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FROM 1-13-98
TO 1-20-98

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January 7, 1998

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Mayor and City Councilmembers
Sacramento, California

Honorable Members in Session:

SUBJECT: Informational Report Concerning
the Use of Project Labor Agreements

LOCATION AND COUNCIL DISTRICT: All districts.

RECOMMENDATION:

At the City Council meeting of December 16, 1997, the City Attorney was asked to report back on the status of the law concerning the use of Project Labor Agreements (PLAs) on public works construction contracts. A discussion of applicable State and Federal court decisions on this topic is provided below. It is recommended that the City Council receive and file this report. City staff will address policy issues associated with the use of PLAs and will seek direction on appropriate action.

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FOR CITY COUNCIL MEETING OF: January 13, 1998

SUMMARY:

A Project Labor Agreement (PLA) is an agreement between a public agency, the unions representing the trades that will be employed on a particular public works project and the contractors and subcontractors performing the project, generally requiring the contractors and subcontractors to comply with the provisions of the PLA in exchange for the unions' agreement not to engage in any job site actions during the course of project construction. The U.S. Supreme Court has held that a PLA requirement does not violate the provisions of the National Labor Relations Act. Two different California Courts of Appeal have issued

SUMMARY - Continued

very recent decisions concluding that PLA requirements included in the bidding requirements for contracts on two massive public works construction projects did not violate the requirement to award such contracts to the lowest responsible bidder. However, this issue is not yet settled, because the California Supreme Court has been asked to review one of the decisions, and may be asked to review the other as well. Appellate court decisions may not be cited or relied upon as legal precedent if the California Supreme Court decides to review them.

If a decision were made to proceed with a PLA requirement on one or more City projects, consideration should be given to limiting the use of PLAs to large and/or time-sensitive projects, where the City can adopt appropriate findings regarding the City's demonstrated need to avoid work stoppages and interruptions, in order to justify the imposition of a PLA requirement.

COMMITTEE/COMMISSION ACTION: None.

CASE LAW GOVERNING PLAs:

A PLA typically requires all contractors and subcontractors on the project to which the PLA applies to hire from the local union halls, establishes rules governing working hours, shifts and wages, commits all parties to specified grievance and dispute resolution procedures, and requires the payment of union dues by employees working on the project, whether or not they are not union members. In exchange for the contractors' and subcontractors' commitment to abide by the terms of the PLA, the unions agree that there will be no job site actions or other work disruptions for the duration of the project. The chief justification for including a PLA requirement in a public works contract is to avoid costly delays in completing the project, that might result from labor actions if there were no PLA. Court decisions considering the legality of a PLA requirement are discussed below.

1. State Law

The only State law issue that has received significant consideration by California's appellate courts is whether including a PLA requirement in a public works construction contract violates the competitive bidding requirements applicable to most public agencies. Prior to mid-November, there was no reported appellate court decision in California on this

CASE LAW GOVERNING PLAs - Continued

issue.¹ Since that time, two different Courts of Appeal have issued decisions on this topic, one involving a San Francisco Airport Commission project, and one involving a Metropolitan Water District project.

ABC v. San Francisco Airports Commission

On November 12, 1997, the First District Court of Appeal issued a decision rejecting a challenge to the use of a "Project Stability Agreement" (PSA) on the San Francisco Airport's International Terminal Expansion Project.² This project is a \$211 million three-year project that is part of a larger \$2.4 billion airport Master Plan involving 77 interrelated contracts, coordinated by 60 construction managers, program managers, architects and engineers. The City (acting through the San Francisco Airports Commission) entered into the PSA with the San Mateo County Building and Construction Trades Council (Trades Council), after three years of negotiations and two public hearings, by adopting a resolution concluding that the PSA would ensure the timely and economical completion of the Master Plan. In summary, the PSA provided as follows:

- The Trades Council agreed that there would be no disruption or slowdown of any kind on the Master Plan construction projects as a result of any labor disputes, and the parties agreed to be bound by dispute resolution procedures specified in the PSA in lieu of any job site action.

