ATTACHMENT #3

CBJ Law Department MEMORANDUM

To: Amy Gurton Mead, City Attorney

From: Christopher F. Orman, Assistant City Attorney

Date: July 24, 2013

RE: Project Labor Agreements

"A project labor agreement (PLA) is a pre-bid contract between a construction project owner and a labor union (or unions) establishing the union as the collective bargaining representative for all persons who will perform work on the project. A PLA generally requires all bidders on the project to hire workers through the union hiring halls; follow specified dispute resolution procedures; comply with union wage, benefit, seniority, apprenticeship and other rules; and contribute to the union benefit funds."[1]

The Assembly – consistent with the case law – has never adopted a resolution requiring PLAs for certain projects.[2] Instead, the Assembly passed a motion on March 8, 2008 generally supporting PLAs "to the extent allowed by law." [3] During this argument on the motion, Mayor Botelho stated each PLA would be reviewed "on a case by case

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[1] *Laborers Local #942 v. Lampkin*, 956 P.2d 422, 428 (Alaska 1998).

[2] In 2008, the Assembly considered Resolution No. 2437 which would have required a PLA for all municipal contracts in excess of $4,000,000. Based on emails including John Hartle and Barbara Ritchie, the resolution was never adopted because a blanket authority would be antithetical to the case law and policies espoused therein. *Lampkin* notes a PLA could be upheld for a myriad of reasons, but the dollar amount of the project alone would not be one of those reasons.

[3] Assembly Meeting No. 2008-07 Notes, p. 4-7 (March 10, 2008)

basis . . . applying the law," even though the Assembly noted a general policy of supporting PLAs. Therefore, in examining whether a PLA would be permitted "to the extent allowed by law" the CBJ must consider: (1) whether the PLA would violate equal protection rights; and (2) whether the PLA undermines the policies underlying the Borough's procurement code.[4] Analyzing the validity of a PLA occurs on a case by case basis and when an agency determines – based on its own policy considerations – whether a PLA would be appropriate for a specific project.[5]

I. Equal Protection

"Analysis of claims under the equal protection clause embodied in article 1, section 1 of the Alaska Constitution requires a sliding scale approach that often affords greater protection to individual rights than that provided by the federal constitution."[6] When "the right to engage in an economic endeavor" such as to bid on a city project has been infringed, the court considers "whether the [City's] interest in requiring successful bidders to sign the PLA was important and whether the nexus between that interest and the PLA was close."[7]

The Alaska Supreme Court has found equal protection rights were not violated by a PLA entered by a borough for a complex school project to ensure the project would be completed on schedule, be below budget, could secure meaningful labor concessions, would be free of labor strife, and would have uniform grievance procedures in place. In

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[4] *Lampkin* at 428 and 432.

[5] *Id.*; This means the CBJ Law Department analyzes whether a PLA would pass legal muster. The choice on whether to use a PLA rests with the department analyzing the project. A department can always choose to not use a PLA, though the political concerns are clear from the Assembly's 2008 motion.

[6] *State Dept. of Transp. & Labor v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 631 (Alaska 1989).

[7] *Lampkin*, 956 P.2d at 430.

Laborer's Local #942 v. Lampkin, the Fairbanks North Star Borough decided to renovate Lathrop High School; a $20 million project.[8] This was one of the biggest projects undertaken by the Borough.[9] Before the bidding process commenced, the Borough Mayor approached the Fairbanks Building and Trades Council.[10] A PLA was produced and a resolution was passed by the assembly which outlined the reasons for the PLA, such as

> to meet the construction time schedules for the projects, to ensure that the projects will be completed with qualified Alaskan workers, to ensure that the projects will meet the highest standards of safety and quality, to avoid labor disputes or conflicts, and to promote overall stability.[11]

The PLA required all contractors to sign the PLA, and all employees under the PLA to join their respective Unions. The PLA established certain grievance procedures, and made the Unions the "sole and exclusive bargaining representatives with respect to rates of pay, hours, and other conditions of employment."[12] A group of non-union employees filed suit, claiming the PLA violated equal protection rights.[13] The Alaska Supreme Court ruled the PLA did not violate equal protection rights because: (1) the PLA promoted labor stability; (2) the Borough had previously used PLAs to good results; (3) the project was complex; (4) the PLA ensured the project would be completed in a timely fashion; and (5) by ensuring stability and completing the project in a timely fashion,

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[8] *Id.* at 427.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 428 fn. 2.

