BUILDING INDUSTRY ELECTRICAL CONTRACTORS ASSOCIATION v. CITY OF NEW YORK

BUILDING INDUSTRY ELECTRICAL CONTRACTORS ASSOCIATION and the UNITED ELECTRICAL CONTRACTORS ASSOCIATION, Plaintiffs,

v.

THE CITY OF NEW YORK and the BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREATER NEW YORK, Defendants.

No. 10 Civ. 8002 (RPP).

United States District Court, S.D. New York.

August 5, 2011.

Alan Marshall Pollack, Robinson Brog Leinwand Greene Genovese & Gluck PC, New York, NY, Attorneys for Plaintiffs.

Jonathan Starr Becker, Office of The Corporation Counsel, New York, NY, **Carol L. O'Rourke Pennington**, Colleran, O'hara & Mills LLP, Garden City, NY, Attorney for Defendant.

OPINION AND ORDER

ROBERT P. PATTERSON, Jr., District Judge.

On December 13, 2010, Defendant the Building and Construction Trades Council of Greater New York and Vicinity ("BCTC") moved to dismiss Plaintiffs' complaint in its entirety pursuant to Rule 12 (b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure. On December 23, 2010, Defendant the City of New York similarly moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6), or, in the alternative, for summary judgment under Rule 56. On March 4, 2011, Plaintiffs filed a joint brief in opposition to these motions along with a motion to amend their complaint. On April 15, 2011, the Defendants filed reply briefs in support. Oral argument was held on June 1, 2011.

BACKGROUND

I. The Parties

Plaintiff the Building Industry Electrical Contractors Association ("BIECA") is a trade association of twenty-seven contractors, of which 16 perform publicly financed projects for the city. (Pls.' Mem. in Opp. at 2.) "The object and purpose of BIECA is . . . to further the interests of its members and those in any way related to the construction industry, to do anything necessary, suitable and proper, including the institution of legal proceedings, consistent with the public interest as well as the interest of this industry and trade, to bargain collectively for the members of this association and to strive to secure labor peace and tranquility in the construction industry." (Id.)

BIECA, on behalf of its member contractors, has entered into a collective bargaining agreement ("CBA") with Local 363 United Electrical Workers of America, IUJAT ("Local 363"). (Id.) The pertinent sections of the CBA between BIECA and Local 363 are:

1. Article I requires BIECA and its contractors to recognize Local 363 as the "sole and exclusive bargaining representative of all of the electrical workers who are or may hereinafter become employed" by any BIECA

> contractor.
>
> 2. Article 2 requires all employees, who are employed by BIECA contractors, to become members of Local 363 by paying dues and initiation fees.
>
> 3. Article 25 requires all contractors that participate in the BIECA to contribute to the Building Trades Welfare Fund, Building Trades Annuity Fund, The Building Trades Educational Benefit Fund, and the Electrician's Retirement Fund (collectively the "Building Trades Funds"), as well as the United Service Workers Union Security Fund, on behalf of their employees who work on job classifications covered by the CBA.

(Id. at 2; Compl. ¶¶ 6-8.)

"Plaintiff United Electrical Contractors Association ("UECA") is a trade organization and not-for-profit corporation formed in 1965." (Pls.' Mem. in Opp. at 2-3.) UECA currently consists of thirteen contractor-members, of which five perform publicly financed projects for the City of New York. (Id. at 3.) "The object and purpose of the UECA is . . . to further the interests of its members and those in any way related to the construction industry, to do anything necessary, suitable and proper, including the institution of legal proceedings, for the accomplishment of its lawful objectives, and to bargain collectively for its members." (Id.)

Since 1995, the UECA has been engaged in ongoing collective bargaining negotiations with Local Union No. 3, International Brotherhood of Electrical Workers ("Local 3"). (Id.) Local 3 is a member of the BCTC. (Id.) To date, UECA and Local 3 have not successfully negotiated a CBA. (Id.) Pursuant to a December 7, 1995 Settlement Agreement with the National Labor Relations Board, UECA contractors are required to contribute to the Building Trades Funds on behalf of their eligible employees. (Id.)

Defendant BCTC is an umbrella organization of approximately fifty construction industry trade unions, representing over 100,000 New York City construction workers. (Affidavit of Gary LaBarbera ("LaBarbera Aff.") at ¶ 4.) "The BCTC provides coordination and support to its affiliated local unions in order to achieve a unified effort on behalf of organized construction workers with respect to governmental affairs, improvement of working conditions, and community and economic development." Id.

The BCTC's affiliates have CBAs with twenty-eight union contractor associations which represent approximately 1,700 construction managers, general contractors and trade contractors. (Id. at ¶ 8.)

II. The Project Labor Agreement ("PLA")

> 'Project labor agreement' shall mean a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work.

N.Y. Labor Law § 222.

In 2008, the New York State Legislature passed New York Labor Law § 222. See Labor Law § 222. This law was passed as part of a 2008 reform package, and sought to reform section 101 of the General Municipal law (known as the "Wicks Law"). See Bill Jacket to Labor Law § 222, City's Mem. in Supp. at Appendix 2. The Wicks Law imposes a number of requirements for public projects, including that local governments prepare separate specifications for the electrical, plumbing and mechanical portions of the work. The Wicks Law requires four prime contractors to be involved in the construction or rehabilitation of a municipal project: electrical, plumbing, and mechanical contractors, as well as a general contractor. Pertinent to this litigation, New York Labor Law § 222 exempts from the coverage of Wicks Law all projects where a locality operates under a PLA.

On November 24, 2009, Mayor Michael R. Bloomberg, along with the president of the BCTC, publicly announced that the City and the BCTC had agreed to enter into three PLAs to be in force through —. (Declaration of Marla G. Simpson, ("Simpson Decl.") Ex. C.) These three PLAs are: (1) "Citywide Rehabilitation and Renovation of City Owned Structures," which applies to projects that predominantly involve the renovation, repair, alteration, rehabilitation or expansion of existing structures for designated City agencies on City-owned property within City limits (Simpson Decl., Ex. E); (2) "New Construction" for the Department and Design and Construction ("DDC"), which applies to eight new construction projects (Simpson Decl., Ex. H); and (3) "New Construction" for the New York City Department of Sanitation ("DSNY"), which applies to three new construction projects. (Simpson Decl., Ex. U.)

Subsequent to the November announcement, the City and the BCTC executed three additional PLAs: (1) a Renovation and Rehabilitation PLA for the New York City Department of Environmental Protection ("DEP") (Simpson Decl., Ex. R); (2) a New Construction PLA for the Department of Parks and Recreation ("DPR") (Simpson Decl., Ex. Z); and (3) a Renovation and Rehabilitation PLA for the New York City Department of Housing Preservation & Development ("HPD"), which applies to the renovation, repair, alteration, rehabilitation or expansion of existing City-owned residential buildings that are part of the Tenant Interim Lease ("TIL") Program. (Simpson Decl., Ex. CC.)

Prior to entering into the PLAs with the BCTC, the City commissioned studies from four consultants to evaluate any potential cost savings and efficiencies that might result from the use of a PLA in conjunction with these projects. (Simpson Decl. ¶ 13-16.) These consultancies included Hill International, the LiRo Group, the Turner Construction Company and Tishman Construction. (Id. ¶ 13.) The Director of the Mayor's Office of Contract Services ("MOCS"), together with a construction official from the relevant City agency, prepared a Report and Recommendation to each of the agencies executing the PLAs. (Id. ¶ 14.) "[E]ach study concludes that by obtaining certain union concessions, including standardizing work hours, overtime time hours, work shift rules and holidays for each of the various construction trades along with `no strike' provisions and common grievance procedures, the City would realize substantial cost savings on projects covered by these PLAs." (Pl.'s Mem. in Opp. at 9; see also Simpson Decl. ¶¶ 5-7 and 63-82.)

There are many similar provisions among the PLAs in question. The most pertinent among these provisions are that the PLAs: (1) provide for pre-hire recognition of the BCTC and its affiliates as the bargaining representatives of all construction workers working on PLA projects; (2) incorporate the affiliates' CBAs, including union security clauses; (3) require most contractors to secure a minimum of eighty-eight percent (88%) of their labor through the BCTC union referral systems; (4) prohibit unions from discriminating in referrals to the projects on the basis of union affiliation; (5) require contractors to contribute to the unions' fringe benefit funds on behalf of all workers in the bargaining unit; (6) provide for uniform work rules and standardized hours of work; and (7) include a broad no-strike clause and dispute resolution mechanisms for all job site disputes. (LaBarbera Aff. at ¶ 28.)

The projects covered by PLAs are open to all successful bidders, union or non-union, so long as they agree to be bound by the terms and conditions of the PLA. (Compl. ¶ 23.) Plaintiffs contend, however, that the PLAs favor the signatory contractors and impose conditions that make it cost-prohibitive for other contractors to bid on PLA covered projects. (Pls.' Mem. in Opp. at 4.)

III. Plaintiffs' Complaint

The Complaint alleges that the above listed provisions, among others, of the PLAs between the BCTC and the City effectively exclude the contractor-members of the UECA and the BIECA from the competitive bidding process for City construction projects. (Compl. ¶ 29.) For example, Plaintiffs contend that the PLA's requirement that a contractor must draw 88% of its labor from the signatory BCTC trade union's hiring hall forces a non-BCTC contractor to work with a "stranger" workforce.

(Tuerck Aff. at ¶ 25.) Additionally, Plaintiffs assert that the PLAs require participant contractor unions to pay fringe benefits into BCTC union funds, resulting in a BIECA or UECA paying the same fringe benefits twice, once into the BCTC union funds and once into the Building Trades Funds. This, Plaintiffs argue, renders it impossible for BIECA or UECA contractors to compete on price with BCTC signatory contractors. (Compl. ¶ 33-34.) Moreover, Plaintiffs challenge the Letter of Assent provision, which requires each contractor awarded a bid under a City PLA to agree to be bound by the terms of the PLA and to certify that it has no other commitments or agreements that would preclude its full and complete compliance with the PLA. (Compl. ¶¶ 30-31.) This requirement, Plaintiffs argue, would preclude a contractor from bidding on PLA covered work to the extent that contractor has existing collective bargaining obligations. (Id. ¶ 31-32.) Specifically, Plaintiffs argue that the Letter of Assent requirement interferes with the existing CBAs between the BIECA contractors and Local 363, and the ongoing collective bargaining negotiations between UECA and Local 3. (Id.)

Plaintiffs also contend that the cost savings that the City argues support the implementation of PLAs are illusory and speculative. (Id. ¶ 40.) The Complaint asserts that the feasibility studies carried out by the four consultancies are based on flawed methodology and on the erroneous assumption that only BCTC contractors would be employed on a particular City project whether or not the project was performed under a PLA. (Id. ¶ 44.) Plaintiffs argue that the studies prepared ignore the impact of the PLAs limiting the number of contractors that might participate in a competitive bidding process. (Id. ¶ 46.) Moreover, the Complaint alleges that the PLAs are not necessary for labor harmony, and that the PLA studies provide "scant evidence" that the types of projects covered by the challenged PLAs have ever been subject to a strike or work stoppage. (Id. ¶¶ 50; 54-57.)

Plaintiffs' Complaint asserts five causes of action. First, it asserts that the PLAs are preempted pursuant to the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"). Second, it asserts a cause of action under 42 U.S.C. § 1983 for interference with Plaintiffs' right, guaranteed by the NLRA, to bargain collectively free of government interference. Third, the Complaint requests declaratory judgment setting forth the "rights duties and responsibilities of the Plaintiffs and Defendants arising from the City's mandate of five (5) unlawful PLAs covering present and future public construction projects." Fourth, Plaintiffs bring a state law claim asserting that the PLAs violate General Municipal Law § 103(1), which provides that "all contracts for public work involving an expenditure of more than thirty-five thousand dollars . . . shall be awarded . . . to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided for in this section." Gen. Munic. Law § 103(1). Finally, the Complaint asserts a state law claim for violation of New York Labor Law § 222, which provides in pertinent part that a municipality may require a PLA where it "determines that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages and any local history of labor unrest, are best met by requiring a project labor agreement." Labor Law § 222. Plaintiffs contend that the City has violated Section 222 by enacting overbroad PLAs and not determining the need for a PLA on a case by case basis.

IV. Defendants' Motions to Dismiss or Alternatively for Summary Judgment

Defendants the City of New York and the BCTC filed separate motions to dismiss or alternatively for summary judgment, raising overlapping arguments.

The City contends that Plaintiffs' preemption claim must fail because the Supreme Court, in Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218 (1993) ("Boston Harbor"), held that the use of PLAs by local governments was not preempted by the NLRA where the PLAs were used in conjunction with proprietary, rather than regulatory conduct on the part of the municipality. Second, the City argues that the Court lacks subject matter jurisdiction with regard to Plaintiffs' claims originating under state law, and that even if the Court could exercise supplemental jurisdiction over

those claims, it should decline to do so. Finally, the City contends that its determination to require PLAs comported with § 222 and New York's public bidding laws because it was rationally based and supported by expert studies on the PLAs concluding that each of the PLAs would result in substantial savings.

Defendant BCTC moves for dismissal first on the same ground asserted by the City; that following Boston Harbor, PLAs are not preempted by the NLRA under the "market participant" doctrine. Second, BCTC asserts that Plaintiffs do not have standing to assert claims under 42 U.S.C. § 1983, and that even if they do, BCTC as a private entity is not a state actor subject to suit under § 1983. BCTC also claims that the interests Plaintiffs' characterize as liberty interests, which underlie the § 1983 claim, are not properly characterized as such. BCTC further contends that the PLAs are lawful under New York's competitive bidding laws, because they protect the public fisc and prevent fraud, favoritism and corruption. BCTC also argues that the PLAs do not violate Labor Law § 222 because the City properly determined that a PLA requirement would be in the public interest. Finally, BCTC argues that the Court should dismiss the state law claims in the event Plaintiffs' federal claims are dismissed because the Court lacks supplemental jurisdiction over those state law claims.

In response, Plaintiffs contend that the PLAs are preempted by the NLRA, despite the Boston Harbor ruling, because here the City is acting as a regulator, rather than as a proprietor. Plaintiffs contend that they have standing to pursue their § 1983 claim because their activities have been "perceptibly impaired" by the diversion of their resources to fighting the City's practice of employing PLAs. Plaintiffs also argue that the BCTC has acted under color of state law such that it is subject to suit under § 1983. Next, Plaintiffs assert that the Court should exercise supplemental jurisdiction over the Complaint's state law claims because they derive from a common nucleus of fact and law as the federal claims. Plaintiffs then argue that Defendants have violated New York's public bidding laws because they have not demonstrated more than a rational basis for implementing the PLAs. Finally Plaintiffs move for leave to amend the Complaint to include further evidence that their activities have been perceptibly impaired and therefore they have standing to pursue their claims under § 1983 and to add a PLA that was executed by the City and the BCTC after the Complaint was filed.

For the reasons discussed below, Defendants' motions to dismiss are granted.