¹ In Associated Builders and Contractors v. Contra Costa Water District (1995) 37 Cal.App.4th 466, 472, the Court of Appeal identified, but declined to rule on this issue, because the public agency involved was not subject to a competitive bidding requirement. Out of three trial court decisions issued in September, 1996, and January, 1997, two of the decisions (in the San Francisco and Los Angeles Superior Courts) concluded that competitive bidding requirements did not preclude PLAs, and the remaining decision (in the Contra Costa Superior Court) concluded that the City of Pinole Redevelopment Agency's PLA requirement violated the competitive bidding law. Both of the trial court decisions allowing the use of PLAs were appealed by the Associated Builders and Contractors (ABC), resulting in the appellate court decisions discussed in this report. The trial court's decision in the City of Pinole case was not appealed.

² Associated Builders and Contractors, Inc. v. San Francisco Airports Commission, 59 Cal.App.4th 25. In a footnote, the court noted that PSAs are also commonly referred to as Project Labor Agreements and perceived no functional difference between the two, noting that "apparently the nomenclature is dictated solely by the degree of adoration or contempt the user holds for such agreements." Id., at 30 n. 2.

CASE LAW GOVERNING PLAs - Continued

- The San Francisco Airports Commission agreed to require all contractors and subcontractors who were awarded contracts for Master Plan projects to abide by the provisions of the PSA, including the following:
 - “Core employees” of the contractor performing work on the project for more than 30 days were required to become members of the union applicable to their craft for the duration of their work, or at least to pay the equivalent dues and fees to the applicable union.³
 - If any additional personnel were needed beyond the core employees during the life of the contract, the applicable union would be given 48 hours to first furnish employees, after which time the contractor could hire anyone from any source it chose.
 - A contractor performing work on the project for more than 30 days was required to follow the grievance procedures for employees who were not otherwise members of the Trade Council’s unions.

After the PSA was adopted, its requirements were included in the bid specifications for the International Terminal Expansion Project. The day before opening of the bids, a petition challenging the PSA compliance requirement was filed by the ABC and the Asian American Contractors Association, who contended, among other arguments, that the requirement violated State competitive bidding laws. The Superior Court rejected this contention and denied the petition. The Court of Appeal upheld the trial court judgment, on the following basis:

1. Since the mode in which a city chooses to contract is a municipal affair, the relevant competitive bidding requirement was not set forth in State law, but in Section 6.1 of the San Francisco Administrative Code, which requires contract awards over \$50,000 to be let “to the lowest reliable and responsible bidder.”
2. The PSA compliance requirement was not invalidated by Section 6.1, because PSA compliance was required to avoid disruption and delay in completion of the Master Plan, and timely completion of the work being bid was a legitimate and necessary attribute for any bidder to be considered either “responsible” or “reliable.” The court

³The PSA defined “core employees” as persons on the active payroll of the contractor for at least 60 of the 100 days preceding award of the contract, except for executives, managers, supervisors, engineering staff, or office and clerical workers.

CASE LAW GOVERNING PLAs - Continued

relied upon information in the record indicating that the cost of administering the Master Plan projects would increase by \$1.5 million, and the Commission would lose \$13 million of revenue, for every month of delay in completion of the Master Plan, and that inflation alone would add an additional \$4.6 million monthly to the cost of the Master Plan. The record also indicated that delays would result in increased expenditures for the continuation of temporary facilities, and in an unqualifiable loss of tourist revenue to San Francisco, and that significant delays in the completion of one contract would likely have a "domino effect" by causing delays in the completion of other, later-in-time contracts.⁴

3. The court distinguished this case from Neal Publishing Co. v. Rolph (1915) 169 Cal. 190, where a contested bidding requirement affirmatively eliminated non-union contractors from receiving a contract award. The court found Neal inapplicable, because the PSA contained no requirement limiting bidding to union contractors, and the record did not demonstrate that the PSA compliance requirement would deter non-union contractors to such an extent that the diminished pool of potential bidders would create a "palpable risk of materially increasing the cost of the work." In determining that the PSA was not "anti-competitive", in violation of the San Francisco Administrative Code, the court observed that San Francisco's prevailing wage requirement ensured that virtually the same labor wage would be paid on the Master Plan contracts with or without the PSA.
4. Even though the court determined that the San Francisco Administrative Code set forth the applicable competitive bidding law, the court also determined that the PSA compliance requirement would satisfy the State law competitive bidding law as well.⁵

