

# 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.

ATTACHMENT #4

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation & Public Facilities  
A.G. file no: 665-98-0098

January 6, 1999  
Page 18

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.<sup>15</sup> 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;

---

<sup>15</sup> 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).

ATTACHMENT #4

Joseph L. Perkins, P.E., Commissioner  
Department of Transportation & Public Facilities  
A.G. file no: 665-98-0098

January 6, 1999  
Page 19

- (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.<sup>16</sup>

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

---

<sup>16</sup> 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).