[12] *Id.* at 428. This fact makes *Lampkin* unique from cases in other states. See *Associated Builders and Contractors, Inc. v. Southern Nevada Water Authority*, 115 Nev. 151, 979 P.2d 224 (Nev. 1999). Other states have found a PLA did not violate the procurement code if it allowed all contractors to bid, required signing the PLA, but did not require all contractors to join their respective unions. *Lampkin* upheld a PLA in this circumstance. The dissent notes this problem and cites cases to support its analysis.

[13] *Id.* at 430.

economic savings were likely.[14] As a result, the Alaska Supreme Court concluded the PLA served an important interest and there was a close relationship between the Borough's interest and the PLA which had been entered.[15]

Many projects have facts which would prevent a PLA from being rendered unconstitutional for equal protection reasons. A project may be complex in that it requires the use of several general contractors, subcontractors, and laborers wherein organizing the workforce becomes paramount; in particular if the PLA aims to resolve labor disputes through one intermediary. If out of state contractors are being used, then there are economic and labor stability considerations which will arise. Furthermore, a complex project will often be time sensitive; thus a PLA can ensure flexible scheduling to aim to have a task completed on schedule. PLAs can, as a result, create economic savings which can be analyzed and addressed where a PLA is being considered. If such facts exist, a PLA will withstand a constitutional attack for equal protection reasons.

II. Reasonable basis to the interests underling the CBJ's procurement code.

"Because of the overlap between the interests underlying the Borough's procurement code and the "important interests" justifying the Borough's impairment of the right of non-union workers to engage in an economic endeavor [the] analysis of the PLA under the equal protection clause is fundamentally similar to [the] analysis of its validity under the procurement code."[16] Despite the similarity in the analysis, there are certain policy differences. A procurement code's competitive bidding code serves

> To prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices

[14] *Id.* at 431-432.

[15] *Id.*

[16] *Id.* at 435 fn. 17.

> practicable. The requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.[17]

These policies balance competitive bidding with the interests of the public. Therefore, when considering these polices, the validity of a PLA under the procurement code will be based on whether "the Borough had a reasonable basis to determine that the PLA furthered the interests underlying the Borough's procurement code."[18] The City cannot provide a "post-hoc rationalization" for the PLA, but must outline the reason via resolution prior to entering a PLA.[19]

A PLA in Fairbanks for renovating a high school was reasonably related to Fairbanks' procurement code's policies. In *Lampkin*, the Alaska Supreme Court analyzed a PLA for a $20 million renovation of Lathrop High School.[20] The Fairbanks procurement code stated,

> *Maximum practicable competition*. All specifications shall be drafted so as to promote overall economy for the purposes intended and encourage maximum free and open competition in satisfying the borough's minimum needs."[21]

The Alaska Supreme Court in interpreting the Fairbanks procurement code, ruled the PLA for the Lathrop School Project reasonably related to the interests of the procurement code because: (1) the project was complex; (2) the PLA ensured flexible scheduling to

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[17] *Id.* at 434.

[18] *Id.* at 435.

[19] *Id.* at 433.