⁴Due to the fact that the financial consequences to San Francisco of delay in completion were "well beyond those implicitly facing all contracting municipalities from the timely completion of every construction project," the court concluded that the Commission's concern regarding delay "was so pervasive that the use of a PSA to modulate labor needs and ensure continuous progress of the work without labor strife was integrally related to the virtues of reliability and responsibility of potential bidders. . . . Given the risk of multimillion dollar overruns caused by even minimal preventable delays, it would render the terms "responsible" and "reliable" bidder meaningless to limit their definitions to matters other than those relating to the ability to complete the work in accordance with the anticipated schedules. Thus, the PSA's objective of eliminating the potential for a significant cause of construction delays was rational and wholly justified on this record as being in the best interests of the public." 59 Cal.App.4th at 39-40.

⁵In addition to these findings, the court also dismissed the ABC's claim that the PSA violated the right of workers to associate, under California Labor Code § 923.

CASE LAW GOVERNING PLAs - Continued

Current Status: The ABC has requested that the California Supreme Court review the First District Court of Appeal decision. If the Supreme Court denies this request, the decision will become "final," and may be cited as legal precedent. If the Supreme Court decides to review the Court of Appeal decision, the decision will be suspended and may not be relied upon as legal precedent. We have been informed that the Supreme Court is not likely to decide whether to review the decision until February or March of 1998.

ABC v. Metropolitan Water District:

On December 15, 1997, the Second District Court of Appeal issued a decision rejecting a challenge to the Metropolitan Water District's (MWD) imposition of a PLA requirement upon contractors bidding for work on the Eastside Reservoir Project.⁶ Like the San Francisco Airport's International Terminal Expansion Project discussed above, the MWD project was a multi-billion dollar construction project, expected to last more than five years, and anticipated, at its peak, to employ more than 1,500 workers. After MWD staff determined that a PLA requirement could increase the potential for on time, effective and efficient construction of the Reservoir Project, a MWD consultant negotiated a PLA with local labor unions and PLA compliance was included in the project specifications. The ABC subsequently challenged the requirement as inconsistent with the State competitive bidding law.

The Court of Appeal found no conflict with MWD's duty to let its contracts to the lowest responsible bidder. Although the decision does not contain the level of detailed analysis found in the San Francisco Airports Commission decision, the court observed that 75 % of all contractors working on the MWD project when the ABC filed its petition were "non-union" contractors, which supported the court's determination that the PLA requirement did not improperly exclude non-union bidders who were willing to abide by the terms of the PLA.⁷

Current Status: We have been informed that ABC is likely to request California Supreme Court review of the Second District Court of Appeal decision. If review is requested, but the Supreme Court denies this request, the decision will become "final," and may be cited as legal precedent. If review is requested and the Supreme Court decides to review the

⁶Associated Builders and Contractors, Inc. v. Metropolitan Water District of Southern California, 1997 Cal.App. LEXIS 1042.

⁷The court also dismissed, without discussing, the ABC's claims that the PLA requirement violated a bidder's constitutional rights to free association and equal protection.

CASE LAW GOVERNING PLAs - Continued

Court of Appeal decision, the decision will be suspended and may not be relied upon as legal precedent.

