

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 2021-00803**

**ASSOCIATED BUILDERS AND CONTRACTORS MASSACHUSETTS CHAPTER
and others¹**

v.

TOWN OF BRAINTREE and another²

**MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARY INJUNCTION**

Defendant Town of Braintree has requested bids for the construction of a new South Middle School to replace a 65-year-old school with that name. The bid specifications require that the selected general contractor enter into a Project Labor Agreement (“PLA”) with Defendant Quincy & South Shore Building Trades AFL–CIO (the “Union”) that would require the use of union laborers and unionized subcontractors on the Project, in exchange for, among other things, a Union commitment that there would be no strikes or work stoppages. In this lawsuit, four non-union contractors and two associations of contractors sue to enjoin the inclusion of the PLA in the project documents.

Plaintiffs have requested a preliminary injunction requiring Braintree to rebid the project without including the PLA requirement. I heard oral argument on September 7, 2021. Since

¹ Merit Construction Alliance, General Mechanical Contractors, Inc., Fernandes Masonry, Inc., LeVangie Electric Co., Inc., and Wayne J. Griffin Electric, Inc.

² Quincy & South Shore Building Trades Council, AFL-CIO. At the preliminary injunction hearing, I allowed this party's motion to intervene as a defendant.

then, Plaintiffs and both Defendants have submitted additional factual materials, or legal argument, or both.

For the reasons set out below, I will issue the requested injunction.

Background

The Braintree school system includes two middle schools: East Middle School and South Middle School. Traditionally those two middle schools served grades 6 through 8.

In December 2015, Braintree decided to expand the two middle schools to include grade 5. This plan was a reaction to the severe space constraints in Braintree's six elementary schools due to general enrollment growth and the expansion of specialized programming for special needs students. Moving grade 5 to the middle schools would free up classrooms in the elementary schools so that those schools would not require expansion. To expand the capacity of its middle schools to serve the fifth graders, Braintree decided to take different approaches to the two middle schools: it would renovate and physically expand East Middle School, and it would replace South Middle School by building a new school. This lawsuit arises from Braintree's plans to build that new South Middle School.

Braintree first obtained a state grant of about \$40,000,000 for the renovation and expansion of the East Middle School. The state funding agency, the Massachusetts School Building Authority, made that grant contingent on Braintree's later construction of the new South Middle School. Braintree put the East Middle School project out to bid without including a Project Labor Agreement in the project documents.

Construction at East Middle School began on time in April 2018. The students remained at the school during construction. The project was initially scheduled for completion in August 2020, but due to COVID that date was adjusted to September 5, 2020. Braintree's affidavits

detail certain delays during the construction project at East Middle School, but the parties agree that the project was not delayed by any labor troubles, even though the teachers union contract expired during the construction period. At the start of one school year – the affidavit of the Interim Superintendent does not make clear which year – occupancy of East Middle School was delayed by one day because of construction. Braintree’s affidavits also point to various difficulties in operating a school while that school was being renovated and physically expanded.

Apparently the expanded and improved East Middle School has been occupied by students in Grades 5 through 8 since September 2020, even though Braintree contends that the general contractor has not yet met the final completion requirements. The fifth graders now at East Middle School came from four of the six elementary schools, freeing up space at those four schools, as intended. Fifth graders remain at the other two Braintree elementary schools, awaiting the opening of the new South Middle School.

Meanwhile, Braintree obtained a state grant of about \$32,000,000 for the construction of the new South Middle School. Braintree has now put that project out for bid. Braintree’s timeline contemplates that construction will begin on October 12, 2021 and will conclude on August 18, 2023.

The town body supervising both projects is the Braintree School Building Committee (the “Committee”). At two public meetings in 2020, the Committee considered whether to include the PLA in the project documents for the construction of the new South Middle School.

