PERCEPTIONS AND INFLUENCE OF PROJECT LABOR AGREEMENTS ON MERIT SHOP CONTRACTORS

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Independent Research Report
CETS 600
Master of Science in Engineering

Winter 1997

ACKNOWLEDGEMENTS

I would like to extend my acknowledgment and gratitude to my academic committee for their assistance and guidance:

Professor Phillip Dunston, Chairman
Professor Joe Mahoney
Professor John Schaufelberger

as well as to the following persons for their time, information and resources that allowed this research to be accomplished:

Kathleen Garrity, Associated Builders and Contractors of Western Washington
Jack Gilchrist, Seattle/King County Building and Construction Trades Council
Arthur Langlie, Associated General Contractors of Washington
Mark Knudsen, Port of Seattle
David Groves, Washington State Labor Council

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CHAPTER 1

INTRODUCTION

1.1 OVERVIEW

Organized labor has suffered a continuous decrease in the percentage of labor force membership over the latter half of the twentieth century. As shown in Figure 1, the construction industry has significantly contributed to this decline. From a high of 87.1% in 1947 to a modern day 18.5% in 1996, the percentage of union membership representation in the industry has continued to slide even though the construction labor force has increased by 1.5 million since 1970. (Northrup and Alario 1997).

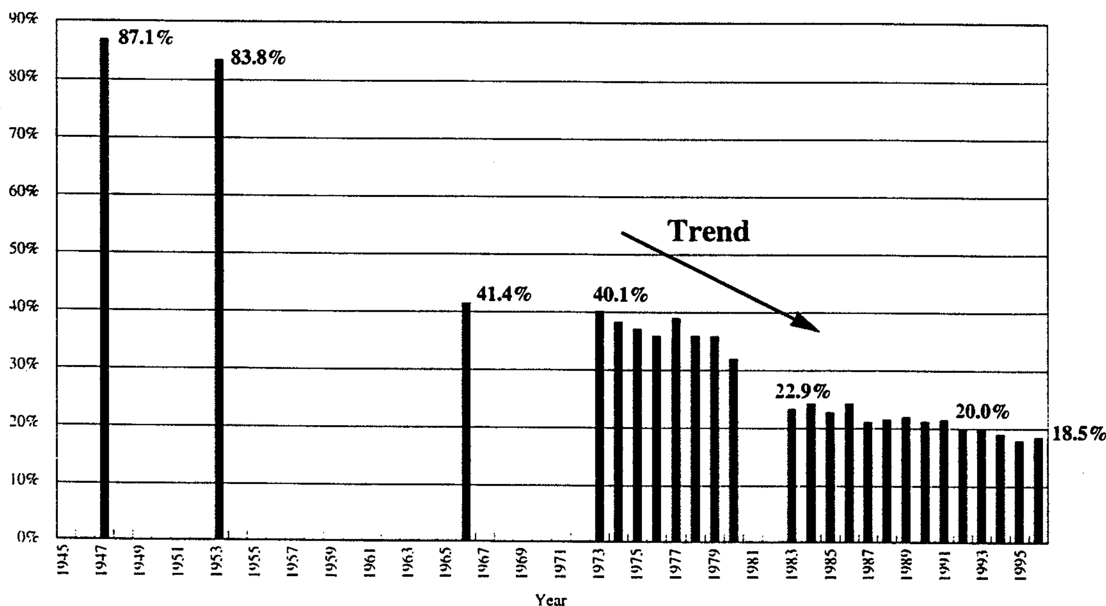

Figure 1. Union employment as a percent of total within the construction industry. (*Source*: Northrup and Alario 1997)

As a result of this substantial decrease in the marketplace unions have felt the necessity to regain their niche in the construction industry, which they once dominated, by increasing their exposure throughout the nation. Unions have introduced legislative initiatives, increased promotional activities, held rallies and demonstrations, engaged in "salting" of companies, as well as lobbied governmental agencies at all levels for the benefit of various

organized labor concerns. One of the most prolific lobbying campaigns of late has been the encouragement of the use of project labor agreements (PLAs) at state. municipal and recently even at the federal level. As a result, several state executive orders and a federal memorandum have been issued encouraging the use of PLAs on select projects.