2. Federal Law

The most significant Federal law issue is whether a PLA requirement is pre-empted by the provisions of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (NLRA). This issue was considered by the U.S. Supreme Court in the *Boston Harbor* decision.⁸ In this case, a court order required a Massachusetts agency responsible for providing water-supply, sewage collection, treatment and disposal services to undertake a \$ 6.1 billion, 10 year project to clean up Boston Harbor, pursuant to the Federal Clean Water Act. The agency's project manager (a private engineering firm), recommended that the agency utilize a PLA to avoid delays by assuring labor stability over the life of the project. The agency subsequently adopted a PLA and incorporated it into the project's bid specifications.⁹

The ABC filed suit to block enforcement of the bid specification imposing the PLA requirement, claiming, among other things, that the requirement was pre-empted by the NLRA.¹⁰ The Supreme Court ruled that the PLA requirement was not pre-empted by the

⁸Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. (1993) 507 U.S. 218, 122 L.Ed.2d 565.

⁹The PLA included the following terms:

- The Building and Construction Trades Council was recognized as the exclusive bargaining agent for all craft employees.
- Specified methods for resolving all labor-related disputes were agreed to.
- All employees were required to become union members within seven days of their employment.
- Use of the Council's hiring halls was required to supply the project's craft labor force.
- The Council agreed to a ten year no-strike commitment.
- All contractors and subcontractors were required to comply with the PLA.

¹⁰Prior Supreme Court decisions have established two distinct NLRA pre-emption principles. The first, known as "Garmòn pre-emption," forbids state and local regulation of activities already regulated by the NLRA. The second, known as "Machinists pre-emption," prohibits state and local regulation of an area that Congress intended to be free of government regulation. See 122 L.Ed 2d, at 574-576. The *Boston Harbor* decision did not consider the ABC's claims that the PLA requirement also was pre-empted by ERISA, violated the Due Process Clause of the 14th

CASE LAW GOVERNING PLAs - Continued

NLRA, because the NLRA pre-emption doctrines only applied to state and local *regulation*, whereas the state agency in *Boston Harbor* was acting in a proprietary rather than a regulatory role. After noting that §§ 8(e) and 8(f) of the NLRA specifically permitted employers in the construction industry - but not other employers - to enter into agreements similar to a PLA (known as prehire agreements), the Court determined that to the extent that a private entity purchasing construction services may chose a contractor based on the contractor's willingness to enter into a prehire agreement, a public entity acting as a *purchaser* of such services should be permitted to do the same.¹¹

DISCUSSION:

As noted above, the U.S. Supreme Court has determined that a PLA requirement does not violate the provisions of the NLRA, and two recent California Court of Appeal decisions have upheld the use of a PLA under competitive bidding laws. However, the latter issue will not be settled in California until the decisions become final or a ruling is issued by the California Supreme Court.

In the event that the decisions become final or are upheld by the California Supreme Court, it is important to note that both cases involved very costly, complex and lengthy projects, where the potential adverse economic consequences of delay were very significant.¹² The *San Francisco Airports Commission* decision to a great degree, and the *MWD* decision to a lesser degree, relied upon these factors to provide the justification needed for imposition of a PLA requirement. For this reason, if a decision were made to proceed with a PLA requirement on one or more City projects, consideration should be given to limiting the use of PLAs to large and/or time-sensitive projects, where the City can adopt appropriate findings regarding the City's demonstrated need to avoid work stoppages and interruptions, in order to justify the imposition of a PLA requirement.

Amendment, and constituted a conspiracy to reduce competition in violation of the Sherman Act, in addition to various state law claims. *Id.*, at 573.

¹¹See 122 L.Ed.2d at 587-580; see also Associated Builders and Contractors v. Contra Costa Water District, *supra*, 37 Cal.App.4th at 471; Associated Builders and Contractors, Inc. v. San Francisco Airports' Commission, *supra*, 59 Cal.App.4th at 36.

¹²The same was true of the cleanup project in the *Boston Harbor* case.

FINANCIAL/POLICY CONSIDERATIONS:

City staff will discuss financial and policy issues associated with the use of PLAs.

MBE/WBE:

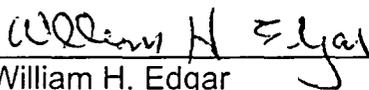
City staff will discuss MBE/WBE issues associated with the use of PLAs.

Respectfully submitted,



Samuel L. Jackson
City Attorney

Approved for City Council Information



William H. Edgar
City Manager