable bidder, as will best promote the public interest."

Furthermore, in 1989, the Legislature amended section 1680 (2) (a) of the Public Authorities Law to provide that:

"[A]ny contract undertaken or financed by the dormitory authority for any construction, reconstruction, rehabilitation or improvement of any building commenced after January first, nineteen hundred eighty-nine for the department of health shall comply with the provisions of section one hundred thirty-five of the state finance law."

Section 135 of the State Finance Law also requires that construction contracts for specified work be awarded:

"separately to responsible and reliable persons, firms or corporations engaged in these classes of work. A contract for one or more buildings in any project shall be awarded to the lowest responsible bidder for all the buildings included in the specifications."

These various competitive bidding statutes have, as noted by the majority, two common purposes:

"(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." (Majority opn, at 68.)***82**

A low bid may be rejected for a good reason, but the "power to reject any or all bids may not be exercised arbitrarily or for the purpose of thwarting the public benefit intended to be served by the competitive process" (*Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 149). Thus, the directive to promote the public interest may not be viewed in isolation, without regard to the full range of fiscal implications, as well as the anticompetitive effects which may result. The question, as we view it, is whether the competitive bidding statutes authorize public authorities to use PLAs to limit the pool of those who will be considered "responsible bidders."

SEPARATION OF POWERS, PLA FAVORITISM, AND POLICY CHOICES

The decision to favor union over nonunion contractors reflects a policy decision which should have been reserved to the Legislature.

"Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator. ... An agency cannot by its regulations effect its vision of societal policy choices [citations omitted] and may adopt only rules and regulations which are in harmony with the statutory responsibilities it has been given to administer" (*Matter of Campagna v Shaffer*, 73 NY2d 237, 242-243).

"Private employers in this State are free to make employment decisions on whatever basis they choose, as long as the basis is not prohibited by law" (*Under 21, Catholic Home Bur. for Dependent Children v City of New York*, 65 NY2d 344, 359). Here, we have public authorities which are statutorily obligated to let contracts to the lowest bidder. But by their very nature, the PLAs may interfere with that obligation because they may cause the "lowest" bids to be inflated by the costs of organized labor, and because the most "responsible" bidder may be one who does not utilize organized labor. The conclusion that particular labor practices best advance certain objective goals is a policy determination best left to the Legislature (*see, Boreali v Axelrod*, 71 NY2d 1 [striking a balance between competing interests, various businesses, and the general public on the basis of political, social and economic, rather than technical factors is more appropriately made by the Legislature instead of the Public Health Council]).

Indeed, the determination that prehire or Project Labor Agreements are permissible as a matter of Federal law was ***83** reached by Congress, a legislative body, and not by the executive branch of the Federal Government (*see,* 29 USC § 158 [e], [f]). The *Boston Harbor* case, which provides the background for these appeals, involved the judicial interpretation of a Federal statute which expressly authorized PLAs, and contained no State law issues. In contrast, the New York State Legislature has not provided a broad grant of authorization for PLAs analogous to congressional amendment of the National Labor Relations Act, and the policies of competitive bidding statutes in promoting competition and discouraging favoritism in the competitive bidding process are at odds with the effect of PLAs. Whether PLAs may be required by the State as a purchaser of construction services absent specific legislative authorization requires the balancing of competing policy interests best left to the legislative branch of government.[FN2]

FN2 Although the majority notes that New York has never prohibited PLAs (majority opn, at 76, n), the central point, that Federal labor policy regarding PLAs has been formulated by Congress, the legislative branch of Government, remains unanswered by the majority.

Moreover, the majority's reliance on *Northern Ohio Ch. of Associated Bldrs. & Contrs. v Gateway Economic Dev. Corp.* (1992 WL 119375 [ND Ohio, May 12, 1992]) and *Utility Contrs. Assn. v Department of Pub. Works* (29 Mass App Ct 726, 565 NE2d 459 [1991]) as evidence that other courts have recognized the "efficiencies to be gained" through the use of PLAs (*see,* majority opn, at 65) is misplaced. In *Northern Ohio Ch.,* plaintiff sought an injunction against the PLA requirement imposed by the Gateway Economic Development Corporation of Greater Cleveland on four Federal law grounds and two State law grounds (violation of Ohio's Public Bidding Statute and violations of the Ohio State Constitution). The District Court dismissed the Federal claims on the ground that Gateway was not a State actor, and declined to retain jurisdiction over the pending State law claims. The court did not address the benefits or efficiencies to be gained from using PLAs. The court in *Utility Contrs.* dismissed the case as moot because the Department of Public Works stated that it did not intend to issue the contested bid specification which required contractors to execute a PLA as a condition of accepting bids.

