NEW LIABILITIES FOR PUBLIC OWNERS

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Iowa has a long tradition of awarding publicly funded construction contracts to the lowest responsible bidder. This tradition, codified in Iowa Code Sections 73A.18 and 384.99, has served Iowa well in the form of high quality construction at reasonable cost.

Recently, organized labor has attempted to change the way publicly funded construction contracts are awarded, not through legislation, but rather through negotiations with local public entities. More and more public entities are being confronted by labor unions with the proposal that they enter into Project Labor Agreements ("PLAs"). A PLA is a "pre-hire" agreement negotiated between a construction project owner and labor unions before contracts are awarded and any employees are hired. It is made a part of the project bid specifications so that the winning bidder must comply with the PLA.

Although it can take many forms, the PLA typically requires that all employees on the job be hired through union hiring halls and that certain pay, benefit and work rules apply to the project. The labor unions promise that the PLAs will ensure high quality work, skilled workers, and timely completion of projects. Sadly, the PLAs seldom fulfill such promises. Instead, PLAs historically have resulted in cost overruns while entangling the public entity in labor relations matters and unnecessary potential liability.

The problems created by implementation of a PLA start with the fact that too many local government project owners do not negotiate with the labor unions about the terms of the PLA, but merely accept what the unions propose. Construction industry collective bargaining negotiations can be extremely time consuming and complex. The members of county boards of supervisors, city councils and school boards often have no experience in such negotiations and simply cannot invest the time necessary for meaningful and productive negotiations. As a result, the terms of the PLA proposed by the unions tend to be accepted, with little or no change.

Pay rates and benefits may be artificially established higher than the relevant market rates and work rules may be unduly restrictive. Most PLAs also require that most, if not all, of the workers employed on the project be hired through a union hiring hall. The artificially high wage and benefit rates, the restrictive work rules, and the requirement that employees be hired through a union hiring hall discourage many contractors from bidding the project. These factors quickly lead to expensive construction.

A second major problem created by implementation of a PLA is the entanglement of the local government project owner in labor relations issues that may create additional potential liability for the local government entity and its representatives. The recent case decided by the Iowa Supreme Court, Master Builders of Iowa, Inc. v. Polk County, demonstrates that local government entities entering into PLAs may violate the Iowa Right to Work Law and the National Labor Relations Act.

In Master Builders, the PLA entered into by the Polk County Board of Supervisors and the Central Iowa Building and Construction Trades Council was challenged by Master Builders of Iowa through a petition for declaratory judgment and injunctive relief. Because the challenge was in the form of a declaratory judgment action, the facts that were available to the court were quite limited. On this limited factual record, the Iowa Supreme Court ruled that PLAs for public projects are not per se illegal.

More specifically, the Court ruled that the use of hiring halls in a PLA is not per se invalid under the right to work law. Only if the hiring hall is used to discriminate between union and non-union members would the PLA violate the law. The Court found that there simply was not enough evidentiary support in the record to conclude that such discrimination would occur in the Polk County PLA. The Court found that there was the potential for discrimination, but the hiring hall provision did not discriminate solely by being incorporated in the PLA. As stated by the dissenting judge however, "[I]t will be easy for union personnel to prefer their own members over nonunion workers on the subjective ground they are more qualified."

Perhaps of more significance is the Court's statement that even though it has ruled that the PLA is not per se illegal, it recognizes that any employee who believes they have been discriminated against by the hiring hall because they are not a union member retains the right to take legal action against the local government project owner and its representatives on the basis that they have discriminated against the employee in violation of Section 158(a)(3) of the National Labor Relations Act. Section 158(a)(3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

As recognized by the Court, if a qualified non-union member is not refered for work under a PLA, strong evidence will exist of illegal discrimination. Litigation almost certainly will result, naming the local government and its representatives as defendants. If a number of qualifed non-union members are not referred for work, a class action suit is possible. In all likelihood, the litigation will challenge the entire hiring process of the PLA and will seek injunctive and monetary relief. The result is a strong possibility of delay in the project and exposure to significant monetary damages.

So what does this mean to a local government entity that has been approached by a group of labor unions with the proposal that they agree to a PLA? It means that if the entity agrees to the PLA, it has subjected itself, and probably its representatives, to substantial potential liability. This potential liability can be completely avoided if the local government does not agree to a PLA but instead leaves all aspects of labor relations to the general contractor. Historically, leaving labor relations to the general contractor has proven to be a successful strategy for obtaining timely and efficient completion of publicly funded construction contracts.

Bottom line, PLAs involve local government entities in labor relations matters for which they have little experience or time. PLAs expose local governments and their representatives to litigation and liability that can be easily avoided simply by following the well established construction procedure of allowing the general contractor the authority to deal with labor relations on the project.