DISCUSSION

I. Standards on a Motion to Dismiss

The "standards for dismissal under [Rule] 12(b)(6) and 12(b)(1) are substantively identical." Lerner v. Fleet Bank, N.A., 318 F.3d 113, 128 (2d Cir. 2003). In order to survive a 12(b)(6) motion to dismiss, Plaintiffs must have alleged "enough facts to state a claim to relief that is plausible on its face." Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)). The court must accept all factual allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. Ruotolo, 514 F.3d at 188. Consideration of a Rule 12(b)(6) motion is limited to the factual allegations in the complaint and documents either attached to or incorporated by reference in the complaint. Marketxt Holdings Corp. v. Engel & Reiman, P.C., 693 F.Supp.2d 387, 392-23 (S.D.N.Y. 2010) (citing Rothman v. Gregor, 220 F.3d 81, 88 (2d Cir. 2000)). The PLAs themselves and the consultant studies related to them were incorporated by reference in Plaintiffs' complaint, and are thus considered by the court on this motion. See Cortec. Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 46-48 (2d Cir. 1991).

The 12(b)(1) motion to dismiss for lack of subject matter jurisdiction challenges the district court's statutory or constitutional power to hear Plaintiffs' state law claims. "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." Makarova v. U.S., 201 F.3d 110, 113 (2d Cir. 2000).

II. Preemption Under the NLRA

Plaintiffs claim that the PLAs in question are preempted by the NLRA because they interfere with certain rights that the NLRA protects. (Compl. ¶ 73-74.) These rights include the right to be free from government interference in the collective bargaining process regarding wages, hours and other terms or conditions of employment. (Id. ¶ 74.) Plaintiffs contend that the PLAs unlawfully interfere with these rights because they preclude Plaintiffs from bidding on covered contracts and interfere with Plaintiffs right to bargain collectively with member unions and potential member unions. (Id. ¶ 76-77.) Defendants argue that this claim should be dismissed because, under the Supreme Court's decision in Boston Harbor, PLAs between government entities and contractors are not preempted by the NLRA where the government entity is acting a proprietor rather than a regulator. (BCTC's Mem. in Supp. at 8; City's Mem. in Supp. at 8.)

A. The Boston Harbor Decision

Boston Harbor addressed the issue of whether the NLRA preempts "a state authority, acting as the owner for a construction project," from enforcing an otherwise lawful prehire collective bargaining agreement negotiated by private parties. Id. at 220. The case arose out of the cleanup of Boston Harbor, a project that was commenced as a result of a court order demanding that the cleanup project proceed expeditiously and without interruption. Id. at 221. The project was expected to cost $6.1 billion and take ten years. Id. The Massachusetts Water Resources Authority ("MWRA") had primary authority over the project, and selected Kaiser Engineers to serve as project manager. Id. Kaiser suggested to MWRA that they be permitted to negotiate a PLA with the Building and Construction Trades Council and its affiliated organizations that would assure labor stability over the life of the projects. Kaiser then negotiated such a PLA with the BCTC which provided for: 1) recognition of the BCTC as the exclusive bargaining agent for all craft employees; 2) use of specified methods for resolving all labor-related disputes; 3) a requirement that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment; 4) the primary use of BCTC hiring halls to supply the project's craft labor force; 5) a ten-year no strike commitment; and 6) a requirement that all contractors and subcontractors agree to be bound by the agreement. Id. at 221-222.

At the outset of the Boston Harbor opinion, the Court reviewed two distinct NLRA preemption principles. Id. at 224. The first, Garmon preemption, see San Diego Building Trades Council v. Garmon, 359 U.S. 236, (1959), prohibits state and local regulation of activities protected by § 7 of the NLRA, or that constitute an unfair labor practice under § 8. Boston Harbor, 507 U.S. at 224-225. The Garmon court held that the state court was precluded from awarding damages to employers for economic injuries resulting from peaceful picketing by labor unions. Id. at 225. "[T]he 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." Id.

A second NLRA preemption principle was established by the Supreme Court in Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) ("Machinists"). Machinists stands for the principle that state and local governments are prohibited from regulating areas that the NLRA leaves to "be controlled by the play of economic forces." Id. at 140. In Machinists the Court 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." Boston Harbor, 507 U.S. at 226.

The Court in Boston Harbor then held that each of the two preemption doctrines applies only to regulatory conduct:

> When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State from regulating

> 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.
>
> Id. at 226-227.

The Court distinguished proprietary activity from the type of activity it had found to be objectionable in Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986). In Gould, the Court explained, the conduct was regulatory because "the statute at issue in Gould addressed 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.'" Boston Harbor, 507 U.S. at 228-229. The Gould Court also noted that it was "not say[ing] that state purchasing decisions may never be influenced by labor considerations." 475 U.S. at 291.

The Boston Harbor Court then noted certain 1959 amendments to §§ 8(e) and 8(f) of the NLRA. Id. at 230. "Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements." Id. Furthermore, "[t]he 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." Id. The Court explained that "[i]t 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." Id. at 231. These conditions included the short-term nature of employment, the contractor's need for steady labor supply and predictable costs, and the longstanding practice of prehire bargaining. Id.

The Boston Harbor Court then turned to whether the PLAs entered into by Kaiser on behalf of the MWRA represented regulation by the state, and found that they did not, and thus that they were not preempted by the NLRA. The Court reviewed the PLAs at issue, and found that MWRA was acting as a proprietor, because it was "attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." Id. at 232. The Court noted that 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." Id. It concluded that "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." Id. at 233.

B. The Market Participant Doctrine

If the City was acting as a market participant in executing the PLAs, rather than as a regulator, the PLAs are not preempted by the NLRA. Boston Harbor, 507 U.S. 229. See also Healthcare Ass'n of New York State v. Pataki, 471 F.3d 87, 108-09 (2d Cir. 2006) ("A major limitation on the labor law preemption doctrines is the principle that state conduct will not be preempted if the state's actions are proprietary, rather than regulatory.")

To determine whether a state entity's actions can be considered those of a market participant, this Circuit has applied the Fifth Circuit's test, formulated in the case Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999). See Sprint Spectrum L.P. v. Mils, 283 F.3d 404, 420 (2d Cir. 2002). Cardinal Towing considered a Texas city's choice to contract with a single towing company for involuntary tows carried out by its police department rather than rotate through a selection of local towing companies. There the court held that:

> [i]n distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power, the key under Boston Harbor is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

180 F.3d at 93.

The Cardinal Towing court explained that both questions seek to identify those government actions that are narrowly focused and in line with the behavior of private parties making similar proprietary decisions that there can be no inference of a regulatory motive. Id. The parties dispute whether both of these questions must be answered in the affirmative in order for the government action to be considered proprietary. The Defendants point to Johnson v. Ranch Santiago Cmty. College Dist., 623 F.3d 1011, 1024-25 (9th Cir. 2010), which interpreted the two questions in the Cardinal Towing test as disjunctive, offering two alternative methods of showing that a given state action constituted non-regulatory market participation. Under Rancho Santiago's interpretation, the first question asks the government entity to show that its activity was proprietary in nature by showing its motivations to be rooted in a desire for efficiencies and cost-savings, and by comparing its conduct to that of a private party. Id. at 1024. The second question requires a showing that the entity's action was narrow in scope and therefore not regulatory. Id. The Rancho Santiago court then stated "we see no reason to require a state to show both that its action is proprietary and that the action is not regulatory." Id.

The test established in Cardinal Towing is not formulated as a list of mandatory elements, each of which must be established for the challenged state action to be classified as proprietary. Instead, the court described the test as two "key questions" to be asked in making this determination. As the Ninth Circuit ruled in Rancho Santiago, the test provides two alternative routes to arrive at the same destination; either the activity is essentially proprietary due to its apparent motives and similarity with actions generally taken by a similarly situated private party, or it is so narrowly circumscribed as to not amount to regulation. 623 F.3d at 1024. Boston Harbor provides that "[á] State may act without offending [the NLRA preemption principles] when it acts as a proprietor and its acts therefore are not tantamount to regulation or policymaking." 507 U.S. 218, 229. This is the standard that the Defendants must meet. While each of the Cardinal Towing questions are useful tools in determining whether a challenged state action is proprietary or regulatory, an affirmative answer to both questions is not what Boston Harbor requires.

C. The City's Act of Entering into PLAs with the BCTC Was Proprietary and Is Not Preempted by the NLRA

Here, Plaintiffs argue that Defendants failed to meet either of the Cardinal Towing prongs, because they have not shown that the PLAs will achieve substantial cost savings and therefore they cannot show that their conduct compares to that of a private land owner. (Pls.' Mem. in Opp. at 26.) Plaintiffs also argue that the PLAs are overbroad and therefore not so narrowly tailored as to defeat an inference of regulatory intent. (Id. at 26-28.) The Defendants counter that the PLAs meet both prongs, because the City's decision to enter into the PLAs was motivated by an interest in cost savings and efficiency, and because the PLAs only relate to certain contracts with the City, and are not directed beyond the City's own projects. (BCTC's Mem. in Supp. at 10-11; City's Mem. in Supp. at 14-15.)

i. The City Was Motivated by Proprietary Interests

The first Cardinal Towing question asks whether the City is motivated by its interest in the efficient procurement of goods and services. In support of their motion, Defendants contend that each of the studies undertaken by consultants hired by the City show that the PLAs would be likely to result in substantial cost savings and additional efficiencies generated by a package of

negotiated work rules. (City's Mem. in Supp. at 14.) Plaintiffs challenge that conclusion, arguing that the studies were flawed, because the use of PLAs artificially reduces the bidding pool and thus increases construction costs. (Pls.' Mem. in Opp. at 26-27.)

Plaintiffs have failed to show that the City's decision to engage in these PLAs with BCTC was motivated by anything other than its interest in managing its construction projects in an efficient manner and at a manageable cost. As discussed earlier, New York Labor Law § 222 exempts those projects that operate pursuant to a PLA from the requirements of the Wicks Law. N.Y. Labor Law § 222. Wicks Law requires the City to employ multiple contractors to oversee certain components of a shared project, logically resulting in inefficiencies. Gen. Municipal Law § 101. The City's consultants concluded that the exemption from these requirements alone will reduce the costs of these projects. (Simpson Decl. ¶ 15 (summarizing consultant findings).) Additionally, the PLAs permitted the City and the BCTC to agree on generally applicable terms of work that will govern these projects, such as a standardized work week, standard holidays, flexible start times, and coordinated lunch periods. (Id. ¶¶ 47-62 (citing to the relevant PLA sections.)) The PLAs also provide for a cap on overtime. (Id.) In addition, the PLAs prohibit strikes and provide for a uniform jurisdictional disputes resolution procedure. (Id.) These uniform work procedures and dispute resolution vehicles are clearly targeted at increasing efficiency and coordination and reducing expense. These provisions clarify responsibility, minimize administrative difficulties and encourage continuous progress.

These are the exact types of considerations that Cardinal Towing considered to be indicia of proprietary action. See 180 F.3d at 693 (finding that a towing contract aimed at easing supervision, minimizing administrative confusion and providing for a unitary quality standard indicated that the City was interested in ensuring efficient performance of the contract). The terms of the PLA lead ineluctably to the conclusion that the City was motivated by efficient, cost-effective and timely completion of their work, and Plaintiffs point to no credible alternative purpose underlying the City's actions.[1] While Plaintiffs contend that the cost-savings and efficiencies the PLAs are projected to provide are illusory, "whether the [PLA] was a good deal for the [City] does not bear on whether the Agreement is regulatory or proprietary." Rancho Santiago, 623 F.3d at 1027. The PLAs on their face are targeted at increasing efficiencies and reducing costs, and "private parties undertaking large construction projects commonly enter into pre-hire project labor agreements like the [PLA] challenged here." Id. at 1026. There has been no showing that the City was motivated by any interest other than a proprietor's interest in having his project completed in a timely and inexpensive fashion.

ii. The Breadth of the PLAs Does Not Render Them Regulation

Plaintiffs next contend that the PLAs should be seen as regulatory and not proprietary action because they are overbroad. In contrast to the PLA at issue in Boston Harbor, the PLAs here are directed at a number of projects and a "broad spectrum of work." (Pls.' Mem. in Opp. at 28-29.) Plaintiffs contend that this breadth results in an inference that the City is acting not only as a proprietor, but also with regulatory intent in executing these PLAs.

The Boston Harbor Court referred to the fact that the PLAs at issue in that case pertained to a single project as support for its conclusion that "[t]here is . . . 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 legitimate." 507 U.S. at 232. A comparison with Cardinal Towing, however, makes clear why the PLAs at issue here are not preempted despite the fact that they cover more than one project.

In Cardinal Towing, the defendant, the City of Bedford, altered their procedure for hiring towing companies to tow vehicles abandoned or damaged by accidents. 180 F.3d 688. Historically, these tows were handled by a rotation system pursuant to which local towing companies would apply and be placed on a list, and when the City needed to tow a vehicle, they would call whichever

company's "turn" it was at the time that tow was needed. Id. at 689. The City changed this practice in favor of hiring one towing company to handle all such tows. Id. This company was selected based on certain identified criteria after a bidding process. Id.

The Court held that the scope of this contract did not subject it to preemption by the NLRA, in part because "as in Boston Harbor—but unlike Gould—the specifications here looked only to the bidder's dealings *with the City*." Id. at 694 (emphasis original). The contract did not affect the conduct of tow truck providers in their dealings with other customers within the City of Bedford, foreclosing the inference that "the City sought to change the tow truck industry as a whole, let alone influence society at large." Id. Similarly, in Rancho Sanitago, the Ninth Circuit applied the Cardinal Towing test and held that a PLA that applied to all covered projects in excess of $200,000 and ran for several years was not preempted by the NLRA, in part because "nothing on the face of the [PLA] indicates that it serves purely regulatory purposes unrelated to the performance of contractual obligations to the state. The [PLA] does not reward or sanction private parties for their conduct in the private market, but rather addresses only how construction contractors and subcontractors will perform work on the District's projects." 623 F.3d 1011 at 1026. See also Metro. Milwaukee Ass'n of Commerce v. Milwaukee Cnty., 431 F.3d 277, 270 (7th Cir. 2005) ("if the state is intervening in the labor relations just of firms from which it buys services, and it is doing so in order to reduce the cost or increase the quality of those services rather than to displace the authority of the National Labor Relations Act and the National Labor Relations Board, there is no preemption.").

The Rancho Santiago court noted that the substantive scope of the PLA challenged in that case was:

> very similar to the Boston Harbor agreement's. Like the District's [PLA], the Boston Harbor agreement recognized one exclusive bargaining agent, specified dispute-resolution mechanisms, required all employees to become union members within seven days of their employment, required use of the union's hiring halls to supply the labor force, prohibited strikes for the term of the agreement, bound all contractors and subcontractors to the agreement, and prescribed the benefits that workers would receive for the duration of the project.

Id. at 1028.

The PLAs at issue in this case share many of the same provisions of the PLAs challenged in Boston Harbor and Rancho Santiago. Indeed, they are nearly indistinguishable from the Boston Harbor PLAs except for the fact that they cover multiple projects. Even this distinction might not be of great importance, however, in view of the fact that the Boston Harbor cleanup project spanned a decade and involved hundreds of contractors, and was thus an enormous "single" project with many components. 507 U.S. at 221. Like the PLAs at issue in Cardinal Towing and Metro. Milwaukee, the challenged PLAs also apply exclusively to the projects that BCTC will perform on behalf of the City. They do not extend to govern conduct by the BCTC or other private parties in the construction industry on behalf of private clients, like the preempted PLAs in Gould. Therefore, these PLAs are not preempted by the NLRA.

D. 42 U.S.C. § 1983

Plaintiffs also asserted a claim pursuant to 42 U.S.C. § 1983, alleging that the City and the BCTC violated Plaintiffs' federally-guaranteed right under the NLRA to bargain collectively, free from governmental interference.

