

Associated Builders and Contractors of Massachusetts **Position Paper on Responsible Employer Ordinances**

Associated Builders and Contractors, Inc., the largest construction association in Massachusetts representing 475 general contractors, subcontractors, suppliers and associates, strongly supports the concept of promoting responsibility and a level playing field in the construction industry. ABC works continuously to inform and educate its member firms on their obligations under the law in key areas such as prevailing wage compliance, insurance requirements and apprentice training. And while ABC supports promoting responsibility in the construction industry, the reality is that the union-sponsored Responsible Employer Ordinances (REOs), in effect in just 13 Massachusetts communities, increase municipal construction costs and add new administrative and enforcement burdens.

First and foremost, it is important to note that the majority of areas addressed in municipal REOs are already addressed in current state law. Furthermore, the manner in which the ordinance deviates from current state law in regulating some of these areas will pose serious problems for the many local construction firms not affiliated with unions. These firms make up the majority of the construction industry. In fact, according to the U.S. Department of Labor, less than 20 percent of the construction workers locally and nationally are union members.

The result will be that if a community passes a Responsible Employer Ordinance, it will limit the ability of these local firms and their employees to participate in their public construction projects. In doing so, the REO will negatively impact the municipality as a result of a drop in bidders and a corresponding increase in prices. A recent study by the Beacon Hill Institute at Suffolk University found that when competition is limited to only the union sector of the industry, school construction prices in Massachusetts rose by 17.3 percent.

In addition to these real problems for local contractors, their workers, and their taxpayers, the ordinance also raises the following issues of concern: (1) conflict with existing state law in areas of apprentice training, health insurance and prevailing wage enforcement; (2) no plan to provide local enforcement or funding; (3) the potential to halt an entire construction project if there is a violation of the ordinance; and (4) local hiring measures that have been found to be illegal in two recent Massachusetts court cases.

Apprentice Training

State apprentice training laws, as defined under M.G.L. Chapter 23, do not call for enrollment in apprentice programs as a precondition to performing public work. Enrollment is required only when apprentices are utilized on the public project. To add this prerequisite to the public bidding statute is clearly not reflective of the statute's intent: to determine a contractor's ability to perform public work. Even the Ward Commission's exhaustive reform recommendations in the public bidding area never suggested apprentice programs be added to this statute.

Also troubling is the fact that this provision would have the effect of discouraging rather than encouraging apprenticeship opportunities.

This state-approved apprenticeship mandate will require even the smallest of firms to have a formal apprentice-training program. The state-approved system, based on the union model, allows all union firms to claim the benefits of the union's collective training program, whether the firm employs apprentices or not. Open shop firms, however, must employ apprentices directly. A family business consisting of a father and two sons, for example, does not have the need or ability to bring on apprentices. Their small family operation is as large as it will ever be, and their training has taken place working one-on-one, from father to sons. Yet, under this Responsible Employer Ordinance, even if this business is well-qualified and in full compliance with all laws, it will be prevented from bidding on public work simply because of this unrealistic apprenticeship requirement.

In addition, the ordinance's requirement that a bidder participate in an apprentice program for each apprenticeable trade in his workforce, whether or not that trade is represented on the project, is in conflict with current apprenticeship state law.

Health Insurance

In the area of health benefits, what this plan proposes is not only unfair and unworkable, it is potentially illegal. The federal Employee Retirement Income Security Act (ERISA) preempts state governments from regulating any employee welfare benefit plans. In a 1989 ruling, New York's Second Circuit Court held that ERISA preempted the portions of New York's prevailing wage statute dealing with supplemental income because the state law required employers to offer specific employee benefits. Because health insurance plans fall under the jurisdiction of ERISA, the state may not determine the benefits covered in either a company's or a union's health and welfare plan.

Additionally, the stipulation in the ordinance that the bidder and all the subcontractors under the bidder furnish health plans "at least comparable" to union plans is unworkable, legality aside. In order to determine if open shop general contractors and subcontractors provide comparable plans, the workload of any city or town would be substantially increased. The department would have to collect and continually update the fund documents for each health and welfare plan. These plans change not only at the time of contract negotiation, but at the discretion of the plans' trustees.

In addition, under the prevailing wage statute (MA General Laws, Chapter 149), the hourly rate for each trade includes a pre-determined rate for health and other benefits. Some employees, who are covered under a spouse's plan, would rather have the cash amount, since they do not need the coverage. This flexibility is not possible under this ordinance.

Prevailing Wage

The prevailing wage language is largely duplicative of the existing state statute. State law already requires **all** contractors, union and open shop, to pay the prevailing wage on all public construction projects. The Attorney General enforces this law and penalizes contractors who do not pay the proper wage.

Project Shutdowns

The ordinance proposes a "temporary suspension of the project until compliance is obtained. This means that even if one subcontractor is unknowingly out of compliance on a large job, the entire job could be shut down. In this case, not only would all the contractors and employees on the project suffer, but an entire community would suffer in that its project would be halted.

Local Hiring

First and foremost, residency requirements were found to be illegal in two a recent Massachusetts Superior Court Cases: *The Utility Contractor's Association of New England vs. the City of Lowell* and *The Utility Contractors' Association of New England vs. the City of Worcester*. In these cases, the court said that the local hiring ordinances are unconstitutional under the Privileges and Immunities Clause of the U.S. Constitution. The clause guarantees to every citizen the rights and privileges enjoyed by every other citizen. In the most recent Worcester case, the court wrote, "The cases could not be clearer...and injunction must be issued."

Legality aside, while it is certainly a worthy goal to want to provide local jobs for local residents, the reality is that the very nature of the construction industry is one of mobility. Workers travel where the work takes them. Unlike workers at a manufacturing facility or retail store, the workplace for a construction worker is not the contractor's office, but the jobsite of the project under construction. The work practices of the industry become apparent when one thinks about the derivation of the term "journeyman."

Summary

In summary, while the intent of much of a Responsible Employer Ordinance is laudable, it is not necessary in light of the protections offered under current state law and is likely to negatively impact the municipality as outlined above. In addition, the ordinance's burdensome requirements will make it virtually impossible for many local contractors and employees to work on public construction projects in their community, and the resulting decrease in competition will increase taxpayer costs.