



## **STUDY: PROJECT LABOR AGREEMENTS ON CHAPTER 149a PROJECTS January 23, 2019**

You asked us to study whether a Project Labor Agreement on the Worcester Ballpark would be necessary or appropriate.

Under a Project Labor Agreement (PLA), all hiring is typically done through the union halls. Non-union contractors and workers may participate, but they must follow this rule, and pay dues to the respective union. In considering the question, we consider the requirements of MGL Chapters 149 and 149a public procurement, which are designed to open bidding to all qualified contractors, and yield the lowest qualified price for any component of the project. PLAs cost more, historically, and this has been cited in the 2003 and 2017 studies by the Beacon Hill Institute, discussed below.

The 2003 study cites a number of Massachusetts communities that embarked on a project utilizing a PLA. A sampling of 126 school projects in the City of Boston, from 1995 – 2003, found that PLAs caused bids to rise by 14%, and caused final construction cost to rise by 12%.

The City of Fall River experienced a similar situation when they rescinded the PLA requirement on several school projects and saw a savings of 8% to 12%.

The City of Lynn initially agreed to PLAs for a series of school projects, but this was challenged in court by the nonunion trades. The court granted an injunction, and the City opened the bidding without a PLA. Similar in Brockton, and even in Worcester, with the City Square project and the new Worcester Vocational School building, where PLAs were rejected.

The City of Malden was challenged by the non-union community when it instituted a PLA on a multiple-school program. The courts found in favor of the City, stating that, because of the complexity and timing of opening a number of schools in time for the school year, and the size of the program, that a PLA was justified. In this case, the

argument was that the PLA would ensure the numbers of workers required to meet these requirements.

The court in the Malden case wrote: “a PLA will not be upheld unless (1) a project is of such size, duration, timing, and complexity that the goals of the competitive bidding statute cannot otherwise be achieved and (2) the record demonstrates that the awarding authority undertook a careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals.”.

It went on to provide this helpful guide to use in considering whether a PLA is appropriate for any project, making it clear that PLAs can and should be carefully considered on a project by project basis:

“We do not articulate a bright-line, litmus-test standard for determining when the use of a PLA is appropriate. Nor do we conclude that a PLA will be justified in all, or even most, circumstances. A project must be of substantial size, duration, timing, and complexity, and the interplay between all four of these factors must be considered. It may be that, in certain cases, the sheer size of a project warrants the adoption of a PLA. In most circumstances, the building of a single school will not, in and of itself, justify the use of a PLA. Our conclusion here relies on the recognition that the timing of this project, given its size, duration and complexity – the “carefully choreographed dance” – makes a PLA necessary to assure the completion of the project on time, within budget, and on a schedule which provides students, parents, teachers, and school administrators the time necessary to make all the required, complicated transitions.”

The 2017 study analyzed 88 school projects in Ohio that were undertaken between 2003 and the present. Of the 88 projects, 15 were built under a PLA. BHI found that PLAs increase actual construction costs by \$23.12 (or 13.12%) per square foot. They increase the winning bids by \$25.06 (or 15.55%) per square foot. The BHI study controlled for such features such as whether a school project was new or renovated, whether it called for a new gym or theater and the number stories above grade. “The evidence is growing that PLAs are adding millions of dollars to construction costs, not only in Ohio but all around the country,” said David G. Tuerck, BHI Executive Director. “Municipal leaders everywhere need to rethink the whole of idea of entering into PLAs for school or other construction projects, in that PLAs result in spending more tax dollars than necessary on these projects and thus reduce the number of projects that can be built.”

So, in considering whether a PLA is appropriate for the ballpark project, we find that the Malden decision is a helpful guide. We first note that the city is not just building a

ballpark, but is also coordinating its work with MassDOT's planned reconstruction of Kelley Square, certainly one of, if not the most notorious of all Worcester traffic locations, and the number one accident location in the Commonwealth of Massachusetts. It is doing this at a time of impressive growth for Worcester, which is now undertaking several high school projects, and is also witnessing a large amount of private investment, with more likely to be on the way.

Turning to the test, we have considered the following questions:

- Is the project of substantial size?
- Is the project expected to last an extended duration?
- Is the timing such that it presents great risk to the City for failure to be completed on time?
- Is the project significantly complex?