"To succeed on a claim asserted under 42 U.S.C. § 1983, a party must prove that he or she was deprived of a right secured by the Constitution or by the laws of the United States and that the person or persons depriving the party of the right acted under color of state law." Ruggiero v. Krzeminski, 928 F.2d 558, 562 (2d Cir. 1991). "In order to seek redress through § 1983 . . ., a plaintiff must assert the violation of a federal right, not merely a violation of federal law." Blessing v. Freestone, 520 U.S. 329, 340 (1999). Here, having found that the PLAs at issue are not preempted

by the NLRA, it follows that "there is no violation of federal law," and thus no violation of a federal right secured by the NLRA, "to form the basis for a claim pursuant to § 1983," Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 635 (7th Cir. 1996).

III. State Supplemental Law Claims

Both BCTC and the City urge this Court to dismiss Plaintiffs' state law claims for lack of subject matter jurisdiction once the federal claims are dismissed. Both Defendants claim that the state law claims fall within the ambit of C.P.L.R. Article 78, which provides a special remedy under New York state law to review administrative determinations, and that therefore federal jurisdiction would be inappropriate. (City's Mem. in Supp. at 17; BCTC's Mem. in Supp. at 24-25.) The City also argues that this Court should decline supplemental jurisdiction over the state law claims at issue because they involve novel questions of state law. (City's Mem. in Supp. at 19.) In the alternative, Defendants argue that the PLAs are lawful under New York's competitive bidding laws. (City's Mem. in Supp. at 20-25; BCTC's Mem. in Supp. at 17-24.)

Plaintiffs urge the Court to exercise supplemental jurisdiction over the state law claims because the evidence underlying the state law claims is the same as that underlying their federal claims. (Pls.' Mem. in Opp. at 34.)

A. Law Governing Supplemental Jurisdiction

Under 28 U.S.C. § 1367, "in any civil action of which the district courts have original jurisdiction the district courts shall have supplemental jurisdiction over all other claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy." A claim is "so related" to those claims within the court's original jurisdiction when the claims "derive from a common nucleus of operative fact, such that a party "would ordinarily be expected to try them all in one judicial proceeding." Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305 (2d Cir. 2003) (citations omitted). The district courts may decline to exercise supplemental jurisdiction, however, if the district court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3).

"Once a district court's discretion is triggered under § 1367(c)(3), it balances the traditional `values of judicial economy, convenience, fairness, and comity,' Cohill, 484 U.S. at 350, in deciding whether to exercise jurisdiction." Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006) (citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988)). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." Cohill, 484 U.S. at 350 n. 7.

B. Article 78 Proceedings Under New York Law

New York's Civil Practice Law and Rules ("CPLR") Article 78 provides a specific and exclusive remedy where a question raised by a party goes to "whether a determination was made in violation of lawful procedure, was affected by error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR § 7803(3). To determine whether Article 78 applies to a given dispute, a reviewing court must "examine the substance of the action to identify the relationship out of which the claim arises and the relief sought." Solnick v. Whelan, 49 N.Y.2d 224, 229 (1980). An Article 78 proceeding is the proper vehicle to determine whether the law has been lawfully applied, or the validity of certain government acts pursuant to a valid statute, rather than a vehicle for challenging the validity of a statute itself. Rosenthal v. City of New York, 283 A.D.2d 156, 158 (1st Dep't 2001); Kovarsky v. Housing and Development Admin., 31 N.Y.2d 184, 191 (1972).

Proceedings under Article 78 can only be heard in the State Supreme Court. CPLR § 7804(b). A number of district courts have dismissed cases brought in federal court that should have been brought to State Supreme Court as an Article 78 proceeding. See Brown v. Tomcat Elec. Sec., Inc.,

No. 03 CV 5175 (FB), 2007 WL 2461823 at *3 (E.D.N.Y. Aug. 27, 2007) ("New York law vests jurisdiction over Article 78 proceedings solely in the state courts"); Blatch v. Hernandez, 360 F.Supp.2d 595, 637 (S.D.N.Y. 2005) ("This claim must be dismissed for lack of subject matter jurisdiction, as New York State has not empowered the federal courts to consider such claims."); Cartegena v. City of New York, 257 F.Supp.2d 708, 710 (S.D.N.Y. 2003) ("State law does not permit Article 78 proceedings to be brought in federal court, and hence I conclude that I do not have the power to exercise supplemental jurisdiction over [plaintiff's] Article 78 claims."); see also Camacho v. Brandon, 56 F.Supp.2d 370, 380 (S.D.N.Y. 1999); Luchesi v. Carboni, 22 F.Supp.2d 256, 258 (S.D.N.Y. 1998).

As pled in their Complaint, Plaintiffs' state law claims challenge the City's decision to enter into the PLAs, arguing that this choice was not "supported by the record or [] sufficiently tailored to a specific project in order to advance the interests embodied in the competitive bidding statutes." (Compl. ¶ 102.) Furthermore, Plaintiffs allege that Defendants:

> have failed to identify any unique challenges posed by the size or complexity of the projects covered by the City PLAs, failed to demonstrate actual rather than illusory cost savings, and have failed to identify any history of labor unrest on similar projects to support the conclusion that the City PLAs were adopted in conformity with the competitive bidding scheme.

(Compl. ¶ 103.)

Moreover, Plaintiffs argue that the PLAs specifically violate Labor Law § 222 because the City enacted "blanket PLAs not limited to a specific project and [failed] to determine the need for a PLA on a project-by-project basis." (Comp. ¶ 107.)

Plaintiffs' state law claims are challenges to the City's actions in view of valid governing New York law. They amount to an assertion that the City's choice to execute the PLAs was unlawful or at best arbitrary and capricious. Thus, they are recast Article 78 claims that are not suitable for adjudication in this Court.

Plaintiffs cite several cases from this Circuit's courts holding that Article 78 claims could be adjudicated by federal courts pursuant to supplemental jurisdiction. James v. Bauet, No. 09 Civ. 609 (PKC), 2009 WL 3817458 at *2 (S.D.N.Y. Nov. 11, 2009) ("None of the cases cited by the City Defendants hold that a federal court is stripped of its jurisdiction to hear federal question cases because plaintiff may have been able to file a parallel Article 78 proceeding in New York state court."); Acista v. City of New York, No. 03 Civ. 1452 (TPG), 2004 WL 691270 at *4-5 (S.D.N.Y. March 31, 2004).

The cases cited by Plaintiffs involved viable federal claims and state law claims that were characterized as arising under Article 78. Here, due to this Court's dismissal of Plaintiff's federal law claims, the state law claims are all that remain. Balancing the traditional `values of judicial economy, convenience, fairness, and comity,' Cohill, 484 U.S. at 350, this Court declines to retain supplemental jurisdiction over Plaintiffs' state law claims. The New York State legislature has devised Article 78 as an exclusive remedy to resolve challenges to the lawfulness of administrative action. "State law does not permit Article 78 proceedings to be brought in federal court," Cartagena, 257 F. Supp. 2d at 710, and so Plaintiffs' state law claims are dismissed.

IV. Plaintiffs' Motion to Amend

Simultaneously with their Memorandum in Opposition, Plaintiffs moved to amend their complaint, in order to include "(1) additional allegations that BIECA and UECA have been perceptibly impaired and therefore have the requisite standing to pursue their claims under § 1983; (2) the HPD PLA, which was executed by the City and BCTC after Plaintiffs filed their Complaint; and (3) any future and all future PLAs that may be adopted by the City in violation of Plaintiffs' rights under Federal and New York State Law." (Pls.' Mem. in Opp. at 44-46.)

Leave to amend a complaint should be granted so long as the proposed amended pleading demonstrates at least "colorable grounds for relief." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 783 (2d Cir. 1984). In light of the Court's rulings in this Opinion, namely that the City's conduct in executing the PLAs in question was proprietary rather than regulatory and that Plaintiffs' claims are thus dismissed, these proposed amendments do not make out a colorable claim for relief. Plaintiffs' motion to amend is therefore denied.

CONCLUSION

As in Boston Harbor, the PLAs at issue in this case represent proprietary rather than regulatory conduct by the City and are therefore not preempted by the NLRA. 507 U.S. 218. The City has not violated the NLRA by executing these PLAs, and therefore Plaintiffs' § 1983 claim has no basis. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims, because they are challenges to municipal conduct that fall within the purview of N.Y. C.P.L.R. Article 78, and thus are more appropriately heard in state court. Plaintiffs' motion to amend is denied.

IT IS SO ORDERED.

Footnotes

---

1. Moreover, several courts have held that any hidden, subjective reasons that may underlie the City's decision to employ PLAs do not weigh into the preemption analysis. See Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 635 (7th Cir. 1996) ("So long as the frontier is pushed no farther from "Boston Harbor" than it is here, we will not travel where Colfax urges; we will not go behind the contract to determine whether the Authority's real, but secret, motive was to regulate labor."); Johnson v. Rancho Santiago Cmty. College Dist., 623 F.3d 1011, 1026 (9th Cir. 2010) ("Congress did not intend for the NLRA's . . . preemptive scope to turn on state officials' subjective reasons for adopting a regulation or agreement.").

Back to Reference

McKinney's **Labor Law** § **222**

McKinney's Consolidated **Laws** of New York Annotated Currentness
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated **Laws** (Refs & Annos)
Article 8. Public Work (Refs & Annos)
§ 222. Project labor agreements

1. Definition. "Project **labor** agreement" shall mean a pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade **labor** organization establishing the **labor** organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the **labor** organization can perform project work.

2. Contracts. Notwithstanding the provisions of any general, special or local **law**, or judicial decision to the contrary:

(a) Any agency, board, department, commission or officer of the state of New York, or of any political subdivision thereof as defined in section one hundred of the general municipal **law**, municipal corporation as defined in section sixty-six of the general construction **law**, public benefit corporation, or local or state authority as defined in section two of the public authorities **law** having jurisdiction over the public work may require a contractor awarded a contract, subcontract, lease, grant, bond, covenant or other agreement for a project to enter into a project **labor** agreement during and for the work involved with such project when such requirement is part of the agency, board, department, commission or officer of the state of New York, political subdivision, municipal corporation, public benefit corporation or local or state authority having jurisdiction over the public work request for proposals for the project and when the agency, board, department, commission or officer of the state of New York, political subdivision, municipal corporation, public benefit corporation or local or state authority having jurisdiction over the public work determines that its interest in obtaining the best work at the lowest possible price, preventing favoritism, fraud and corruption, and other considerations such as the impact of delay, the possibility of cost savings advantages, and any local history of labor unrest, are best met by requiring a project labor agreement.

(b) Any contract, subcontract, lease, grant, bond, covenant or other agreement for projects undertaken pursuant to this section shall not be subject to the requirements of separate specifications (referred to as the Wicks Law) when the agency, board, department, commission or officer of the state of New York, or political subdivision thereof, municipal corporation, public benefit corporation or local or state authority having jurisdiction over the public work has chosen to require a project labor agreement, pursuant to paragraph (a) of this subdivision.

(c) Whenever the agency, board, department, commission or officer of the state of New York, or political subdivision thereof, municipal corporation, public benefit corporation or local or state authority having jurisdiction over the public work enters into a contract, subcontract, lease, grant, bond, covenant or other agreement for the construction, reconstruction, demolition, excavation, rehabilitation, repair, renovation, alteration, or improvement for a project undertaken pursuant to this section, it shall be deemed to be a public works project for the purposes of this article, and all the provisions of this article shall be applicable to all the work involved with such project including, but not limited to, the enforcement of prevailing wage requirements by the fiscal officer as defined in paragraph (e) of subdivision five of section two hundred twenty of this article.

(d) Every contract entered into by any agency, board, department, commission or officer of the state of New York, or any political subdivision thereof, municipal corporation, public benefit corporation or local or state authority having jurisdiction over the public work for a project shall contain a provision that the design of such project shall be subject to the review and approval of the entity and that the design and construction standards of such project shall be subject to the review and approval of such

state entity, if applicable. In addition, every such contract shall contain a provision that the contractor shall furnish a labor and material bond guaranteeing prompt payment of moneys that are due to all persons furnishing labor and materials pursuant to the requirements of any contracts for a project undertaken pursuant to this section and a performance bond for the faithful performance of the project, which shall conform to the provisions of state or local law, and that a copy of such performance and payment bonds shall be kept by such entity and shall be open to public inspection.

(e) Any contract, subcontract, lease, grant, bond, covenant, or other agreement for construction, reconstruction, demolition, excavation, rehabilitation, repair, renovation, alteration, or improvement with respect to each project undertaken pursuant to this section, the entity shall consider the financial and organizational capacity of contractors and subcontractors in relation to the magnitude of work they may perform, the record of performance of contractors and subcontractors on previous work, the record of contractors and subcontractors in complying with existing **labor** standards and maintaining harmonious **labor** relations, and the commitment of contractors to work with minority and women-owned business enterprises pursuant to article fifteen-A of the executive **law** through joint ventures of subcontractor relationships. With respect to any contract for construction, reconstruction, demolition, excavation, rehabilitation, repair, renovation, alteration, or improvement in excess of three million dollars in the counties of the Bronx, Kings, New York, Queens, and Richmond; one million five hundred thousand dollars in the counties of Nassau, Suffolk and Westchester; and five hundred thousand dollars in all other counties within the state; the entity shall further require that each contractor and subcontractor shall participate in apprentice training programs in the trades of work it employs that have been approved by the department for not less than three years and shall have graduated at least one apprentice in the last three years and shall have at least one apprentice currently enrolled in such apprenticeship training program. In addition, it must be demonstrated that the program has made significant efforts to attract and retain minority apprentices, as determined by affirmative action goals established for such program by the department.

CREDIT(S)

(Added L.2008, c. 57, pt. MM, § 18, eff. July 1, 2008.)

HISTORICAL AND STATUTORY NOTES

L.2008, c. 57 legislation

L.2008, c. 57, pt. MM, § 20, provides:

"This act shall take effect July 1, 2008, and shall control all contracts advertised or solicited for bid on or after the effective date of this act under the provisions of any **law** requiring contracts to be let pursuant to provisions of **law** amended by this act."

Former Sections

Former § **222**, relating to preference to citizens of New York in public works construction, was added by L.1921, c. 50, amended by L.1930, c. 689; L.1933, cc. 556, 557; L.1941, c. 33, § 9; L.1974, c. 207, § 1; L.1975, c. 848, § 1, and repealed by L.1982, c. 133, § 30, eff. June 1, 1982.

LIBRARY REFERENCES

Labor and Employment ⇨1244.
Public Contracts ⇨7.
Westlaw Topic Nos. 231H, 316A.
C.J.S. Public Contracts §§ 16 to 17.

RESEARCH REFERENCES

Encyclopedias

NY Jur. 2d, Constitutional Law § 51, Interest Essential to Raising Question.

NY Jur. 2d, Counties, Towns, & Municipal Corp. § 1435, Ground for Cancellation; Disqualification of Contractor.