[20] *Id.*

[21] *Id.* The CBJ's procurement code grants more discretion to the assembly and lacks this any broad declaration regarding competition. *See* CBJ 53.50.050(c)(3) [the contract "shall be awarded to the responsive and responsible offeror **whose proposal is determined to be the most advantageous to the City** and Borough of Juneau."] Given the history of emails and correspondence between CBJ Law and the assembly, the issue of the procurement code and its scope appears inapplicable here.

not interfere with students and classes; (3) the PLA ensured flexible scheduling to eliminate potential strikes or other labor difficulties; and (4) the PLA ensured despite the scheduling the costs would be kept to a minimum.[22] Therefore, the Alaska Supreme Court found the Fairbanks Borough's PLA "does not violate the mandates of its procurement code" because it had a reasonable basis to granting competition while protecting the public's interests.[23]

From Alaska cases and pertinent out of state cases, a list can be created containing the various reasons a PLA has been deemed reasonably related to the interests of a procurement code. In a 1999 Attorney General Decision titled "The Legality of Project Labor Agreements," the State listed the holdings and reasons given by various courts for upholding a PLA. The list includes:

(1) the construction project is very complex;

(2) the project is to be constructed over an unusually long period;

(3) there has been a history of labor strife on past projects concerning the same facility;

(4) there are demonstrable cost savings or other efficiencies flowing from a project labor agreement;

(5) the owner-agency is operating under court mandated deadlines;

(6) there is some unique feature of the project which necessitates the use of an agreement;

(7) the project unquestionably presents special challenges to the owner-agency;

(8) the project requires multiple general contracts or an unusually large number of contractors or sub-contractors;

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[22] *Id.*

[23] *Id.* at 435.

(9) the scope of the project could result in conflicts between competing labor unions regarding jurisdiction over the same type of work.[24]

Examining this list[25], the "crux of the court's concern [is] that the agency show 'something more' than a generalized desire for labor stability so that the work will be completed on time."[26] Given the factors provided above are not all inclusive, the CBJ Assembly has recognized a tenth factor: how many projects are occurring in Juneau at the same time.[27] This tenth factor recognizes if there are several large projects occurring at the same time the labor force may be depleted; thus a PLA can ensure the work on this specific project will not be delayed and that sufficient and capable workers will be handling the project.

The same facts affirming the legality of a PLA from an equal protection attack are echoed as to the legality of the PLA pursuant to the procurement code analysis. A project may be complex in that it requires the use of several general contractors, subcontractors, and laborers wherein organizing the workforce becomes paramount; in particular if the PLA aims to resolve labor disputes through one intermediary.

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[24] Joseph Perkins, *Legality of Project Labor Agreements*, 1999 WL 345978 * 11-12 (Alaska A.G. 1999) ["This list of factors is not exhaustive. The cases from which the above list is derived are: *Boston Harbor*, 113 S.Ct, 1190; *Lampkin*, 956 P.2d 422; *New York State Thruway*, 666 N.E.2d 185; *Assoc, Builders v. San Francisco Airports Comm.*, 68 Cal.Rptr.2d 737; *Assoc, Builders v. Metropolitan Water District of So. Cal.*, 69 Cal.Rptr.2d 885 (Cal. App. 1997) review granted, 951 P.2d 1182 (1998); *Enertech Electrical, Inc. v. Mahoning County Commr's.*, 1994 WL 902493 (D.C.N.D. Ohio 1994); *Assoc, Builders v. Mass. Water Resources Auth.*, 1990 WL 86360 (D. Mass. 1990) (the district court decision affirmed in Boston Harbor); *Utility Contractors Assoc. v. Commr's of Mass, Dep't of Public Works*, 1996 WL 106983 (Mass. Super. 1996).].

[25] Calling these "factors" or a "factor list" may be a misnomer. In *Lampkin*, only three of these factors were present: (1) complex project; (2) involved a school with students, therefore a unique feature existed; and (3) the project required multiple contractors. While the AAG Decision regarding PLAs mentions these as factors, they really constitute a list of holdings from various cases. How many of these holdings must be present to satisfy the procurement code remains unclear, though *Lampkin* provides at least a base level for the analysis.