The argument for PLAs is that they keep projects on time and on budget, and that they help assure the availability of qualified skilled labor. Entities seeking to employ a PLA do cite various reasons for doing so. In one federal study from 2011, Hill International noted: "when a project scope is clearly defined and labor requirements are clearly understood in advance, for a project that requires multiple trades in a geographic area where many projects are on-going and competing for skilled labor, and where an organization exists that can enter into an agreement to provide access to an efficient, trained labor supply and can negotiate beneficial terms and conditions, then a PLA makes sense and its potential benefits may be analyzed and documented in a feasibility study."

There are a multitude of qualified union and non-union contractors across all trades in the Central Massachusetts market. Even in these robust economic times, there are no labor shortages to date, and none are expected within the period that the Ballpark project will be underway. The Construction agencies of MA (Associated General Contractors of MA, etc.) are concerned that labor shortages are possible, but that has not been the case to date. The unions are not making any concessions to owners or municipalities when demanding a PLA, which decreases even more any appeal of a PLA.

Historically the unions are not as able to guarantee a diverse workforce, either. The Worcester Employer and Inclusionary Participation policy can be utilized as a contract requirement with the CM community, which they will pass down to their subcontractors, regardless of any union affiliation.

This writer has experience on union and non-union, public and private projects, throughout the Commonwealth, as a Project Manager/Project Executive for both Gilbane and Skanska. Of those projects over the last 15 years, only Harvard University initiated a PLA, for the Allston Campus expansion. The PLA was initiated by the University to incorporate some Harvard centric requirements (no work on Commencement day, certain local restrictions on parking, etc.), and to ensure no interruption of the work. The project cost had the potential to grow to \$1B, certainly a huge project both in cost and complexity. None of the public school districts I have been associated with, all of which had a date-certain to be open for the start of school, instituted a PLA. The same holds true for the public and private universities, where a schedule delay would impact the beginning of the various Division 1 sports, or classes, or research. In all cases, the construction contracts included certain language addressing the required milestone dates, and the penalties for not meeting those dates. The penalties were financial, either in terms of a cost per day penalty (Liquidated Damages), or bearing the cost of alternate facilities and transportation for athletes and/or students (Consequential Damages).

On the many projects that Skanska (and all other CMs) build in Boston, the work force is largely union. Non-union contractors do participate without issue. One of the factors that increase construction costs on these projects are requirements from the unions to have some number of support workers on site at all times, whether needed or not. These workers merely drive up the cost without a resultant benefit to the project, but the unions require them.

It would be difficult to argue that the new Worcester Ballpark is of such size, duration, timing and complexity that it would justify the implementation of any type of project agreement beyond local and/or minority participation. The construction schedule is ample, the work no more complicated or complex than any of the Worcester school projects, the cost 30% less than the current Worcester high school project, and the size smaller than the high school projects in overall square footage. Granted there are specialties in Ballpark design that do not exist in schools, but there are complex elements (labs, full food service, workshops, gymnasiums, etc.) in the technical programs in the schools that far exceed those in a Ballpark.

While the current and anticipated construction market in Central Massachusetts is robust, it is not anticipated that there will be a shortage of skilled labor in any trade. The very large projects, such as MGM Grand in Springfield and the Science Center at Amherst College, are complete. The activity on other college campuses is robust, with a number of projects in various stages of completion during the course of the Ballpark

project. In fact, Skanska is the Owner’s Project Manager for two significant projects at the College of the Holy Cross, which will run concurrently with the Ballpark project. The Holy Cross projects will be union–only at the choice of the college. None of the ongoing or anticipated projects in the region will deplete the available labor force, according to industry associations.

It is likely that many, if not all of the Construction Management firms that ultimately respond to the RFQ/P for the construction of the Ballpark will have union affiliation. To date, firms that are expressing interest in bidding on the project are Gilbane, Consigli, Shawmut, Fontaine, Walsh Brothers and Suffolk. Some of these firms will team with national stadium builders, but all of the firms listed are signatory to at least two unions (Carpenters and Laborers).

The Letter of Intent that has been executed between the City and the Team includes a date for beneficial use and occupancy of the Ballpark “no later than February 1, 2021”, and “Opening Day commencing April, 2021”. These dates will be included in the construction contract, and the remedy for the City will be liquidated damages in favor of the City. It is, of course, expected that the City, the Team, the Designer, the City’s OPM and the selected Construction Manager will all manage the work to be complete in advance of these dates.

The Massachusetts public procurement laws were established to provide, in a pre-qualified environment, fair and open competition across all trades. This has proved to provide the lowest responsible cost for public projects, and any firm, whether union or not, merely needs to be prequalified by DCAMM to submit a proposal.

Respectfully submitted,

-----

Keith Martin