NOTES OF DECISIONS

Construction and application 1

1. Construction and application

Apprenticeship training program requirement under Labor Law did not apply to all contracts subject to Wicks Law, which required governmental entity contracting for qualifying project to prepare separate bid specifications and award separate contracts for plumbing and gas fitting, heating, ventilating and air conditioning, and electric wiring and light fixtures, but applied only to those contracts where government entity had elected to utilize project **labor** agreement (PLA) and thereby to opt out of separate bidding mandate. Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith (4 Dept. 2012) 98 A.D.3d 335, 949 N.Y.S.2d 549. **Labor** and Employment ⊂ 927

Department of **Labor** reasonably interpreted apprenticeship training program requirement under **Labor Law** to apply only to those contractors and subcontractors who performed work under project **labor** agreement (PLA); thus, contractor or subcontractor was not required to maintain apprentice training program of its own. Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith (4 Dept. 2012) 98 A.D.3d 335, 949 N.Y.S.2d 549. Labor and Employment ⊂ 927

County and contractors's association were subject to widely-applicable rule, not singled out for special treatment, and thus lacked standing to challenge amendments to public works contract requirements under Home-Rule Provision of New York State Constitution; plaintiffs alleged that amendments were unconstitutional because they implemented, without a request from a local government, higher monetary threshold amounts for eight counties for subdividing public works projects, but plaintiffs were all subject to the same standard $500,000 threshold which applied to the other 54 counties. Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith, 2010, 30 Misc.3d 455, 915 N.Y.S.2d 903, affirmed as modified 949 N.Y.S.2d 549. Constitutional Law ⊂ 687; Constitutional Law ⊂ 688

Amendments to public works contract requirements were enacted in furtherance of, and bore a reasonable relationship to, a substantial State-wide concern, and thus fell outside purview of Home-Rule Provision of New York State Constitution; although amendments set higher monetary threshold amounts for eight counties for subdividing public works projects, and did so without a request from local governments, amendments took into account that large construction projects were significantly more common and labor costs for contractors were significantly higher in those counties than elsewhere in New York State. Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith, 2010, 30 Misc.3d 455, 915 N.Y.S.2d 903, affirmed as modified 949 N.Y.S.2d 549. Counties ⊂ 24

Contractors dealing with public works projects must participate in apprenticeship programs approved by New York State Department of **Labor** (DOL) only when projects both exceed monetary threshold and where there is a project **labor** agreement (PLA) in place. Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith, 2010, 30 Misc.3d 455, 915 N.Y.S.2d 903, affirmed as modified 949 N.Y.S.2d 549. **Labor** And Employment ⊂ 925

McKinney's **Labor Law** § **222**, NY **LABOR** § **222**

Current through L.2013, chapter 16.

McKinney's **General Municipal Law § 103**

McKinney's Consolidated Laws of New York Annotated Currentness
General Municipal Law (Refs & Annos)
Chapter 24. Of the Consolidated Laws
Article 5-A. Public Contracts (Refs & Annos)
➡§ 103. Advertising for bids and offers; letting of contracts; criminal conspiracies

1. [Eff. until June 1, 2013, pursuant to L.2003, c. 62, pt. X, § 41. See, also, subd. 1 below.] Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than thirty-five thousand dollars and all purchase contracts involving an expenditure of more than twenty thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein including but not limited to a soil conservation district to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section, provided, however, that purchase contracts (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) may be awarded on the basis of best value, as defined in section one hundred sixty-three of the state finance law, to a responsive and responsible bidder or offerer in the manner provided by this section except that in a political subdivision other than a city with a population of one million inhabitants or more or any district, board or agency with jurisdiction exclusively therein the use of best value for awarding a purchase contract or purchase contracts must be authorized by local law or, in the case of a district corporation, school district or board of cooperative educational services, by rule, regulation or resolution adopted at a public meeting. In any case where a responsible bidder's or responsible offerer's gross price is reducible by an allowance for the value of used machinery, equipment, apparatus or tools to be traded in by a political subdivision, the gross price shall be reduced by the amount of such allowance, for the purpose of determining the best value. In cases where two or more responsible bidders furnishing the required security submit identical bids as to price, such officer, board or agency may award the contract to any of such bidders. Such officer, board or agency may, in his or her or its discretion, reject all bids or offers and readvertise for new bids or offers in the manner provided by this section. In determining whether a purchase is an expenditure within the discretionary threshold amounts established by this subdivision, the officer, board or agency of a political subdivision or of any district therein shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within the twelve-month period commencing on the date of purchase. Purchases of commodities, services or technology shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds established by this subdivision. A change to or a renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount of all purchases of the same commodities, services or technology from the same provider within the twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount. For purposes of this section, "sealed bids" and "sealed offers", as that term applies to purchase contracts, (including contracts for service work, but excluding any purchase contracts necessary for the completion of a public works contract pursuant to article eight of the labor law) shall include bids and offers submitted in an electronic format including submission of the statement of non-collusion required by section one hundred three-d of this article, provided that the governing board of the political subdivision or district, by resolution, has authorized the receipt of bids and offers in such format. Submission in electronic format may, for technology contracts only, be required as the sole method for the submission of bids and offers. Bids and offers submitted in an electronic format shall be transmitted by bidders and offerers to the receiving device designated by the political subdivision or district

McKinney's **State Finance Law** § **135**

McKinney's Consolidated **Laws** of New York Annotated Currentness
State Finance Law (Refs & Annos)
Chapter 56. Of the Consolidated **Laws**
Article IX. Contracts (Refs & Annos)
§ 135. Separate specifications for contract work for the state

Except as otherwise provided in section two hundred twenty-two of the labor **law**, every officer, board, department, commission or commissions, charged with the duty of preparing specifications or awarding or entering into contracts for the erection, construction or alteration of buildings, for the **state**, when the entire cost of such work shall exceed three million dollars in the counties of the Bronx, Kings, New York, Queens, and Richmond; one million five hundred thousand dollars in the counties of Nassau, Suffolk and Westchester; and five hundred thousand dollars in all other counties within the state, must have prepared separate specifications for each of the following three subdivisions of the work to be performed:

1. Plumbing and gas fitting.

2. Steam heating, hot water heating, ventilating and air conditioning apparatus.

3. Electric wiring and standard illuminating fixtures.

Such specifications must be so drawn as to permit separate and independent bidding upon each of the above three subdivisions of work. All contracts hereafter awarded by the state or a department, board, commissioner or officer thereof, for the erection, construction or alteration of buildings, or any part thereof, shall award the three subdivisions of the above specified work 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.

Each bidder on a public work contract, where the preparation of separate specifications is not required, shall submit with its bid a separate sealed list that names each subcontractor that the bidder will use to perform work on the contract, and the agreed-upon amount to be paid to each, for: (a) plumbing and gas fitting, (b) steam heating, hot water heating, ventilating and air conditioning apparatus and (c) electric wiring and standard illuminating fixtures. After the low bid is announced, the sealed list of subcontractors submitted with such low bid shall be opened and the names of such subcontractors shall be announced, and thereafter any change of subcontractor or agreed-upon amount to be paid to each shall require the approval of the public owner, upon a showing presented to the public owner of legitimate construction need for such change, which shall be open to public inspection. Legitimate construction need shall include, but not be limited to, a change in project specifications, a change in construction material costs, a change to subcontractor status as determined pursuant to paragraph (e) of subdivision two of section two hundred twenty-two of the labor law, or the subcontractor has become otherwise unwilling, unable or unavailable to perform the subcontract. The sealed lists of subcontractors submitted by all other bidders shall be returned to them unopened after the contract award.

Nothing in this section shall be construed to prevent the authorities in charge of any state building, from performing any such branches of work by or through their regular employees, or in the case of public institutions, by the inmates thereof.

CREDIT(S)

(L.1940, c. 593. Amended L.1961, c. 292, § 1; L.2008, c. 57, pt. MM, § 3, eff. July 1, 2008.)

HISTORICAL AND STATUTORY NOTES

L.2008, c. 57 legislation

Opening par. L.2008, c. 57, pt. MM, § 3, rewrote the opening paragraph, which had read:

"Every officer, board, department, commission or commissions, charged with the duty of preparing specifications or awarding or entering into contracts for the erection, construction or alteration of buildings, for the state, when the entire cost of such work shall exceed fifty thousand dollars, must have prepared separate specifications for each of the following three subdivisions of the work to be performed:".

Second-to-last undesig. par. L.2008, c. 57, pt. MM, § 3, inserted the second-to-last undesignated paragraph.

L.2008, c. 57, pt. MM, § 20, provides:

"This act shall take effect July 1, 2008, and shall control all contracts advertised or solicited for bid on or after the effective date of this act under the provisions of any law requiring contracts to be let pursuant to provisions of law amended by this act."

L.1972, c. 337 legislation

Section 29 of L.1972, c. 337, eff. May 22, 1972, provided:

"Notwithstanding any other provision of law or of this act [L.1972, c. 337], any contract let for the purpose of constructing, reconstructing, rehabilitating or improving facilities for the department of correctional services pursuant to this act shall be in conformity with the provisions of section one hundred thirty five of the **state finance law**."

Derivation

State Finance Law of 1909, c. 58, § 50, added L.1921, c. 469; renumbered § 49a, L.1925, c. 611; and amended by L.1926, c. 689; L.1933, c. 257; L.1936, c. 621. Said § 50 was from **State Finance Law** of 1909, c. 58, § 50, added L.1912, c. 514, § 2; and repealed by L.1920, c. 556.

CROSS REFERENCES

Chautauqua, Cattaraugus, Allegany and Steuben southern tier extension railroad authority, contracts, see Public Authorities **Law** § 2642-m.

Letting of construction contracts, see Education **Law** §§ 376, 458.

Powers of Battery Park City Corporation Authority, see Public Authorities **Law** § 1974.

Separate specifications for certain public work, see General Municipal **Law** § 101.

Town buildings, procedure for contract awards, see Town **Law** § 222.

LAW REVIEW AND JOURNAL COMMENTARIES

Avoiding negative effects of the Wicks **Law**. Jerome Reiss, 211 N.Y.L.J. 1 (Feb. 17, 1994).

Redeveloping corporate governance structures: not-for-profit governance during major capital projects--a case study at Lincoln Center For the Performing Arts. Lesley Friedman Rosenthal, 76

PROJECT LABOR AGREEMENT
COVERING SPECIFIED CONSTRUCTION WORK UNDER THE CAPITAL IMPROVEMENT PROGRAM FOR FISCAL YEARS 2009-2014

ON BEHALF OF THE

NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY

TABLE OF CONTENTS

PROJECT LABOR AGREEMENT COVERING SPECIFIED CONSTRUCTION ON BEHALF OF THE NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY

ARTICLE 1 - PREAMBLE

WHEREAS, the New York City School Construction Authority ('Authority), acting as its own Construction Manager, desires to provide for the cost efficient, safe, quality, and timely completion of certain rehabilitation and renovation work performed under the Authority's Capital Improvement Program ("CIP") and Restructuring Program ("Program Work," as defined in Article 3) for Fiscal Years 2010 to 2014 in a manner designed to afford the lowest costs to the Authority, and the Public it represents, and the advancement of permissible statutory objectives;

WHEREAS, this Project Labor Agreement will foster the achievement of these goals, inter alia, by:

(1) providing a mechanism for responding to the unique construction needs associated with this Program Work and achieving the most cost effective means of construction, including direct labor cost savings, the Building and Construction Trades Council of Greater New York and Vicinity, on its behalf and on behalf of its affiliated Local Unions and their members, waiving various shift and other hourly premiums and other work and pay practices which would otherwise apply to Program Work.

(2) expediting the construction process and otherwise minimizing the disruption to the educational environment of New York City public schools;

(3) promoting the statutory objectives stated in the Authority's enabling legislation, Public Authorities Law § 1725 et seq., in a non-discriminatory manner

designed to open construction opportunities to all qualified bidders;

(4) avoiding the costly delays of potential strikes, slowdowns, walkouts, picketing and other disruptions arising from work disputes and promoting labor harmony and peace for the duration of the Program Work;

(5) standardizing the terms and conditions governing the employment of labor on the Program Work

(6) permitting wide flexibility in work scheduling and shift hours and times to allow maximum work to be done during off-school hours yet at affordable pay rates;

(7) permitting adjustments to work rules and staffing requirements from those which otherwise might obtain;

(8) providing comprehensive and standardized mechanisms for the settlement of work disputes, including those relating to jurisdiction;

(9) furthering public policy objectives as to improved employment opportunities for minorities, women and the economically disadvantaged;

(10) ensuring a reliable source of skilled and experienced labor;

and, WHEREAS, the Building and Construction Trades Council of Greater New York and Vicinity, its affiliated Local Unions and their members, desire to assist the Authority in improving public education in the City of New York, as well as to provide for stability, security and work opportunities which are afforded by a Project Labor Agreement;

and, WHEREAS, the Parties desire to maximize Program Work safety conditions for both workers and users of New York City Schools under construction;

NOW, THEREFORE, the Parties enter into this Agreement:

SECTION 1. PARTIES TO THE AGREEMENT

This is a Project Labor Agreement ("Agreement") for rehabilitation and renovation work to be performed under the defined CIP and Restructuring Program entered into by the New York City School Construction Authority and the Building and Construction Trades Council of Greater New York and Vicinity ("Council") and its signatory affiliated Local Unions and their members) ("Local Unions").

ARTICLE 2 - GENERAL CONDITIONS

SECTION 1. DEFINITIONS

Throughout this Agreement, the various Union parties including the Building and Construction Trades Council of Greater New York and Vicinity and its affiliated Local Unions, are referred to singularly and collectively as "Union(s)"; where specific reference is made to "Local Unions," that phrase is sometimes used; the term "Contractor(s)" shall include any Construction Project Manager who may serve as a successor to the Authority in that role, to General Contractors and to all other contractors, and subcontractors of whatever tier, engaged in Program Work within the scope of this Agreement as defined in Article 3; the New York City School Construction Authority is referred to as the "Authority," except that when the Authority is referred to in its capacity as Construction Project Manager, it (or any successor to the Authority acting in that capacity) is referred to as "Construction Project Manager;" the Building and Construction Trades Council of Greater New York and Vicinity is referred to as the "Council"; and the work covered by this Agreement (as defined in Article 3) is referred to as "Program Work".

SECTION 2. CONDITIONS FOR AGREEMENT TO BECOME EFFECTIVE

This Agreement shall not become effective unless each of the following conditions are met: (1) the Agreement is signed by the Council, on behalf of itself, its affiliated Local Unions and their members; and (2) the Agreement is approved and signed by the President and Chief Executive Officer of the Authority.

SECTION 3. ENTITIES BOUND & ADMINISTRATION OF AGREEMENT

This Agreement shall be binding on all Unions and their affiliates, the Construction Project Manager (in its capacity as such) and all Contractors performing Program Work, as defined in Article 3. The Contractors shall include in any subcontract that they let for performance during the term of this Agreement a requirement that their subcontractors, of whatever tier, become signatory and bound by this Agreement with respect to that subcontracted work falling within the scope of Article 3 and all Contractors and subcontractors performing Program Work shall be required to sign an Affidavit of Project Labor Agreement in the form annexed hereto as Exhibit "A". This Agreement shall be administered by the Construction Project Manager or such other designee as may be named by the Authority, on behalf of all Contractors.

SECTION 4. SUPREMACY CLAUSE

This Agreement, together with the local Collective Bargaining Agreements appended hereto as Schedule A, represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Program Work, in whole or in part. Where a subject covered by the provisions, of this Agreement is also covered by a Schedule A, the provisions of this Agreement shall prevail. It is further understood that no Contractor shall be required to sign any other agreement as a

condition of performing Program Work. No practice, understanding or agreement between a Contractor and a Local Union which is not set forth in this Agreement shall be binding on this Program Work unless endorsed in writing by the Construction Project Manager or such other designee as may be designated by the Authority.