[26] *Lampkin*, 956 P.2d at 433.

[27] Noted at CBJ Assembly Meeting 2008-07.

Furthermore, a complex project will often be time sensitive; thus a PLA can ensure flexible scheduling to aim to have a task completed on schedule. A department will also want to examine the cost-savings from a PLA which includes flexible scheduling and creates a uniform policy for handling labor disputes. If such facts exist, a PLA – if a department chooses to use a PLA – will withstand an argument of illegality as to the CBJ's procurement code.

Conclusion

A PLA will be upheld if the City can articulate important reasons for the agreement and show the agreement has a reasonable relationship to the procurement code's policies. Historically, PLAs are used in complex projects, such as renovating a school, because those projects include a myriad of general and sub-contractors ranging from electrical, plumbing, and architects to carpentry, and other more specialized ornamental contractors and work. A PLA in those circumstances will ensure: (1) the labor associated with such a project will remain coordinated no matter other projects transpiring; (2) a large and sufficient labor force; (3) save money by having negotiations and issues dealt with by one intermediary; and (4) avoid unnecessary delays on time sensitive projects. A school renovation for example, triggers all of these concerns and thus a PLA can meet the legal standards outlined herein.

The cost of the project alone – while an aspect in analyzing a project's complexity and certainly could be considered in how a PLA could generate cost savings – is not dispositive.[28] This explains why the Assembly resolution was not adopted. Instead, the

[28] Of interest, in 2009 President Obama issued an executive order which recommended PLAs for projects costing more than $25 million. However, Obama's executive order provides some great analysis and language about PLAs, such as not requiring PLAs to be used, but only adopting a policy of their use. This executive order revoked President Bush's executive orders which adopted a more competitive bidding policy.

focus turns on whether the project will require a myriad of general and subcontractors and if coordinating those groups on a long term project will be served by a PLA.

But the ultimate decision on whether to use a PLA rests with the department. There are no legal precepts requiring a PLA be used; only political (the assembly's possible predilection) and policy reasons (those by the department). If a department believes a PLA will serve the interests and concerns raised by a project, then the legality of that PLA can be examined for risk assessment purposes by the CBJ Law Department. The decision to not use a PLA does not touch upon any legal issues, and thus does not trigger a risk assessment.

ATTACHMENT #4

MEMORANDUM

State of Alaska
Department of Law

TO: Joseph L. Perkins, P.E.
Commissioner
Department of Transportation

DATE: January 6, 1999

FILE NO.: 665-98-0098

TELEPHONE NO.: 451-2811

SUBJECT: Legality of Project Labor Agreements

FROM: Paul R. Lyle
Assistant Attorney General

INTRODUCTION

The Department of Transportation and Public Facilities (department) is exploring the use of a specification in selected rural airport construction contracts that requires successful bidders to enter into project labor agreements. The agreements would require the contractor to obtain workers for that project exclusively through a union or trade council job referral system that would recruit and train workers, "including those in the immediate community," to perform work on the project. You have asked whether project labor agreements may be lawfully required in airport construction contracts in rural communities. While our opinion is tailored to this specific issue, the analysis in this opinion applies to all departmental construction projects.

The draft specification we have reviewed appears to require the successful bidder to negotiate a project labor agreement after obtaining a construction contract. However, project labor agreements are usually negotiated between owners and unions before the contract is advertised for bids. *See, e.g., Building & Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190, 1192-93 (1993) (*"Boston Harbor"*). This approach is necessary in order to ensure a level competitive playing field for prospective bidders. Bidders cannot bid on a contract if they cannot ascertain the labor rules with which they will be required to comply once the contract is awarded. Therefore, this memorandum assumes that the department would undertake to negotiate with an appropriate trades council the terms of the project labor agreement before any rural airport construction project requiring use of a project labor agreement was put out to bid. The project labor specification would need to be revised to require the successful bidder to sign the project labor agreement as a condition precedent to the award of the contract.