1.2 AN EXPLANATION OF PROJECT LABOR AGREEMENTS

PLAs have been used for decades on both publicly and privately funded construction projects, and only until recent years their use has gone highly uncontested on publicly funded projects. Even today they remain virtually unopposed when used on privately funded contracts. PLAs have been used in the past by the federal government on significant and major construction undertakings such as hydroelectric dams, atomic energy facilities and flood control projects (Construction Labor Report 1997) as well as extensively on public works projects at the state and local level.

The institution of a PLA typically begins with wages and working rules being negotiated between the owner/agency, or a representative such as a construction management company, and union officials or organizations representing the various crafts such as local Building and Construction Trades Councils. There are two primary elements included in PLAs: (1) the requirement for job site contractors and subcontractors to use the building and construction trade hiring halls to obtain work force labor, and (2) the no-strike clause binding the signatory unions normally for the duration of the project (Murphy and Casey 1994). The agreements typically also provide wages and benefits that parallel local union scale and outline grievance and dispute resolution procedures. The PLA is then incorporated into the bidding documents or specifications thereby binding all prospective bidders to the negotiated terms.

Supporters allege that PLAs promote a continuous, stable and economically advantageous project, benefiting the owner from a cost efficiency, quality, safety and timeliness

standpoint. These claims are found in the language in several state executive orders as well as the federal Executive Memorandum of June 1997.

The majority of the opponents to PLAs are traditionally open-shop, or non-union contractors, and organizations that are associated and support such contractors such as the Associated General Contractors of America (AGC) and the Association of Builders and Contractors (ABC). Arguments against PLAs include allegations that the agreements interfere with an employee's right to choose to join a union, they drive up construction costs, and they exclude open-shop contractors from bidding on projects by placing restrictions on the bidding conditions. Opponents also claim that since more than 80 percent of all construction workers in the United States are **not** members of any union, PLAs give preferential treatment or "set-aside" employment to less than 20 percent of the construction workforce.

1.3 PROBLEM STATEMENT

During the past five years the use of PLAs on publicly funded projects has been a troublesome issue to many in the construction industry. Significant resources have been expended throughout the United States by various organizations trying to prevent their use on publicly funded projects with seemingly no clear results. Although PLAs tend to be incorporated in large and significant construction projects, in actuality they most likely are associated with only a minor percentage of overall construction performed in the United States. To this end, several questions arise. Is the use of PLAs actually affecting open shop contractors or countermining the open market concept? Has there been any definitive legal precedence established since the *Boston Harbor* decision (discussed later) to assist in arguing for or against their use in state and municipal contracting? Are contractors not affiliated with unions affected by the use of PLAs and are they concerned about their use? Is the use of PLAs on the rise? Does the use of PLAs actually provide the benefits to construction projects that advocates assert?

contractors must adhere to the terms of the PLA contained in the specification. In review of the Revised Code of Washington (RCW), an allowance for pre-qualification of bidders is supplied in RCW 47.28.030, which states, "The rules adopted under this section . . . (3) May establish pre-qualification standards and procedures as an alternative to those set forth in RCW 47.28.070, but the pre-qualification standards and procedures under RCW 47.28.070 shall always be sufficient." In review of the cited RCW, the pre-qualification standards are administrative in nature supplying information to ensure the bidding contractor is responsive and responsible to allow contract award. No mention to PLAs, either inclusive or exclusive was made in either clause.

In *Manson* the Washington Department of Transportation seemingly took advantage of RCW 47.28.030. In addition to the five basic elements of the clause in RCW 47.28.070, the contract specifications further pre-qualified bidders by requiring evidence of successful construction of a floating bridge similar to the one being contemplated in the contract. The court found that the Department of Transportation could not restrict the bidding by the pre-qualification requirement, "prequalification standards, as authorized in RCW 47.28.070, tend to limit the extent of competitive bidding. It is the function of the legislature, not the judiciary or an administrative agency, to circumscribe competitive bidding." Furthermore, pertaining to the requirement that the bidders supply evidence of previous successful construction of the proposed floating bridge configuration, the court found " . . . the issue is whether that decision *(of requiring evidence of successful like projects in the past)* can be applied as a pre-qualification item - thus drastically curtailing the competitive bidding process. We hold that the department, under existing legislation, does not have that authority."

Washington State Executive Order 96-08 encouraging PLAs is relatively new and has yet to be legally challenged, but it is similar to executive orders issued in other states in which PLAs have been aggressively challenged with varying degrees of results. The New York Court of Appeals recently issued two opposite decisions. As quoted from these

decisions, "the court held that state procurement laws require public purchasing agencies to demonstrate that a PLA promotes public interest by:

> '(1) Protection of the public by obtaining the best work possible at the lowest possible price, and
>
> '(2) Prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts.'