It is further agreed that, where there is a conflict, the terms and conditions of this Project Labor Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements, except for all work performed under the NTL Articles of Agreement, the National Stack/Chimney Agreement, the National Cooling Tower Agreement, all instrument calibration work and loop checking shall be performed under the terms of the UA/IBEW Joint National Agreement for Instrument and Control Systems Technicians, and the National Agreement of the International Union of Elevator Constructors, with the exception of Articles 7, 9 and 10 of this Project Labor Agreement, which shall apply to such work.

SECTION 5. LIABILITY

The liability of any Contractor and the liability of any Union under this Agreement shall be several and not joint. The Construction Project Manager and any Contractor shall not be liable for any violations of this Agreement by any other Contractor; and the Council and Local Unions shall not be liable for any violations of this Agreement by any other Union.

SECTION 6. THE AUTHORITY

The Authority shall require in its bid specifications for all Program Work within the scope of Article 3 that all successful bidders, and their subcontractors of all tiers, become bound by, and signatory to, this Agreement. The Authority (including in its role as Construction Project Manager) shall not be liable for any violation of this

Agreement by any Contractor. It is understood that nothing in this Agreement shall be construed as limiting the sole discretion of the Authority (including in its role as Construction Project Manager) in determining which Contractors shall be awarded contracts for Program Work. It is further understood that the Authority (including in its role as Construction Project Manager) has sole discretion at any time to terminate, delay or suspend the Program Work, in whole or part, on any Program.

SECTION 7. AVAILABILITY AND APPLICABILITY TO ALL SUCCESSFUL BIDDERS

The Unions agree that this Agreement will be made available to, and will fully apply to, any successful bidder for Program Work who becomes signatory thereto, without regard to whether that successful bidder performs work at other sites on either a union or non-union basis and without regard to whether employees of such successful bidder are, or are not, members of any unions. This Agreement shall not apply to the work of any Contractor which is performed at any location other than the site of Program Work.

ARTICLE 3-SCOPE OF THE AGREEMENT

SECTION 1. WORKED COVERED

Program Work shall be limited to designated rehabilitation and renovation construction contracts bid and let by the New York City School Construction Authority after the effective date of this Agreement for rehabilitation and renovation work performed on New York City Public Schools pursuant to funds authorized under the Capital Improvement and Restructuring Programs for Fiscal Years 2010 to 2014. Subject to the foregoing, and the exclusions below, such Program Work generally shall

include demolition, reconstruction, rehabilitation, renovation work associated with school improvement and restructuring, technology enhancement, safety enhancement, general enhancement, CIP and other programs and needs as set forth in the Capital Program.

It is understood that Program Work does not include, and this Project Labor Agreement shall not apply to, any other work, including:

1. Contracts let and work performed in connection with projects carried over, recycled from, or performed under bids or rebids relating to work initiated under Fiscal Years Programs prior to 2009, or to any contracts for Fiscal Year Programs after 2009 which have been bid prior to the effective date of this Agreement.

2. Contracts let and work performed in connection with any and all Mentor and Graduate Mentor Contracts involving minority and women contractors, provided such contracts have a value of $1,000,000 or less; except to the extent that a Mentor Contractor not otherwise bound to a Schedule "A" chooses, on a job-by-job basis, to work under the terms of the PLA.

3. Contracts let by and work performed under the authority of New York City Department of Education or the New York City Department of Design and Construction.

4. Contracts let and work performed for lease build out construction.

5. Contracts let and work performed under the New Capacity Program of the Capital Plan (including new building construction, additions to existing facilities, and lease build outs).

6. Contracts let and work performed under the Charter and Partnership Schools Program of the Capital Plan.

7. Contracts let and work performed for Maintenance and Janitorial work.

8. Technology Enhancements to the extent they do not involve construction services.

SECTION 2. TIME LIMITATIONS

In addition to falling within the scope of Section 1, to be covered by this Agreement Program Work must be (1) let for bid after the effective date of this Agreement, and (2) let for bid prior to June 30, 2014, the expiration date of this Agreement. It is understood that this Agreement, together with all of its provisions, shall remain in effect for all such Program Work until completion, even if not completed by the expiration date of the Agreement. If Program Work otherwise falling within the scope of Section 1 is not let for bid by the expiration date of this Agreement, this Agreement may be extended to that work by mutual agreement of the parties.

SECTION 3. EXCLUDED EMPLOYEES

The following persons are not subject to the provisions of this Agreement, even though performing Program Work:

a. Superintendents, supervisors (excluding general and forepersons specifically covered by a craft's Schedule A), engineers, professional engineers and/or licensed architects engaged in inspection and testing, quality control/assurance personnel, timekeepers, mail carriers, clerks office workers, messengers, guards, technicians, non-manual employees, and all professional, engineering, administrative and management persons;

b. Employees of the Authority, or of any New York City or other municipal or State agency, authority or entity (including but not limited to employees of the New York City

Department of Education), or employees of any other public employer, even though working on the Program site while covered Program Work is underway;

c. Employees and entities engaged in off-site manufacture, modifications, repair, maintenance, assembly, painting, handling or fabrication of project components, materials, equipment or machinery or involved in deliveries to and from the Program site;

d. Employees of the Construction Project Manager (except that in the event the Authority engages a contractor to serve as Construction Project Manager, then those employees of the Construction Project Manager performing manual, on site construction labor will be covered by this Agreement);

e. Employees engaged in on-site equipment warranty work;

f. Employees engaged in geophysical testing other than boring for core samples;

g. Employees engaged in laboratory, specialty testing, or inspections, pursuant to a professional services agreement between the Authority, or any of the Authority's other professional consultants, and such laboratory, testing, inspection or surveying firm;

h. Employees engaged in work which is ancillary to Program Work and performed by third parties such as electric utilities, gas utilities, telephone companies, and railroads, provided such entities may only install their work up to a pre-determined demarcation point in a project, and provided further, the employees of such entities may not perform the work historically performed by the affiliated local unions.

i. Employees engaged in technology installation (except to the extent they are involved in construction services in connection with such installation) and provided that all low voltage work from the pre-determined demarcation point (or points where there is a

SCA School Construction Authority

Sunday, Apr 14, 2013 2:08:51 PM

Labor Law Compliance

LCMS - Labor Law Compliance Management System

Project Labor Agreement

Project Labor Agreement FAQ

Q: What is the rate of pay for shifts performed on the weekend?

A: PLA Weekend Wage Rates - Under the PLA, as negotiated, there are three (3) possible weekend scenarios:

1. A **Weekend Make-Up Day** because of conditions beyond the control of the Contractor, such as severe weather, power failure, fire or natural disaster preventing the performance of Program Work on a regularly scheduled work day, with the mutual agreement of the Local Union on a craft-by-craft basis: **Straight Time plus 5%**.

2. **Weekend Shift Work**, where a worker ***has not*** already worked five days (or four (4) ten-hour days on a site where the entire site is working on a four (4) ten-hour day shift) in the week: **The Contract Rate -or- Time and a half straight time, whichever is LESS**.

3. **Overtime Work**, where a worker has already worked five days (or four ten-hour days on a site where the entire site is working on a four ten-hour day shift) in the week: **The Contract Rate**.

Q: How is overtime calculated?

A: Computation of Overtime (The forty (40) hour week question):

1. For a standard five day work week, overtime is paid when a worker works:
   - more than eight hours in a day -AND/OR-
   - more than five days in a week regardless of how many hours worked each of those five days (e.g., after working four hours a day for each of five days for a total of only twenty hours, the worker would still be entitled to overtime for all time on any additional day worked.)

2. When the entire job is on a four ten-hour day basis, overtime is payable when a worker works:
   - more than ten hours in a day -AND/OR-
   - more than four ten-hour days in the week.

Q: How are four ten-hour day projects scheduled?

A: The decision to work on a four ten-hour day basis must be made by agreement between the SCA, the General Contractor, and the Local Unions on a craft-by-craft basis. No individual trade(s) may be singled out on a PLA site to work a four ten-hour day straight time basis without ALL trades working on the four ten-hour day basis.

Q: Who is permitted to work on a SCA project that is subject to the PLA?

A: **The only construction workers permitted** on a PLA job site are members of one of the unions listed on the attached PLA Telephone Contact List. There are many other unions representing building and construction workers. Some of these other unions are from Long Island, Westchester and New Jersey, and others are New York City based, but they are not signatory to the PLA and therefore cannot represent any workers on a PLA job. (It also does not matter whether any of these other unions have apprenticeship programs of their own.)

Additionally, a company that is signatory to one of these "other" unions CAN work on our PLA jobs, but the firm MUST get ALL of its workers (subject to the eighth worker provision, of course) for the trade directly from the appropriate union shown on the PLA Telephone Contact List by directly contacting and sending the union the notarized single page affidavit. The firm must also send a copy of that original affidavit with each weekly or monthly supplemental benefit check payment sent to the union.

Again, **O N L Y workers who are members of one of the unions listed on the attached** PLA Telephone Contact List may perform construction work on our PLA sites.

Project Labor Agreements

Research Compiled from NYC Mayor's Office of Contract Services (MOCS)

Inn of Court Group Meeting

February 13, 2013

PROJECT LABOR AGREEMENT FAQ

Q1. Does a contractor need to be signatory with the unions in the NYC Building and Construction Trades Council in order to bid on projects under the PLA?

A. No, any contractor may bid by signing and agreeing to the terms of the PLA. The contractor need not be signatory with these unions by any other labor agreement or for any other project.

Q2. Does a contractor agreeing to the PLA and signing the Letter of Assent create a labor agreement with these unions outside of the project covered by the PLA?

A. No, the PLA applies only to those projects that the Contractor agrees to perform under the PLA and makes no labor agreement beyond those projects.

Q3. Does the PLA affect the subcontractors that a bidder may utilize on the project?

A. Subject to the Department's approval of subcontractors pursuant to Article 17 of the Standard Construction Contract, a contractor may use any subcontractor, union or non-union, as long as the subcontractor signs and agrees to the terms of the PLA.

Q4. Are bidders required to submit Letters of Assent signed by proposed subcontractors with their bid in order to be found responsive?

A. No, bidders do not have to submit signed Letters of Assent from their subcontractors with their bid. Subcontractors, however, will be required to sign the letter of Assent prior to being approved by the Department.

Q5. May a contractor or subcontractor use any of its existing employees to perform this work?

A. Generally labor will be referred to the contractor from the respective signatory local unions. See PLA Article 4. However, contractors and subcontractors may continue to use up to 12% of their existing, qualifying labor force for this work, in accordance with the terms of PLA Article 4, Section 2B. Certified MWBEs for which participation goals are set pursuant to NYC Administrative Code §6-129 that are not signatory to any Schedule A CBAs may use their existing employees for the 2nd, 4th, 6th and 8th employee needed on the job if their contracts are valued at or under $500,000. For contracts valued at above $500,000 but under $1,000,000, such certified MWBEs may use their own employees for the 2nd, 5th and 8th employees needed on the job in accordance with the provisions of PLA Article 4, Section 2C. If additional workers are needed by these MWBEs, the additional workers will be referred to the contractor from the signatory local unions subject to the contractor's right to meet 12% of the additional needs with its existing, qualifying employees.

Q6. Must the City set MWBE participation goals for the particular project or contract in order for a certified MWBE to utilize the provisions of PLA Article 4, Section 2C?

A. No. PLA Article 4, Section 2(C) specifies what categories of MWBEs are eligible to take advantage of this provision (i.e., those MWBEs for which the City is authorized to set participation goals under §6-129). For purposes of section 2(C), it is not necessary for the project to be subject to §6-129 or for the City to have actually set participation goals for the particular contract or project. The result is the same where a projects receives State funding and therefore is subject to the requirements of Article 15-A of the Executive Law.

Q7. May a contractor bring in union members from locals that are not signatory unions?

A. Referrals will be from the respective signatory locals and/or locals listed in schedule A of the PLA. Contractors may utilize 'traveler provisions' contained in the local collective bargaining agreements (local CBAs) where such provisions exist and/or in accordance with the provisions of PLA Article 4, Section 2.

Q8. Does a non-union employee working under the PLA automatically become a union member?

A. No, the non-union employee does not automatically become a union member by working on a project covered by the PLA. Non-union employees working under the PLA are subject to the union security provisions (i.e., union dues/agency shop fees) of the local CBAs while on the project. These employees will be enrolled in the appropriate benefit plans and earn credit toward various union benefit programs. See PLA Article 4, Section 6 and Article 11.

Q9. Are all contractors and subcontractors working under the PLA, including non-union contractors and contractors signatory to collective bargaining agreements with locals other than those that are signatories to the PLA, required to make contributions to designated employee benefit funds?

A. Contractors and subcontractors working under the PLA will be required to contribute on behalf of all employees covered by the PLA to established jointly trusteed employee benefit funds designated in the Schedule A CBAs and required to be paid on public works under any applicable prevailing wage law. See PLA Article 11, Section 2. The Agency may withhold from amounts due the contractor any amounts required to be paid, but not actually paid into any such fund by the contractor or a subcontractor. See PLA Article 11, Section 2 C.

Q10. What happens if a contractor or subcontractor fails to make a required payment to a designated employee benefit fund?

A. The PLA sets forth a process for unions to address a contractor or a subcontractor's failure to make required payments. The process includes potentially the direct payment by the City to the benefit fund of monies owed and the corresponding withholding of payments to the Contractor. See PLA Article 11, Section 2. The City strongly advises Contractors to read these provisions carefully and to include appropriate provisions in subcontracts addressing these possibilities

Q11. Does signing on to the PLA satisfy the Apprenticeship Requirements established for this bid?

A. Yes. By agreeing to perform the Work subject to the PLA, the bidder demonstrates compliance with the apprenticeship requirements imposed by this invitation for Bids.

Q12. Does the PLA provide a standard work day across all the signatory trades?

A. Yes, under the *New Construction PLAs*, all signatory trades will work an eight (8) hour day, Monday through Friday with a day shift at straight time as the standard work week.

A. Under the *Renovation and Rehabilitation PLAs*, all signatory trades will work an eight (8) hour day, Monday through Friday with a day shift at straight time as the standard work week. The Renovation PLA also permits a contractor to schedule a four day [within Monday through Friday] work week, ten (10) hours per day at straight time if announced at the commencement of the project. See PLA Article 12, Section 1. This is an example where the terms of the PLA override provisions of the Standard Construction Contract (compare with section 37.2 of the Standard Construction Contract).

Q13. Does the PLA create a common holiday schedule for all the signatory trades?

A. Yes, the PLA recognizes eight (8) common holidays. See PLA Article 12, Section 4.

Q14. Does the PLA provide for a standard policy for 'shift work' across all signatory trades?

A. Yes. In addition, under the *New Construction PLAs* a day shift does not have to be scheduled in order to work the second and third shifts. See PLA Article 12, Section 3.

A. Under the *Renovation and Rehabilitation PLAs*, second and third shifts may be worked with a standard 5% premium pay. In addition, a day shift does not have to be scheduled in order to work the second and third shifts at the 1.05 hourly pay rate. See PLA Article 12, Section 3.

Q15. May the Contractor schedule overtime work, including work on a weekend?

A. Yes, the PLA permits the Contractor to schedule overtime work, including work on the weekends. See PLA Article 12, Sections 2, 3, and 5. To the extent that the Agency's

approval is required before a Contractor may schedule or be paid for overtime, that approval is still required notwithstanding the PLA language.