The majority contends that the separation of powers doctrine is not implicated in these appeals because competitive bidding statutes provide sufficient guidance for agency action (majority opn, at 76). However, we have repeatedly held that absent a *specific* grant of legislative authority, a governmentalbody***84** may not use its contracting power to implement an extrinsic social policy by requiring the adoption of specified labor practices (*see, Matter of Broidrick v Lindsay,* 39 NY2d 641 [Mayor not authorized to require certain minority percentages of employment by construction contractors in enforcing nondiscrimination statutes]; *Matter of Fullilove v Beame,* 48 NY2d 376 [New York City may not implement the goal of nondiscrimination by requiring contractors to adopt an affirmative action program as a condition of contracting with the city] *Subcontractors Trade Assn. v Koch,* 62 NY2d 422 [Mayor may not require that 10% of all construction contracts awarded by the city be given to locally based enterprises in order to promote the development of businesses and opportunities in economically depressed areas]; *Under 21,* 65 NY2d 344, *supra* [Mayor may not enforce laws prohibiting employment discrimination by prohibiting those who secure contracts with the city from refusing to hire people on the basis of sexual orientation or affectional preference]). As in the foregoing cases, the competitive bidding statutes provide the general directive to award contracts to the lowest responsible bidder, but do not authorize the particular remedy which the Authorities seek to implement here. Indeed, by balancing the competing interests in this case, without statutory authorization, the majority engages in the kind of policy making properly reserved to the Legislature.

We recognize that unlike the New Jersey competitive bidding statute at issue in *Harms Constr. Co. v New Jersey Turnpike Auth.* (137 NJ 8, 644 A2d 76), New York State's competitive bidding statutes do not promote "unfettered competition" and we do not urge that interpretation of our statutes here. Moreover, the fuller description of New Jersey's competitive bidding statutes provided by the New Jersey Supreme Court in *Tormee Constr. v Mercer County Improvement Auth.* (143 NJ 143, 669 A2d 1369), indicates that, similar to New York law, New Jersey requires all contracts requiring public

advertisement for bids be awarded to the "lowest responsible bidder" (*see also,* NJ Stat Annot § 40A:11-6.1).

The New Jersey Supreme Court also invalidated the PLA in *Tormee* because no "exceptional circumstances," which the court believed had been demonstrated in the Thruway Authority case, justified the PLA's anticompetitive effects. However, even in reaching this holding, the *Tormee* court stated:

"[W]e recognize that the Legislature is better suited ***85** than the judiciary to determine 'the size, complexity and cost' of projects that justify recourse to a PLA. *New York Thruway, supra,* 620 N.Y.S.2d at 856, 207 AD2d 26. We also believe that the Legislature is better suited to accommodate the several interests of labor, management, and the public. *Harms, supra,* 137 N.J. at 45" (143 NJ, at 150-151, 669 A2d, at 1373, *supra).*

It is important to note that the PLAs were negotiated without the input of any spokesperson for nonunion contractors or nonunion labor. The terms of the Bridge PLA were reached after approximately four months of negotiations between the Thruway Authority construction manager and various union representatives. The Roswell Park PLA was negotiated between the Dormitory Authority construction manager, local unions affiliated with the Buffalo Building Trades Council, and four other unions. Apart from the construction managers acting on behalf of the authorities, no representatives of nonunion interests were present at any of the negotiation sessions which resulted in the PLAs at issue here.

The majority freely concedes that "[b]y comprehensively requiring all bidders to conform to a variety of union practices and limiting their autonomy to negotiate employment terms with a labor pool that includes nonunion workers", the PLAs create anticompetitive effects (majority opn, at 65). Nevertheless, the majority contends that the PLAs do not promote "favoritism or cronyism" because the agreements apply to all contractors, both union and nonunion, and discrimination against employees on the basis of union membership is prohibited.

The Bridge and Roswell Park PLAs decrease competition *because* they impermissibly favor union contractors over nonunion contractors. Favoritism can take many forms, and the fact that no contractor has been prohibited outright from submitting a bid does not conclusively demonstrate fairness of the bidding process. If the apparently neutral terms of the PLAs skew the competition in favor of union contractors over nonunion contractors, it is immaterial that both groups may become parties to the agreements.