> advancement of the interests embodied in the competitive bidding statutes.

666 N.E.2d at 190 (emphasis added).

If the department proceeds with a project labor agreement, with or without first seeking to amend the procurement regulations, then it should be prepared to demonstrate the state's specific needs for the agreement. In addition, the department should be prepared to demonstrate the rational relationship between the terms of the agreement and the twin goals of obtaining the best work at the lowest price and the prevention of favoritism, fraud or improvidence in the award of the contract. It will be especially important for the department to demonstrate how the agreement "promotes overall economy" for the project in order to comply with AS 36.30.060(c).

It would be advisable for the department to prepare a record of decision that sets out, in writing, the specific state needs (unrelated to regional hire) that would be met by the terms of a project labor agreement.[15] An agreement could then be negotiated with a trades council that satisfactorily meets those needs. If the department does not first seek to have the Department of Administration change the procurement regulations, it will also be necessary for the department to explain why the state's needs cannot be met through any less restrictive specification than one mandating that project labor be acquired from a single source and why no other manner of project hiring will suffice. 2 AAC 12.090; 2 AAC 12.790.

Examples of cases upholding the use of project labor agreements under competitive bidding laws include those where:

(1) the construction project is very complex;

(2) the project is to be constructed over an unusually long period;

(3) there has been a history of labor strife on past projects concerning the same facility;

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[15] The record of decision envisioned here would be similar to the decisional document prepared in state condemnation cases. *See Ship Creek Hydraulic Syndicate v. State*, 685 P.2d 715 (Alaska 1984).

(4) there are demonstrable cost savings or other efficiencies flowing from a project labor agreement;

(5) the owner-agency is operating under court-mandated deadlines;

(6) there is some unique feature of the project that necessitates the use of an agreement;

(7) "[t]he project unquestionably present[s] special challenges" to the owner-agency, *Lampkin*, 956 P.2d at 435;

(8) the project requires multiple general contracts or an unusually large number of contractors or subcontractors;

(9) the scope of the project could result in conflicts between competing labor unions regarding jurisdiction over the same type of work.[16]

As stated earlier, *post-hoc* rationalizations for the adoption of a project labor agreement will not be tolerated by the supreme court. *Lampkin*, 956 P.2d at 433; *New York State Thruway*, 666 N.E.2d at 193-94. A generalized "'desire for labor stability so that work will be completed on time'" will also be insufficient to sustain the use of a project labor agreement under the procurement code. *Lampkin, id.* (quoting *New York State Thruway, id.*).

Project labor agreements that "have as their purpose social policy making, such as remedying racial and gender bias, will not be sustained." *New York State Thruway*, 666 N.E.2d at 194. In addition to being unconstitutional, a project labor

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[16] This list of factors is not exhaustive. The department may be able to identify other factors that, standing alone or in combination, justify the use of a project labor agreement. The cases from which the above list is derived are: *Boston Harbor*, 113 S.Ct. 1190; *Lampkin*, 956 P.2d 422; *New York State Thruway*, 666 N.E.2d 185; *Assoc. Builders v. San Francisco Airports Comm.*, 68 Cal.Rptr.2d 737; *Assoc. Builders v. Metropolitan Water District of So. Cal.*, 69 Cal.Rptr.2d 885 (Cal. App. 1997) *review granted*, 951 P.2d 1182 (1998); *Enertech Electrical, Inc. v. Mahoning County Commr's.*, 1994 WL 902493 (D.C.N.D. Ohio 1994); *Assoc. Builders v. Mass. Water Resources Auth.*, 1990 WL 86360 (D. Mass. 1990) (the district court decision affirmed in *Boston Harbor*); *Utility Contractors Assoc. v. Commr's of Mass. Dep't of Public Works*, 1996 WL 106983 (Mass. Super. 1996).