Q16. Are overtime payments affected by the PLA?

A. Yes, all overtime pay incurred Monday through Saturday will be at time and one half (1 ½). There will be no stacking or pyramiding of overtime pay under any circumstances. See PLA Article 12, Section 2. Sunday and holiday overtime will be paid according to each trades CBA.

Q17. Does the PLA contain special provisions for the manning of Temporary Services?

A. Yes. Where temporary services are required by specific request of the agency or construction manager, they shall be provided by the contractor's existing employees during working hours in which a shift is scheduled for employees of the contractor. The need for temporary services during non-working hours will be determined by the agency or construction manager and may be limited to one person per applicable trade where practicable. There will be no stacking of trades on temporary services. See PLA Article 15.

Q18. What do the workers get paid when work is terminated early in a day due to inclement weather or otherwise cut short of 8 hours?

A. The PLA provides that employees who report to work pursuant to regular schedule and not given work will be paid two hours of straight time. Work terminated early for severe weather or emergency conditions will be paid only for time actually worked. In other instances where work is terminated early, the worker will be paid for a full day. See PLA Article 12, Sections 6 and 8.

Q19. Should a local collective bargaining agreement [local CBA] expire during the project will a work stoppage occur on a project subject to the PLA?

A. No. All the signatory unions are bound by the 'no strike' agreement as to the PLA work. Work will continue under the PLA and the otherwise expired local CBA(s) until the new local CBA(s) are negotiated and in effect. See PLA Articles 7 and 19.

Q20. May a contractor working under the PLA be subject to a strike or other boycott activity by a signatory union at another site while the contractor is a signatory to the PLA?

A. Yes. The PLA applies ONLY to work under the PLA and does not regulate labor relations at other sites even if those sites are in close proximity to PLA work.

Q21. If a contractor has worked under other PLAs in the New York City area, are the provisions in this PLA generally the same as the others?

A. While Project Labor Agreements often look similar to each other, and particular clauses are often used in multiple agreements, each PLA is a unique document and should be examined accordingly.

Q22. What happens if a dispute occurs between the contractor and an employee during the project?

A. The PLA contains a grievance and arbitration process to resolve disputes between the contractor and the employees. See PLA Article 9.

Q23. What happens if there is a dispute between locals as to which local gets to provide employees for a particular project or a particular aspect of a project?

A. The PLA provides for jurisdictional disputes to be resolved in accordance with the NY Plan. See PLA Article 10. A copy of the NY Plan is available upon request from the Department. The PLA provides that work is not to be disrupted or interrupted pending the resolution of any jurisdictional dispute. The work proceeds as assigned by the contractor until the dispute is resolved. See PLA Article 10, Section 3.

Q24. Are there special provisions for Saturday work when a day is 'lost' during the week due to weather, power failure or other emergency?

A. Yes, under the *Renovation and Rehabilitation PLAs*, when this occurs the Contractor may schedule Saturday work at weekday rates. See PLA Article 12, Section 5.

Q25. Do the provisions of the PLA apply equally to subcontractors as well as contractors?

A. Yes, the provisions of the PLA apply to subcontractors.

Q26. If there is a disruption in the project schedule, must a contractor continue to pay workers during the 'down time'?

A. A contractor is free to lay-off workers and re-hire at a later date when work resumes.

Q27. May a contractor discharge a union referral for lack of productivity?

A. Yes.

Q28. May a contractor assign a management person to site?

A. Yes, the PLA places no restriction on management and/or other non-trade personnel as long as such personnel do not perform trade functions.

Q29. Who decides on the number of workers needed?

A. Generally, the contractor (or subcontractor) decides on the number of workers needed and the means and methods of work.

Q30. When will the agency shop dues payer affiliate workers become eligible for union benefits?

A. The union benefit funds are governed by the federal ERISA law and the workers will become eligible for certain benefits at different points in time. Contractors who will have agency shop dues payer affiliate workers should speak with the respective union(s) as to benefit eligibility thresholds.

Q31. If a contractor has a company benefit plan and assigns a worker in the plan to a PLA project under the 'bring along' provisions in Article 4, must the contractor continue to pay into the firm's benefit plan as well as the union benefit fund?

A. The issue of continuing company benefit payments is governed by the federal ERISA law and the firm should consult with its own legal counsel.

NYC Project Labor Agreements (PLAs)

Mayor's Office of Contract Services

Definition

- **An agreement by an owner (here, the City) with construction trades that all bidders must agree to as part of a responsive bid. Subcontractors to be used by prime contractors on a City contract must also agree to the terms of the PLA to be approved**

PLAs: Key Concepts

- **Key concept is that under PLAs, contractors and subcontractors use labor referred by the building trades (open shop and M/WBE contractors have "bring-along" provisions)**
- **Bidders that assent to the PLA need not be signatory to any other union agreement (thus, open shop contractors that don't have union agreements are able to agree and bid)**
- **Key concept is that all of the provisions in the PLA apply to all contractors-and sub-contractors—on City projects covered by a PLA**

PLAs and Wicks Law Reform

In 2008, the NYS Legislature amended the Wicks Law to allow for an exemption to its requirements where PLAs are utilized. This is advantageous to the City because:

- The City no longer must bid the "Wicks trades" separately (leading to more subcontracting opportunities, savings and flexibility)
  - **There are Bid Shopping Protections (Electrical, Plumbing, HVAC)**
  - **Prompt Payment – All Subs**
  - **Prequalification Lists Available**

NYS Labor Law Section 222

- **Recent Changes in NYS Law [adoption of Labor Law Section 222 in 2008] have better defined the circumstances where PLAs may be utilized, including "programmatic" PLAs**

Negotiating the PLAs

- **Brings together all the affiliated and historically related trades necessary for building construction with the City (public owner)**
  - **These trades are prevailing unions for virtually all Labor Law 220 classifications**
- **Bargaining with Building Trades allows for changes in overtime, holiday and shift pay within Labor Law 220, thus reducing labor costs for the City (public owner)**

Other Reasons for Negotiating PLAs

- **Avoid delays**
- **Promote labor harmony on the worksite**
- **Permit flexibility in work schedules**
- **Ensuring reliable source of skilled and experienced labor**

PLAs - the "Big Picture"

- **NYC PLAs:**
  - **will save the City nearly $300 million over the next four years**
  - **allow for the restoration of dozens of major infrastructure projects**
  - **create 1,800 construction jobs**
  - **contain unique provisions to help small, minority and women owned construction firms**

Work covered under the NYC PLAs (Mayoral Agencies)

- **Specified new construction: DDC, DSNY, DPR**
- **DEP buildings/plants within New York City**
- **Programmatic PLA for building rehabilitation, renovation & repair: DDC, DCAS, DSNY, DPR, ACS, DFTA, DHS, DOC, DOHMH, HRA, FDNY, NYPD**

Contracts NOT covered under the PLAs

- Site work
- Street/subsurface work
- Small Purchase-Building Repair
- Predominately maintenance work

Cost Savings

- **Renovation Work (multi-agency): 3% to 14.6%**
- **Renovation (DEP only) – 2.9% to 14.4%**
- **DDC New Construction – 4.6% to 10%**
- **DSNY New Construction – 5.7% to 6.5%**
- **DPR New Construction – 10.2%**

Format of PLAs by New York City

- **Provisions 'adjust' existing prevailing local agreements – work rules issues**
- **Local agreements referenced as 'Schedule A' in the PLAs (govern where PLA does not override)**
- **Adjustments DO NOT cut regular hourly pay/ benefits rate or freeze pay/benefits**

Common Features in the NYC PLAs--other than Adjustments

- **No strike provision**
- **Union recognition**
- **Administrative provisions**
- **Dispute resolution**
- **Special provision for M/WBE contractors not otherwise union signatories (the "bring-along" provision)**

Adjustments in the NYC Renovation PLA

- **Small premium for shift work**
- **4 days by 10 hour schedule available**
- **Saturday 'weather make-up' available at straight time**
- **Management rights**
- **Maximum apprentice/journeyperson ratio authorized**

Adjustments in the NYC Renovation PLA (continued)

- **Standard 40 hour week**
- **Common start time**
- **½ hour lunch**
- **8 common holidays**
- **Overtime capped at time and a half from Monday – Saturday**

How are the New Construction PLAs different from the Renovation PLA?

- **Each new construction PLA specifies the projects by name and location**
- **Shift work at regular rates**
- **No 4 by 10 hour shift availability**
- **No Saturday 'make-up' at straight time**

What will be most different for contractors working under the PLA who ordinarily do public work on an open shop basis?

- **No 'splitting' of workers between trades**
- **Union referral in hiring [See Article 4]**
  - Must get referrals from the union for first seven workers; eighth worker can be contractor/subcontractor's own labor (12%)
  - Any non-union worker on the job must be registered with the union
  - Contractor may "send back" unproductive referral (if you send back a shop steward, that can be a grievance)
- **Payment of benefits into joint trusteed funds [See Article 11]**
  - Benefits Funds to be paid by Contractor
  - Workers not in union subject to 'agency shop fee' in lieu of union dues (equal or less than union member dues—withholding from wages)

Additional Information for Open Shop Contractors

- **Forepersons will be union members and will all be experienced as forepersons**
- **Requirements contractors—special provision for less than 48 hour notice in hiring**
- **No boycott permitted [See Article 7]**
- **Union grievance procedures [See Articles 7 and 9]**

PLA – M/WBE

- **City certified M/WBE firms receive specific "bring-along" for contracts under $1M:**
  - **For contracts at or below $500k – 2nd, 4th, 6th, 8th workers per trade**
  - **For contracts between $500k and $999k – 2nd, 5th, 8th workers per trade**
- **M/WBE firms that become union signatory get to bring all employees for the applicable trade subject to union standards of proficiency**

Resources

- **Additional PLA information is currently on the MOCS website and will be added to construction agency websites in due course**
- **The MOCS website can be found at:** http://www.nyc.gov/mocs
- **The Vendor Enrollment website can be found at:** http://www.nyc.gov/selltonyc

NOTICE: THIS CONTRACT IS SUBJECT TO A PROJECT LABOR AGREEMENT

This contract is subject to the attached Project Labor Agreement ("PLA") entered into between the City and the Building and Construction Trades Council of Greater New York ("BCTC") affiliated Local Unions. By submitting a bid, the Contractor agrees that if awarded the Contract the PLA is binding on the Contractor and all subcontractors of all tiers. The bidder to be awarded the contract will be required to execute the attached Letter of Assent prior to award. Contractor shall include in any subcontract a requirement that the subcontractor, and sub-subcontractors of all tiers, become signatory to and bound to the PLA with respect to the subcontracted work. Contractor will also be required to have all subcontractors of all tiers execute the attached Letter of Assent prior to such subcontractors performing any work on the Project. Bidders are advised that the City of New York and City agencies have entered into multiple PLAs. The terms of each PLA, while similar, are not identical. All bidders should carefully read the entire PLA that governs this Contract.

To the extent that the terms of the PLA conflict with any other terms of the invitation for bids, including the Standard Construction Contract, the terms of the PLA shall govern. Where, however, the invitation for bids, including the Standard Construction Contract, requires the approval of the City/Department, the PLA does not supersede or eliminate that requirement.

In addition to the various provisions regarding work rules, Contractors should take special note of the requirement that Contractors and Subcontractors make payments to designated employee benefit funds. See PLA Article 11, Section 2. The PLA also contains provisions for what occurs when a contractor or a subcontractor fails to make required payments into the benefit funds, including potentially the direct payment by the City to the benefit fund of monies owed and corresponding withholding of payments to the Contractor. See PLA Article 11, Section 2. The City strongly advises Contractors to read these provisions carefully and to include appropriate provisions in subcontracts addressing these possibilities.

This Contract is subject to the apprenticeship requirements of Labor Law §222 and to apprenticeship requirements established by the Department pursuant to Labor Law §816-b. Please be advised that the involved trades have apprenticeship programs that meet the statutory requirements of Labor Law 222(e) and the requirements set by the Department pursuant to Labor Law §816-b, contractors and subcontractors who agree to perform the Work pursuant to the PLA are participating in such apprenticeship programs within the meaning of Labor Law §222(e) and the Department's directive.

If this Contract is subject to the Minority-Owned and Women-Owned Business Enterprise ("M/WBE") program created by Local Law 129, the specific requirements of M/WBE participation for this Contract are set forth in Schedule B entitled the "Subcontractor Utilization Plan", and are detailed in a separate Notice to Prospective Contractors included with this bid package. If such requirements are included with this Contract, the City strongly advises Contractors to read those provisions, as well as PLA Article 4, Section 2(C), carefully. A list of M/WBE firms may be obtained from the DSBS website at www.nyc.gov/buycertified, by emailing DSBS at buyer@sbs.nyc.gov, by calling (212) 513-6356, or by visiting or writing DSBS at 110 William St., New York, New York, 10038, 7th floor. Eligible firms that have not yet been certified may contact DSBS in order to seek certification by visiting www.nyc.gov/getcertified, emailing MWBE@sbs.nyc.gov, or calling the DSBS certification helpline at (212) 513-6311.

The local collective bargaining agreements (CBAs) that are incorporated into the PLA as PLA Schedule A Agreements are available on computer disk from the Department's Contract Officer upon the request of any prospective bidder. Please note that the "PLA Schedule A" is distinct from the Department's Schedule A that is a part of this invitation for bids.

A contact list for the participating unions is set forth after the FAQs.

Below are answers to frequently asked questions (FAQs) about this PLA:

Q1. Does a contractor need to be signatory with the unions in the NYC Building and Construction Trades Council in order to bid on projects under the PLA?

A. No, any contractor may bid by signing and agreeing to the terms of the PLA. The contractor need not be signatory with these unions by any other labor agreement or for any other project.

Q2. Does a contractor agreeing to the PLA and signing the Letter of Assent create a labor agreement with these unions outside of the project covered by the PLA?

A. No, the PLA applies only to those projects that the Contractor agrees to perform under the PLA and makes no labor agreement beyond those projects.

Q3. Does the PLA affect the subcontractors that a bidder may utilize on the project?

A. Subject to the Department's approval of subcontractors pursuant to Article 17 of the Standard Construction Contract, a contractor may use any subcontractor, union or non-union, as long as the subcontractor signs and agrees to the terms of the PLA.

Q4. Are bidders required to submit Letters of Assent signed by proposed subcontractors with their bid in order to be found responsive?

A. No, bidders do not have to submit signed Letters of Assent from their subcontractors with their bid. Subcontractors, however, will be required to sign the letter of Assent prior to being approved by the Department.

Q5. May a contractor or subcontractor use any of its existing employees to perform this work?

A. Generally labor will be referred to the contractor from the respective signatory local unions. See PLA Article 4. However, contractors and subcontractors may continue to use up to 12% of their existing, qualifying labor force for this work, in accordance with the terms of PLA Article 4, Section 2B. Certified MWBEs for which participation goals are set pursuant to NYC Administrative Code §6-129 that are not signatory to any Schedule A CBAs may use their existing employees for the 2nd, 4th, 6th and 8th employee needed on the job if their contracts are valued at or under $500,000. For contracts valued at above $500,000 but under $1,000,000, such certified MWBEs may use their own employees for the 2nd, 5th and 8th employees needed on the job in accordance with the provisions of PLA Article 4, Section 2C. If additional workers are needed by these MWBEs, the additional workers will be referred to the contractor from the signatory local unions subject to the contractor's right to meet 12% of the additional needs with its existing, qualifying employees.