Prior to the PLAs, bidders for Bridge or Roswell Park projects had the ability to compete directly for a pool of labor which included both union and nonunion workers. Contractors could enter into collective bargaining agreements and obtain union ***86** affiliated employees, or, contractors could negotiate directly with workers for their services. In contracting directly with nonunion workers, contractors had the ability to independently negotiate the terms of employee benefit plans and the tasks each worker would be required to perform. Contractors could also choose employees on the basis of their familiarity with a particular management team and the contractor's business practices, and on the basis of an employee's prior work history with the contractor.

The PLAs systematically render every advantage to unions and union-affiliated workers. The only successful bidders who lose their ability to staff their work crews in accordance with their prior practice are nonunion contractors. Union contractors, who are already familiar with and use union hiring halls do not suffer any disruptions in their business routines. Moreover, the limited number of workers which contractors may employ outside of the union referral process provides only limited relief from the intrusive impact of the PLAs.[FN3] Furthermore, since employees hired outside the referral systems must satisfy certain requirements, nonunion contractors also incur additional administrative costs in attempting to retain their employees.[FN4]

FN3 The Bridge PLA limits the hiring of employees outside of the referral system to a maximum of 12% per craft. The Roswell Park PLA provides that no more than 10 core

employees may be hired for each craft and only in a one to one ratio with union referred workers until the maximum is reached.

FN4 A Bridge contractor must submit a name to a three-person committee charged with the duty of determining whether that person is "qualified." A Roswell Park contractor may only retain "core" employees.

The PLAs also require nonunion contractors to adopt a variety of union practices which place them at a disadvantage with contractors already familiar with jurisdictional rules of various unions and the requirements of local collective bargaining agreements. As the majority notes, the Bridge PLA "incorporates the local collective bargaining agreements of the signatory unions and makes them binding on all successful bidders" (majority opn, at 70); the Roswell Park PLA contains similar provisions. The PLAs also require nonunion contractors to relinquish any savings they may realize from directly negotiating terms of employment with workers since the unions must be recognized as exclusive bargaining agents.

Respondents contend, and the majority accepts, that PLAs protect the public fisc and that a public authority--in support of its decision to utilize a PLA-- need point only to an ***87** anticipated cost savings and experience with labor unrest, as the Thruway Authority has done. But this ignores the fact that nonunion contractors may be able to submit substantially lower bids if they are not required to comply with a PLA. Moreover, the anticipated savings to the public project are directly attributable to the elimination of the costs of organized labor and labor unrest, or, as the majority notes, "concessions won from local unions" (majority opn, at 70). Viewed another way, organized labor drives the cost of a project up; PLAs bring it back down. Thus, the savings from the PLA are, in essence, artificial and illusory. Viewed in such a light, it cannot be seriously argued that public authorities' endorsement or utilization of PLAs to appease labor unions is not fundamentally a matter of social policy. As such, it is an issue that should be addressed by the Legislature.

In addition to creating illusory cost savings, the PLAs are in direct contravention of the second purpose of the competitive bidding statutes--to avoid favoritism in the letting of public contracts. True, this is not a situation in which a single bidder has been favored (*compare, Gerzof v Sweeney,* 16 NY2d 206), and though the favoritism of PLAs may be rationally explained, it is nevertheless manifestly contrary to the second purpose of the competitive bidding statutes. And it is all the more offensive to the competitive bidding statutes because favoritism following from PLAs directly promotes and inflates the artificial cost savings used to support the decision to utilize a PLA in the first instance.

Further, the PLAs turn the concept of competitive bidding upside down. Our jurisprudence reflects that lowest responsible bidders are usually selected by encouraging the most competition to obtain the lowest bid, and then determining whether the lowest bidder is responsible. PLAs, however, operate on the implicit and irrebuttable presumption that a bidder is responsible only if it is a union contractor. But the requirement that a bidder be responsible cannot be used to decrease competition at the commencement of the bidding process so that the range of bids is artificially restricted and inflated.

Although ensuring labor peace may be a legitimate purpose of entering into a PLA, given proper authorization by the Legislature, we have never held, and the Legislature has never stated that ensuring labor peace is a legitimate purpose of New York State's competitive bidding statutes. Indeed, our jurisprudence holds that rejection of a low bid from a nonunion contractor solely because of fear that protest by unions would ***88** delay construction violates New York's competitive bidding statutes (*see, Matter of M. Cristo, Inc. v State of New York Off. of Gen. Servs.,* 42 AD2d 481, cited with approval in *Matter of Conduit & Found. Corp. v Metropolitan Transp. Auth.,* 66 NY2d 144, 148; *Matter of Long Is. Signal Corp. v County of Nassau,* 51 Misc 2d 320).