"The court found that the record supporting the *Tappen Zee* PLA met this criteria and the record for the *Roswell Park* PLA did not."

In a more recent development, *Albany Specialties* appealed a lower court decision and in doing so the New York Supreme Court rejected a PLA requirement on the construction of a $54 million county courthouse. In this case, the court cited the requirements and precedence established in *Tappen Zee* should apply and determined that those requirements, or "burdens," were not satisfied in this case.

Other developments nationwide concerning the legality of PLAs include *Entertech Electric* where the Sixth Circuit Court of Appeals overruled an Ohio district court upholding a PLA on a Mahoning County justice center project. The Circuit Court stated that "Ohio state law - requiring that contracts be awarded to 'lowest and best bidders' - permits the county to make a 'qualitative determination' on which bid is lowest and best. This determination, the appellate court held, can include the condition that successful bidders comply with a project labor agreement." (Cockshaw's 1996).

California court decisions pertaining to PLAs also seem to be mixed and somewhat mixed. In *West Coast*, a case involving a $3M project containing a PLA with the Contra Costa Building Trades Council, a state superior court ruled that a requirement mandating public works be constructed under PLAs violated California's competitive bidding laws. In this case, the court relied on *George Harms Construction* and concluded "A public agency may not impose conditions on public works contracts which would have the effect of limiting the pool of contractors from which bids will be accepted." (Cockshaw's 1996).

In contrast to the above, during the same month another California Superior Court upheld the *San Francisco Airport* PLA on the $2.4B expansion project of San Francisco International Airport by stating the PLA "is constitutional and consistent with the purposes underlying competitive bidding statutes." This decision is under appeal, but its outcome may be critical to the resolution of a challenges which may be pitted against future municipal and state contracts. Pending the outcome, similarities between the airport expansion project and California state competitive bidding codes with like projects in other states will allow for *San Francisco Airport* to be used in establishing precedence and a successful criteria for the use of a PLAs in future projects.

2.3 SUMMARY

Through the review of a series of legal challenges against PLAs in public works contracts throughout the United States, it can be seen that there has been no clear and convincing precedence set by the courts pertaining to the use of PLAs on state and municipal projects. *Boston Harbor* does not seem to play a significant role in legal challenges of PLAs in individual states as it only ruled that the use of PLAs is not in violation of the NLRA, not on their validity in individual states.

A review of the RCW public bidding policies for port districts, public highways and transportation, and the state government finds that PLAs are not specifically excluded from use in construction contracts, but the RCW does not specifically allow for their use. The mixed decisions pertaining to PLAs that other state courts have made has not allowed for the establishment of a simple legal precedence. It appears that current state laws do not exclusively prohibit the use of PLAs on public works projects. Therefore, decisions pertaining to PLAs will continue to be handled on a state by state and court by court basis.

CHAPTER 3

RATIONALIZING THE USE OF PROJECT LABOR AGREEMENTS

3.1 OVERVIEW

One of the most debated aspects of the use of PLAs are the endorsements that the public agencies seem to be giving organized construction labor over open shop contractors. The federal executive memorandum on PLAs states, in part, "These specially negotiated agreements between the project owner or construction manager and one or more labor organizations are reached at the outset of the projects in order to **guarantee efficient, timely and quality work; establish fair and consistent labor standards and work rules; supply skilled labor, experienced and highly competent work force, establish set labor-related costs over the project's life;** and assure stable labor-management relations legally binding dispute resolution mechanisms and protection from strikes, lockouts and other such disruptions." (emphasis added by author). The State of Washington executive order closely parallels these assertions by stating, ". . . the use of project labor agreements should be considered only in those limited circumstances when such an agreement clearly benefits the interests of the State from a cost, efficiency, quality, safety and timeliness standpoint."

It can be derived from these public documents that cost, contractor capability, and contractor safety are the foundations from which PLAs are derived. By including such factors in the language of these documents, one is led to believe that the measurement of each factor can be, or already has been made, and organized labor in the construction industry has performed superior than open shop contractors in each case. The purpose of this chapter is to review several critical construction areas which PLAs contend that union contractors are better in performing. Through the use of others research and studies, this chapter will outline that these contentions may not necessarily be accurate.