Q6. Must the City set MWBE participation goals for the particular project or contract in order for a certified MWBE to utilize the provisions of PLA Article 4, Section 2C?

A. No. PLA Article 4, Section 2(C) specifies what categories of MWBEs are eligible to take advantage of this provision (i.e., those MWBEs for which the City is authorized to set participation goals under §6-129). For purposes of section 2(C), it is not necessary for the project to be subject to §6-129 or for the City to have actually set participation goals for the particular contract or project. The result is the same where a projects receives State funding and therefore is subject to the requirements of Article 15-A of the Executive Law.

Q7. May a contractor bring in union members from locals that are not signatory unions?

A. Referrals will be from the respective signatory locals and/or locals listed in schedule A of the PLA. Contractors may utilize 'traveler provisions' contained in the local collective bargaining agreements (local CBAs) where such provisions exist and/or in accordance with the provisions of PLA Article 4, Section 2.

Q8. Does a non-union employee working under the PLA automatically become a union member?

A. No, the non-union employee does not automatically become a union member by working on a project covered by the PLA. Non-union employees working under the PLA are subject to the union security provisions (i.e., union dues/agency shop fees) of the local CBAs while on the project. These employees will be enrolled in the appropriate benefit plans and earn credit toward various union benefit programs. See PLA Article 4, Section 6 and Article 11.

Q9. Are all contractors and subcontractors working under the PLA, including non-union contractors and contractors signatory to collective bargaining agreements with locals other than those that are signatories to the PLA, required to make contributions to designated employee benefit funds?

A. Contractors and subcontractors working under the PLA will be required to contribute on behalf of all employees covered by the PLA to established jointly trusteed employee benefit funds designated in the Schedule A CBAs and required to be paid on public works under any applicable prevailing wage law. See PLA Article 11, Section 2. The Agency may withhold from amounts due the contractor any amounts required to be paid, but not actually paid into any such fund by the contractor or a subcontractor. See PLA Article 11, Section 2 C.

Q10. What happens if a contractor or subcontractor fails to make a required payment to a designated employee benefit fund?

A. The PLA sets forth a process for unions to address a contractor or a subcontractor's failure to make required payments. The process includes potentially the direct payment by the City to the benefit fund of monies owed and the corresponding withholding of payments to the Contractor. See PLA Article 11, Section 2. The City strongly advises Contractors to read these provisions carefully and to include appropriate provisions in subcontracts addressing these possibilities.

Q11. Does signing on to the PLA satisfy the Apprenticeship Requirements established for this bid?

A. Yes. By agreeing to perform the Work subject to the PLA, the bidder demonstrates compliance with the apprenticeship requirements imposed by this invitation for Bids.

Q12. Does the PLA provide a standard work day across all the signatory trades?

A. Yes, all signatory trades will work an eight (8) hour day, Monday through Friday with a day shift at straight time as the standard work week.

Q13. Does the PLA create a common holiday schedule for all the signatory trades?

A. Yes, the PLA recognizes eight (8) common holidays. See PLA Article 12, Section 4.

Q14. Does the PLA provide for a standard policy for 'shift work' across all signatory trades?

A. Yes. In addition, a day shift does not have to be scheduled in order to work the second and third shifts. See PLA Article 12, Section 3.

Q15. May the Contractor schedule overtime work, including work on a weekend?

A. Yes, the PLA permits the Contractor to schedule overtime work, including work on the weekends. See PLA Article 12, Sections 2, 3, and 5. To the extent that the Agency's approval is required before a Contractor may schedule or be paid for overtime, that approval is still required notwithstanding the PLA language.

Q16. Are overtime payments affected by the PLA?

A. Yes, all overtime pay incurred Monday through Saturday will be at time and one half (1 ½). There will be no stacking or pyramiding of overtime pay under any circumstances. See PLA Article 12, Section 2. Sunday and holiday overtime will be paid according to each trades CBA.

Q17. Does the PLA contain special provisions for the manning of Temporary Services?

A. Yes. Where temporary services are required by specific request of the agency or construction manager, they shall be provided by the contractor's existing employees during working hours in which a shift is scheduled for employees of the contractor. The need for temporary services during non-working hours will be determined by the agency or construction manager and may be limited to one person per applicable trade where practicable. There will be no stacking of trades on temporary services. See PLA Article 15.

Q18. What do the workers get paid when work is terminated early in a day due to inclement weather or otherwise cut short of 8 hours?

A. The PLA provides that employees who report to work pursuant to regular schedule and not given work will be paid two hours of straight time. Work terminated early for severe weather or emergency conditions will be paid only for time actually worked. In other instances where work is terminated early, the worker will be paid for a full day. See PLA Article 12, Sections 6 and 8.

Q19. Should a local collective bargaining agreement [local CBA] expire during the project will a work stoppage occur on a project subject to the PLA?

A. No. All the signatory unions are bound by the 'no strike' agreement as to the PLA work. Work will continue under the PLA and the otherwise expired local CBA(s) until the new local CBA(s) are negotiated and in effect. See PLA Articles 7 and 19.

Q20. May a contractor working under the PLA be subject to a strike or other boycott activity by a signatory union at another site while the contractor is a signatory to the PLA?

A. Yes. The PLA applies ONLY to work under the PLA and does not regulate labor relations at other sites even if those sites are in close proximity to PLA work.

Q21. If a contractor has worked under other PLAs in the New York City area, are the provisions in this PLA generally the same as the others?

A. While Project Labor Agreements often look similar to each other, and particular clauses are often used in multiple agreements, each PLA is a unique document and should be examined accordingly.

Q22. What happens if a dispute occurs between the contractor and an employee during the project?

A. The PLA contains a grievance and arbitration process to resolve disputes between the contractor and the employees. See PLA Article 9.

Q23. What happens if there is a dispute between locals as to which local gets to provide employees for a particular project or a particular aspect of a project?

A. The PLA provides for jurisdictional disputes to be resolved in accordance with the NY Plan. See PLA Article 10. A copy of the NY Plan is available upon request from the Department. The PLA provides that work is not to be disrupted or interrupted pending the resolution of any jurisdictional dispute. The work proceeds as assigned by the contractor until the dispute is resolved. See PLA Article 10, Section 3.

You can find these research materials at the URLs listed below:

Mayor's Office of Contract Services Homepage (MOCS)

http://www.nyc.gov/html/mocs/html/home/home.shtml

Project Labor Agreement FAQ (MOCS)

http://www.nyc.gov/html/mocs/downloads/pdf/pla/PLA%20FAQ.pdf

NYC Project Labor Agreements (Slides from MOCS)

http://www.nyc.gov/html/mocs/downloads/pdf/pla/PLA%20Vendor%20Training%20Slides.pdf

New Construction Notice to Bidders (From MOCS)

http://www.nyc.gov/html/mocs/downloads/pdf/pla/PLA%20New%20Construction%20Bid%20Notice.pdf

NYS, Unions Agree to PLA for Tappan Zee Bridge Work

06/19/2012

By Esther D'Amico

The New York State Thruway Authority and 14 labor groups have given the nod to a project labor agreement (PLA) for the Tappan Zee bridge replacement project, Gov. Andrew Cuomo's office announced on June 18. The PLA, which is expected to save taxpayers about $452 million and provide thousands of construction jobs, will be a required provision of the RFP for the new bridge project. The agreement is subject to final approval from the Federal Highway Administration and the Thruway Authority board of directors.

Photo Courtesy of New York State Thruway Authority

The plan includes employment opportunities for union members in the Hudson Valley and New York Metropolitan region, and it acts as a mechanism to settle jurisdictional disputes through an organized grievance process. The plan also stipulates that lock-out or other work disruptions, including renegotiations of area collective bargaining agreements, is not permitted.

"For too long we have talked about replacing the Tappan Zee, and we cannot wait any longer," Cuomo said in a statement. "Replacing the Tappan Zee Bridge represents one of the largest public infrastructure projects in the nation, and the agreement reached today will allow thousands of New York's working men and women to secure good jobs building a new, safer bridge."

Cuomo's office says the key provisions of the plan include a standardized 40-hour, straight-time work week for all trades and the flexibility to schedule four 10-hour work days to optimize construction, for a combined estimated savings of $122,956,095 million; a higher ratio of apprentices to journeypersons than typically allowed in collective bargaining agreements, saving an estimated $59 million; providing workers that arrive one hour prior to their shift $25 a day rather than an hour of overtime, saving an estimated $59 million; standardized holidays that eliminate overtime for service trades, saving an approximate $2.6 million.

James Cahill, president of the state's Building Construction Trades Council, in a statement called the agreement historic. "We have been talking about building a new Tappan Zee Bridge for decades; under Andrew Cuomo's leadership, we are finally building a new bridge," Cahill said.

Under the agreement, the Building Trades Council of Westchester and Putnam, the Rockland County Buildings Trades Council, the NYS Buildings Trades Council, and the Thruway Authority, as representative for the selected design-build contractor, are expected to sign a memorandum of understanding.

Transportation officials hope to select the design-build team this summer, Thomas Madison, Thruway Authority executive director, told attendees at a Moles lecture last month.

Meanwhile, the Thruway Authority intends to debt finance most of the cost of the project. On June 18, Moody's Investor Service revised its outlook to negative from stable on the Thruway Authority's A1 rating, due to an "as-yet uncertain finance plan for the new Tappan Zee bridge and risks associated with the execution and management of a design-build contract and the environmental permitting and financing requirements for this very large and complex construction project." Moody's says the project will require significant borrowing and entail contract management, environmental permitting, as well as financing and construction risk.

Moody's says its assigned A1 rating reflects the Thruway Authority's "strategic and vital transportation role" in the region and its "generally stable financial performance achieved through fairly steady toll increases and cost-containment efforts."

Keywords: Tappan Zee Bridge;New York State Thruway Authority;Project Labor Agreement;PLA;Gov. Andrew Cuomo;Federal Highway Administration;Hudson Valley;Unions;New York Metropolitan Region;Collective Bargaining Agreements;Building Construction Trades;Building Trades Council of Westchester;Moody's Investor Service

Reader Comments:

Sign In to Comment

To write a comment about this story, please **sign in**. If this is your first time commenting on this site, you will be required to fill out a brief **registration form**. Your public username will be the beginning of the email address that you enter into the form (everything before the @ symbol). Other than that, none of the information that you enter will be publically displayed.

rgi1 wrote:
Did anyone estimate what all those savings would amount to if the project was open shop?
6/21/2012 7:33 AM CDT
Recommend (4) Report Abuse Permalink

You must be logged in to leave a comment. Login | Register

Submit

POWERED BY Pluck

We welcome comments from all points of view. Off-topic or abusive comments, however, will be removed at the editors' discretion.

Editorial

Editorial: Labor pact will help build bridge

Published: June 26, 2012 7:33 PM

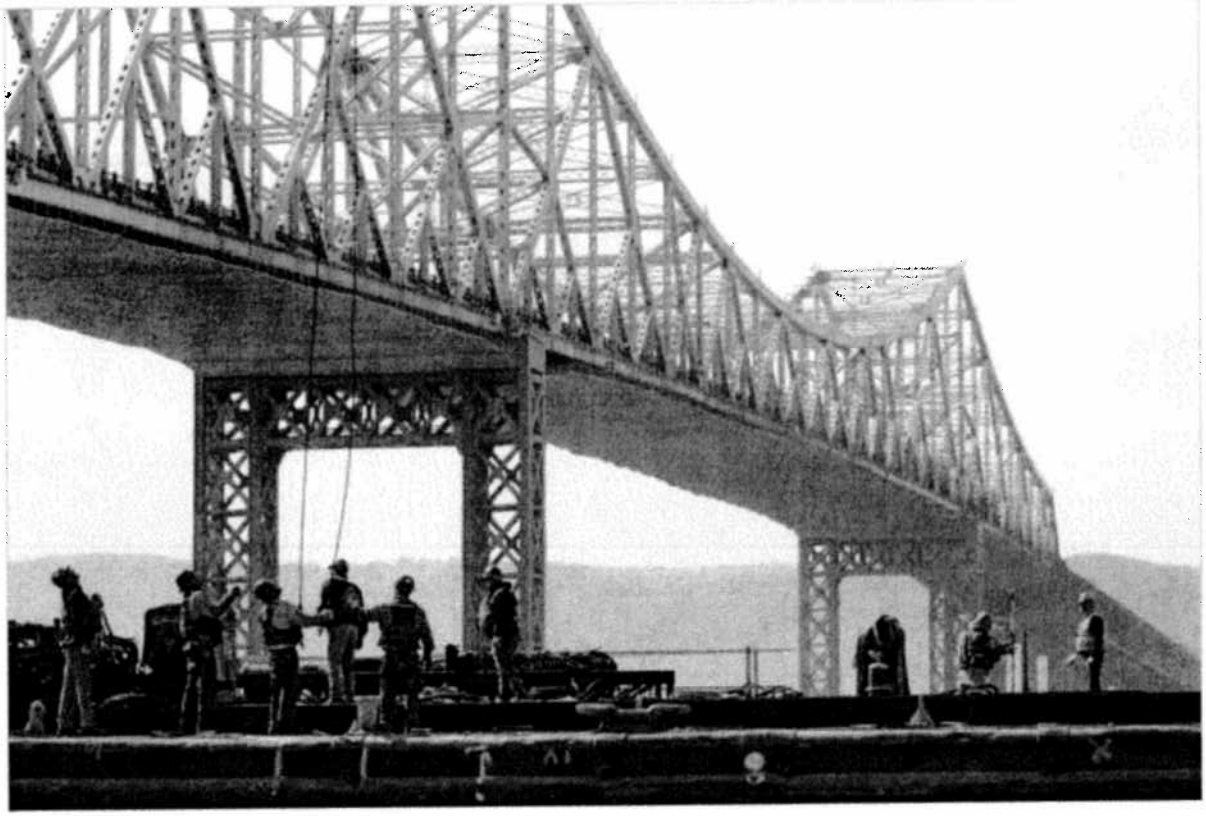

Photo credit: Rory Glaeseman | Workers continue early construction of pilings, from barges, just north of the Tappan Zee Bridge crossing from Westchester to Rockland County, in background. (March 13, 2012)

Plans for a new Tappan Zee Bridge got a needed hand when labor leaders struck a deal with Gov. Andrew M. Cuomo that will translate to hundreds of millions in savings.

Assuming, of course, that there is funding for the project.

Cuomo, the New York State Thruway Authority and 26 unions representing 14 trades announced terms last week that would save $452 million on the construction of a new Hudson River span. At a cost of about $5.2 billion, it would be one of the largest public works projects in the country.

MORE: Analysis and discussion from Viewsday | Newsday columnists | More opinion

CARTOONS: Walt Handelsman's Cartoons | National Cartoon Roundup

A complex project of this scope, which could mean roughly 45,000 jobs, needs uniformity in its work rules and workforce. This agreement gives it just that -- one set of rules.

Criticism that the agreement forecloses the use of cheaper nonunion labor doesn't resound in reality. Is New York really going to build a bridge with nonunion labor?

Certainly not, but this agreement does have a 12 percent provision that allows contractors to hire some nonunion workers while allowing a higher number from smaller businesses and those owned by women or minorities. All told, businesses in these categories could gain $400 million in work.