Appeasing unions through favorable treatment in order to ensure labor peace is antithetical to the idea of open and honest competition and does not further the goal of obtaining lowest responsible bidders. Absent statutory authorization, it is irrational to permit the use of PLAs to hold bidders accountable for the conduct of third parties in the guise of seeking "responsible" contractors, since

contractors should only be held responsible for their own conduct. Nothing in the history of the competitive bidding statutes suggests that favorable treatment of unions is permissible because of organized labor's ability to cause labor unrest by protesting a bidder's lawful labor practices; indeed precedent suggests otherwise.

It is clear from the foregoing that the PLA requirements at issue here cannot be equated with neutral bid specifications such as the use of a particular grade of building materials. Indeed, it is difficult to distinguish this case from *Associated Bldrs. & Contrs. v City of Rochester* (67 NY2d 854) where an association of nonunion contractors challenged a city ordinance which established a preference for workers who participate in State-approved apprentice programs. Although support for apprenticeship training would arguably have promoted the goal of securing a responsible bidder by ensuring a skilled workforce, we invalidated the preference as being unsupported by the specific goals of competitive bidding statutes.

PUBLIC BENEFIT CORPORATIONS

The majority suggests that only public authorities, by virtue of their status as public benefit corporations, may enter into PLAs because they have been granted a measure of flexibility and independence not provided to other agencies. However, the majority's reliance on *Matter of Plumbing, Heating, Piping & Air Conditioning Contrs. Assn. v New York State Thruway Auth.* (5 NY2d 420, 422), where we permitted the Thruway Authority to issue specifications for "construction, plumbing, heating and ventilating, electrical and site development work" to be performed in a single contract, instead of the separate contracts called for by State Finance Law § 135, is unwarranted. The interpretation of "lowest responsible bidder" orthe***89*** standards for determining the lowest responsible bidder were not at issue in that case and we did not hold, or even suggest, that public authorities had greater flexibility than other agencies in awarding contracts.

Moreover, the executive branch has a stated policy of requiring the Thruway Authority and the Dormitory Authority, as contracting agencies for New York State, to employ the same standards as other contracting agencies in determining "responsible and reliable" bidders. Recognizing that "it is the established policy of the State of New York to award certain contracts to the lowest responsible and reliable bidder as will best promote the public interest," Governor Cuomo issued guidelines, in 1993, to all contracting agencies for determining the responsibility of bidders (9 NYCRR 4.170). The guidelines, promulgated by Executive Order because "the public interest would be served by the uniform application" of competitive bidding standards, apply not only to the public authorities here, but to agencies which are not public benefit corporations such as the Office of General Services (created by Executive Law § 200), the Department of Transportation (created by Transportation Law § 11), the Department of Environmental Conservation (continued in existence by ECL 3-0101), and the Office of Parks, Recreation and Historic Preservation (continued in existence by PRHPL 3.03). Thus, distinguishing between public authorities and other agencies by vesting public benefit corporations with additional discretion to authorize PLAs also creates anomalies in executive branch enforcement policies.

Moreover, recent legislative activity indicates that the Legislature has considered, and acted where action was deemed necessary to permit consideration of employees' labor affiliation in awarding public works contracts. In 1988, the Legislature created the New York City School Construction Authority. The new legislation permitted the Authority to suspend competitive bidding upon certain conditions, for various construction contracts, notwithstanding the provisions of Public Buildings Law § 8, State Finance Law § 135, General Municipal Law § 103, or of provisions in general, special or local law, charter or administrative code (Public Authorities Law § 1734). [FN5] ***90***

FN5 However, section 1734 (1) (b) provides that the School Construction Authority is subject to General Municipal Law § 101, which requires separate specifications for certain types of construction work (Public Authorities Law § 1734 [1] [b]).

Section 1735 of the Public Authorities Law, also enacted in 1988, and applying only to contracts involving (a) plumbing and gas fitting; (b) steam heating, hot water heating, ventilating and air conditioning apparatus; and (c) electric wiring and standard illuminating fixtures,[FN6] provides, in

relevant part:

"In awarding contracts pursuant to this section the authority shall, in addition to [other factors] ... consider the following factors when establishing a list of pre-qualified bidders for construction work: (a) the degree to which a contractor or subcontractor utilizes employees who are represented by a labor organization; (b) the absence of any intentional misrepresentation with regard to lists of subcontractors previously submitted ... and (c) the record of the bidder in complying with existing labor standards, maintaining harmonious labor relations and recognizing state approved apprentice programs" (Public Authorities Law § 1735 [5]).