In addition to standardizing parameters like allowing for a four-day workweek with 10-hour days, the agreement limits overtime. And it prevents work stoppages with a no-strike provision that shouldn't be overlooked, since many of these private-sector unions are expected to enter contract talks at some point during construction.

And while labor agreed to a 15-percent wage concession, the hard-hit trades get some gains of their own -- like needed jobs during a recession that hasn't been kind to construction workers.

This project labor agreement is similar to others that once helped build infrastructure like the Hoover Dam in Nevada, Shasta Dam in California, Disney World and, more recently, scores of schools and stadiums across the country. In fact, a project labor agreement has been in place since 1994 for ongoing repairs on Tappan Zee itself.

While this agreement provides controls and flexibility for the project, it doesn't trump the big unanswered question: How is New York going to pay for a new bridge?

Borrowing? Higher tolls? And will Congress ever get its act together and pass a transportation bill that would enable the state to borrow $2 billion from Uncle Sam?

Cuomo has promised a financial plan soon and we are waiting to see it.

For now, this project labor agreement resolves some uncertainties. It's one tool of the many needed to put the span in place.

User rating: (1) Click to rate

Comments

Please log in to comment. Civility matters; click here to read our commenting guidelines.

PROJECT LABOR AGREEMENT

COVERING

THE TAPPAN ZEE HUDSON RIVER CROSSING PROJECT

TABLE OF CONTENTS

PROJECT LABOR AGREEMENT COVERING

THE TAPPAN ZEE HUDSON RIVER CROSSING PROJECT

ARTICLE 1 - PREAMBLE

WHEREAS, the New York State Thruway Authority desires to provide for the efficient, safe, quality, and timely completion of a construction project to replace the Tappan Zee Bridge, in a manner designed to afford the lowest reasonable costs to the Authority, and the Public it represents, and the advancement of public policy objectives;

WHEREAS, this Project Labor Agreement will foster the achievement of these goals, inter alia, by:

(1) avoiding the costly delays of potential strikes, slowdowns, walkouts, picketing and other disruptions arising from work disputes and promote labor harmony and peace for the duration of the Project;

(2) standardizing the terms and conditions governing the employment of labor on the Project;

(3) permitting wide flexibility in work scheduling and shift hours and times;

(4) providing negotiated adjustments to work rules and staffing requirements from those which otherwise might apply;

(5) providing comprehensive and standardized mechanisms for the settlement of work disputes, including those relating to jurisdiction;

(6) ensuring a reliable source of skilled and experienced labor;

(7) furthering public policy objectives as to improved employment opportunities for minorities, women and the economically disadvantaged in the construction industry;

(8) minimizing potential losses of toll revenues;

(9) expediting the construction process and otherwise minimizing traffic inconveniences to the public;

and, WHEREAS, the signatory Unions desire the stability, security and work opportunities afforded by a Project Labor Agreement;

and, WHEREAS, the Parties desire to maximize Project safety conditions for both workers and the motoring public;

NOW, THEREFORE, the Parties enter into this Agreement:

SECTION 1. PARTIES TO THE AGREEMENT

This is a Project Labor Agreement ("Agreement") entered into by and between the New York State Thruway Authority, on its own behalf and on behalf of any subsequently designated Program Manager which might be used in connection with this Project, and by the New York State Building & Construction Trades Council, AFL-CIO on behalf of itself and its affiliates and local union members; the Building and Construction Trades Council of Westchester and Putnam County, AFL-CIO, on behalf of itself and its affiliated local union members; the Rockland County Building & Construction Trades Council, AFL-CIO, on behalf of itself and its affiliated local union members; and the signatory Local Unions on behalf of themselves and their members.

ARTICLE 2 – GENERAL CONDITIONS

SECTION 1. DEFINITIONS

Throughout this Agreement, the Union parties and the signatory Local Unions and County Councils are referred to singularly and collectively as "Union(s)"; where specific reference is made to "Local Unions" that phrase is sometimes used; the term

"General Contractor" refers to the successful bidder for the Project work; the term "Contractor(s)" refers to the General Contractor and its subcontractors of whatever tier, engaged in on-site Project construction work within the scope of this Agreement as defined in Article 3; "Program Manager" refers to any entity retained by the Authority to serve as Program Manager of the Tappan Zee Hudson River Crossing Project (in the event no outside entity is retained to serve as Program Manager, and the New York State Thruway Authority retains that role for itself, that term shall refer to the New York State Thruway Authority when acting in that capacity); the New York State Thruway Authority is referenced as the "Authority"; the New York State Buildings & Construction Trades Council, AFL-CIO is referenced as the "NYS Council"; the Westchester and Putnam County and Rockland County Building and Construction Trades Councils, AFL-CIO are referenced as the "County Councils," and the work covered by this Agreement (as defined in Article 3) is referred to as the "Project Work".

As used in this Agreement, (1) "staging area" refers to an area dedicated to the assembly of workers, construction components, and construction equipment for transport to the project site; (2) "preparation area" refers to an area dedicated to the handling of construction components and assembly of construction equipment to make ready for transport to the project site; and (3) "fabrication" means the manufacturing of materials into construction components intended for use in the project and locations where fabrication occurs are not considered either staging or preparation areas.

SECTION 2. CONDITIONS FOR AGREEMENT TO BECOME EFFECTIVE

This Agreement shall not become effective unless each of the following conditions are met: (1) the Agreement is signed by the NYS and the County Councils, and the Local Unions; (2) the Agreement is approved by the Federal Highway Administration and (3) the Agreement is approved by vote of the Board of Directors of the Authority and signed by the Authority.

SECTION 3. ENTITIES BOUND & ADMINISTRATION OF AGREEMENT

This Agreement shall be binding on all signatory Unions, the Program Manager, and all Contractors performing on-site Project Work, including site preparation and staging areas, as defined in Article 3. (There is no obligation to award work to unions that are not signatory to this Agreement.) The Contractors shall include in any subcontract that they let, for performance during the term of this Agreement, a requirement that their subcontractors, of whatever tier, become bound by this Agreement with respect to subcontracted work performed within the scope of Article 3. This Agreement shall be administered by the Program Manager, on behalf of all Contractors.

SECTION 4. SUPREMACY CLAUSE

This Agreement, together with the local Collective Bargaining Agreements appended hereto as Schedule A, represents the complete understanding of all parties and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project, in whole or in part,

except that to the extent a Contractor is a signatory to the National Stack/Chimney Agreement, the National Cooling Tower, the UA/IBEW Joint National Agreement for Instrument and Control Systems Technicians and the National Agreement of the International Union of Elevator Constructors, those agreements shall apply, except that Articles 7, 9 and 10 of this Agreement shall still apply. Where a subject covered by the provisions, explicit or implicit, of this Agreement is also covered by a Schedule A, the provisions of this Agreement shall prevail. It is further understood that no Contractor shall be required to sign any other agreement as a condition of performing work on this Project. No practice, understanding or agreement between a Contractor and a Local Union which is not explicitly set forth in this Agreement shall be binding on this Project unless endorsed in writing by the Program Manager.

SECTION 5. LIABILITY

The liability of any Contractor and the liability of any Union under this Agreement shall be several and not joint. The Program Manager and any Contractor shall not be liable for any violations of this Agreement by any other Contractor; and the NYS and County Councils and Local Unions shall not be liable for any violations of this Agreement by any other Union.

SECTION 6. THE AUTHORITY

Upon final approval, the Authority shall require in its bid specifications for all work within the scope of Article 3 that the successful bidder, and its subcontractors of whatever tier, become bound by this Agreement and signatory to the Letter of Assent included as Appendix I. The Authority shall not be liable in any manner under this

Agreement, except to the extent it serves as its own Program Manager. It is understood that nothing in this Agreement shall be construed as limiting the sole discretion of the Authority and/or General Contractor in determining which Contractors shall be awarded contracts for Project Work. It is further understood that the Authority has sole discretion at any time to terminate, delay or suspend the work, in whole or part, on this Project.

SECTION 7. AVAILABILITY AND APPLICABILITY TO ALL SUCCESSFUL CONTRACTORS

The Unions agree that this Agreement shall be made available to, and shall fully apply to any successful General Contractor (and its subcontractors) for Project Work who becomes bound thereto, without regard to whether that successful General Contractor (or its subcontractors) performs work at other sites on either a union or non-union basis and without regard to whether employees of such successful General Contractor (or its subcontractors) are, or are not, members of any unions. This Agreement shall not apply to the work of any Contractor which is performed at any location other than the Project site, as defined in Article 3, Section 1.

ARTICLE 3 - SCOPE OF THE AGREEMENT

The Project Work covered by this Agreement shall be as defined and limited by the following sections of this Article.

SECTION 1: THE WORK

This Agreement shall only apply to the following, on-site construction work performed as part of the Tappan Zee Hudson River Crossing Project (Project Work):

That on site construction work covered by [Contract D214134/PIN8TZ1.00], generally defined as any new bridge(s) and/or tunnel(s) that replace the existing Tappan Zee Bridge/Causeway and span across the Hudson River between Tarrytown and South Nyack, New York, along Interstates 87/287 between interchanges #9 and #10; approach spans thereto; modification to existing roadways; ancillary buildings; associated land and waterway structures; associated marine work; temporary traffic controls/ structures; demolition work; and removal of the existing Tappan Zee Bridge/Causeway. (At the Contractor's option, work that occurs beyond interchanges #9 and #10 may be covered by this Agreement.)

"On site" construction work in connection with the above shall be defined to include Project Work performed at dedicated preparation and staging areas within 15 miles of the project site.

SECTION 2. TIME LIMITATIONS

This Agreement shall be further limited to Project Work performed under an Authority construction contract awarded after the effective date of this Agreement and performed prior to the termination date (December 31, 2017) of this Agreement. It is further understood that this Agreement, together with all of its provisions, shall remain in effect for all Project Work bid and awarded, but not completed, by December 31, 2017. If the Project Work described above is not awarded by December 31, 2017, this Agreement may be extended by mutual agreement of the parties.

SECTION 3. EXCLUDED EMPLOYEES

The following persons (excluding divers) are not subject to the provisions of this Agreement, even though performing work on the Project:

a. Superintendents, supervisors (excluding general and forepersons specifically covered by a craft's Schedule A), engineers, inspectors and testers, quality control/ assurance personnel, timekeepers, mail carriers, clerks, office workers, messengers, guards, technicians, non-manual employees, and all professional, engineering (except field surveyors), administrative and management persons;

b. Employees of the Authority, or of any other State agency, authority or entity or employees of any municipality or other public employer;

c. Employees and entities engaged in off-site manufacture, modifications, repair, maintenance, assembly, painting, handling or fabrication of bridge components, materials, equipment or machinery, or involved in deliveries to and from the Project site, excepting local deliveries of all major construction materials including fill, ready mix, asphalt and item 4 which are covered by this Agreement;

d. Employees of the Program Manager, excepting those performing manual, on-site construction labor who will be covered by this Agreement;

e. Employees engaged in on-site equipment warranty work;

f. Employees engaged in geophysical testing (whether land or water) other than boring for core samples;

g. Employees engaged in laboratory or specialty testing or inspections;

h. Employees engaged in ancillary Project Work performed by third parties such as electric utilities, gas utilities, telephone companies, and railroads.

SECTION 4. NON-APPLICATION TO CERTAIN ENTITIES

This Agreement shall not apply to the parents, affiliates, subsidiaries, or other joint or sole ventures of any Contractor which do not perform work at this Project. It is agreed, for the purposes of this Agreement only, that this Agreement does not have the effect of creating any joint employment, single employer or alter ego status among the Authority, the Program Manager and/or any Contractor. The Agreement shall further not apply to the Authority or any other state agency, authority, or other municipal or

public entity and nothing contained herein shall be construed to prohibit or restrict the Authority or its employees or any other state authority, agency or entity and its employees from performing on or off-site work related to the Project. As any portion of Project Work is completed and turned over to the Authority, the Agreement shall not have further force or effect with respect to such portions except where inspections, additions, repairs, modifications, check-out and/or warranty work are assigned in writing (copy to Local Union involved) by the General Contractor for performance under the terms of this Agreement.

ARTICLE 4 - UNION RECOGNITION AND EMPLOYMENT

SECTION 1. PRE-HIRE RECOGNITION

The Contractors recognize the signatory Unions as the sole and exclusive bargaining representatives of all craft employees who are performing on-site Project Work within the scope of this Agreement as defined in Article 3.

SECTION 2. UNION REFERRAL

A. The Contractors agree to hire Project craft employees covered by this Agreement through the job referral systems and hiring halls (where the referrals meet the qualifications set forth in items 1, 2 and 4 of subparagraph B) established in the Local Unions' area collective bargaining agreements (attached as Schedule A to this Agreement). Notwithstanding this, the Contractors shall have sole rights to determine the competency of all referrals; the number of employees required; the selection of employees to be laid-off (except as provided in Article 5, Section 3); and the sole right to

reject any applicant referred by a Local Union, subject to the show-up payments required in the applicable Schedule A. In the event that a Local Union is unable to fill any request for qualified employees within a 48-hour period after such requisition is made by the Contractor (Saturdays, Sundays and holidays excepted), the Contractor may employ qualified applicants from any other available source. In the event that the Local Union does not have a job referral system, the Contractor shall give the Local Union first preference to refer applicants, subject to the other provisions of this Article. The Contractor shall notify the Local Union of Project craft employees hired within its jurisdiction from any source other than referral by the Union.

B. A Contractor may request by name, and the Local will honor, referral of persons who have applied to the Local for Project Work and who meet the following qualifications as determined by a Committee of 3 designated, respectively, by the applicable Local Union, the Program Manager and a mutually selected third party or, in the absence of agreement, the permanent arbitrator (or designee) designated in Article 7:

(1) possess any license required by NYS law for the Project Work to be performed;

(2) have worked a total of at least 1000 hours in the Construction craft during the prior 3 years;

(3) were on the Contractor's active payroll for at least 60 out of the 180 calendar days prior to the contract award;

(4) have demonstrated ability to safely perform the basic functions of the applicable trade.

Except as provided below, no more than 12 per centum of the employees covered by this Agreement, per Contractor by craft, shall be hired through the special provisions above (any fraction shall be rounded to the next highest whole number). The Contractor's first name referral must be a general foreperson (if otherwise included in a craft's Schedule A). Thereafter, the Contractor may seek a name referral for the 16th, 24th, 32nd referral, and for every 8th referral thereafter.

The Committee may also allow a Contractor, subject to the above per centum, to employ socially or economically disadvantaged persons as defined in 49 CFR 26.5 for entry into the construction industry outside of the formal apprenticeship program.

This Project is subject to the federal Disadvantaged Business Enterprise ("DBE") program (49 CFR Part 26), with a 10% DBE goal, and federal Equal Employment Opportunity requirements (23 CFR Part 230). Notwithstanding the above provision, a certified DBE may, with respect to its first 14 hires, request referral by name under the above requirements of up to 50% of the employees covered by this Agreement, by craft. In that case, the first name referral must be a general foreperson (if otherwise included in a craft's Schedule A). The 3rd, 5th, 7th, 9th, 11th and 13th employee may be a name referral. Thereafter, the above 12 per centum referral provision will apply, meaning that the 22nd, 30th, 38th and every 8th employee thereafter may be a name referral.

SECTION 3. NON-DISCRIMINATION IN REFERRALS

The Local Unions represent that their hiring halls and referral systems shall be operated in a non-discriminatory manner and in full compliance with all applicable federal, state and local laws and regulations which require equal employment