FN6 Section 1735 also exempts the School Construction Authority from General Municipal Law § 101, which covers the same type of work.

Section 1735 also creates a committee (composed of two representatives of the Authority, one representative from the Board of Trustees of the Authority, two representatives from construction-related labor organizations and two representatives from the construction industry), to "review and report on the contracts issued pursuant to this section and on the procedures and methodology of the authority in awarding such contracts" (Public Authorities Law § 1735 [4]). Originally scheduled to expire on June 30, 1994, section 1735 was amended in 1994 to extend the date of expiration to June 30, 1999. During the 1993-1994 session, the Legislature also considered requiring the State, as a purchaser of goods and services, to consider whether a contractor had entered into a bona fide collective bargaining agreement with its workers (*see,* 1993 NY Senate-Assembly Bill S 5902, A 8454).

The factual distinctions drawn by the majority to support its differing results in the Thruway Authority and Dormitory Authority cases are immaterial to the question of whether the PLAs conflict with the purposes of the competitive bidding statutes and whether utilization of PLAs is a matter of social policy best left to the Legislature. Indeed, the ultimate irony of the majority's project-specific and fact-bound inquiry into whether "the decision to enter into the PLA had as its purpose ***91** and likely effect the advancement of the interests embodied in the competitive bidding statutes" is this: any cost savings or timeliness in completing a public works project that is anticipated by the use of a PLA will be offset by the costs and interruptions of the CPLR article 78 litigation that will be commenced to challenge every public project in which a PLA is required as a bid specification. Such a paradox can be avoided by acknowledging the policy implications and myriad factual considerations involved in the use of PLAs in public works, and permitting such decisions to be authorized, informed, and guided by legislative action taken pursuant to that body's power to make policy choices and enact laws to effectuate them (*see,* Matter of Citizens For An Orderly Energy Policy v Cuomo, 78 NY2d 398, 410).

Given the Legislature's demonstrated interest and involvement in the issues currently before this Court, any judicial or executive determination that the State, acting in its proprietary capacity, may require PLAs, is an unwarranted intrusion on the legislative process. Given the competing political, social and economic policies at stake, and the ability of the Legislature to engage in broad fact-finding hearings to determine the best interests for the State, the issue of whether PLAs may be required in public works projects is properly within the province of the Legislature.

In *Matter of New York State Ch. v New York State Thruway:* Order affirmed, with costs.

Judges Titone, Bellacosa, Levine and Ciparick concur with Chief Judge Kaye; Judge Smith dissents and votes to reverse in a separate opinion in which Judge Simons concurs.

In *Matter of General Bldg. Contrs. v Dormitory Auth.:* Order reversed, with costs, and judgment of Supreme Court, Albany County, reinstated.

Judges Titone, Bellacosa, Levine and Ciparick concur with Chief Judge Kaye; Judge Smith concurs in result in a separate opinion in which Judge Simons concurs. ***92**

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Briefs and Other Related Documents (Back to top)

- 1995 WL 17050881 (Appellate Brief) Brief of Intervenor-Respondent New York State Building and Construction Trades Council, AFL-CIO (Nov. 17, 1995)
- 1995 WL 17050878 (Appellate Brief) Respondents-Respondents' Brief (Nov. 16, 1995)
- 1995 WL 17050912 (Appellate Brief) Respondents-Respondents' Brief (Nov. 16, 1995)
- 1995 WL 17050890 (Appellate Brief) Brief of Associated General Contractors of America, Inc. as Amicus Curiae in Support of Petitioners/Appellants (Nov. 14, 1995)
- 1995 WL 17050884 (Appellate Brief) Brief for Intervenor-Respondent-Respondent Local 40 (Nov. 13, 1995)
- 1995 WL 17050909 (Appellate Brief) Appellants' Brief (Sep. 18, 1995)
- 1995 WL 17050915 (Appellate Brief) Brief of Amicus Curiae Associated Builders and Contractors, Inc. in Support of Appellants Appeal (Sep. 18, 1995)
- 1995 WL 17050874 (Appellate Brief) Petitioners/Appellants' Brief (Aug. 30, 1995)
- 1995 WL 17050887 (Appellate Brief) Brief of the Building and Construction Trades Department, AFL-CIO, as Amicus Curiae in Support of Respondents (1995)

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