At the first meeting, on March 9, 2020, Committee Chair Nicole Taub, who was then the Interim Chief of Staff and Operations for Braintree, expressed her desire to “start having discussions on project labor agreement (PLA) for the south middle school.” Minutes, Exhibit A to Taub Affidavit, at 2. Chair Taub asked Michael Carroll, one of three representatives present

from Braintree's construction project manager Hill International, "how a PLA could be incorporated in the project. Mr. Carroll noted a PLA could be added if the district chose to do so." *Id.* He briefly described the implications of a PLA, including "that this could reduce the overall eligible subcontractors, which ultimately could affect the cost of the project." *Id.* Mr. Carroll mentioned that the previous administration had considered a PLA for the East Middle School project, but decided not to follow that course. Despite the absence of a PLA, Mr. Carroll said, 65% of the labor on that East Middle School project was union. The Committee then voted to table the subject of a PLA until its next meeting.

Shortly after this meeting, the world went largely virtual as COVID spread. The Committee began conducting virtual public meetings, apparently monthly. The subject of a PLA for the South Middle School construction project did not arise again until the Committee's virtual meeting of September 14, 2020.

The minutes of that meeting report that both Committee Chair Taub (by now Braintree's Chief of Staff and Operations) and Mayor Kokoros "reported on the value and benefits associated with implementing a project labor agreement (PLA) for the South Middle School project." Minutes, Exhibit B to Taub Affidavit, at 2. Someone – I infer from context perhaps Chair Taub – explained that "a PLA is good for a project of this size, duration, timing and complexity to ensure timely completion to meet the enrollment needs of the schools, furthered statutory goals for school construction, and help increase workforce diversity." *Id.* It was mentioned that Braintree had "used a PLA, in the past, on a South Middle School repair and renovation project that was finished on time and within budget." *Id.*

Mayor Kokoros then listed some reasons for considering a PLA. The first was that a PLA was an "agreement by building trades to continue[] work without delay due to labor

stoppage,” which was important because the South Middle School construction schedule “has a direct impact to correcting school overcrowding within the district.” *Id.* Meeting the construction schedule was also important, the Mayor said, because of “considerations of parity”; the fifth graders at the newly renovated East Middle School had “technology advantages” over the fifth graders who remained at the two elementary schools awaiting construction of the new South Middle School. *Id.* Finally, the Mayor suggested, a “PLA will support more diverse work force.” *Id.*

The only other Committee member commenting on the PLA was Shannon Hume, the Committee Vice-Chair who was also the President of the Town Council. Vice-Chair Hume said that she was on the Committee when it used a PLA for the earlier South Middle School repair and renovation project, and “in her opinion that the project was on time and on budget because of the PLA.” *Id.* Vice-Chair Hume said that “the outcome of the [current] project” would be impacted by “any scheduling or weather delays.” *Id.* She further noted that the “unions have the resources to bring more trained people for all trades to correct delays and [their] impacts and Braintree will know the cost of a completed on time project up front.” Vice-Chair Hume then moved to include a PLA in the South Middle School bid documents, and her motion carried unanimously.

Analysis

1. PLAs and the Competitive Bidding Statute

The Massachusetts competitive bidding statute, M.G.L. c. 149, §§ 44A- 44H, encourages robust bidding on public construction projects, to meet two statutory purposes. “The purpose of competitive bidding statutes is transparent: ‘to ensure that the awarding authority obtain the lowest price among responsible contractors’ and ‘to establish an open and honest procedure for

competition for public contracts.” *John T. Callahan & Sons, Inc. v. Malden*, 430 Mass. 124, 128 (1999), quoting *Modern Continental Constr. Co. v. Lowell*, 391 Mass. 829, 840 (1984) (further citation omitted). Project labor agreements discourage non-union contractors from bidding, and in that way “do have some anti-competitive effect.” *Callahan*, 430 Mass. at 131. Despite that effect, “PLAs on public construction projects are not absolutely prohibited. Rather, in limited circumstances, described below, where a project is of sufficient size, duration, timing and complexity, their use is consistent with the purposes of the competitive bidding statute, notwithstanding the resulting interference with competition.” *Id.* at 131-132.

All parties agree that *Callahan* provides the legal framework for analysis of the injunction request in this case. When a public body proposes to include a PLA in construction documents, *Callahan* requires application of a two-part test:

[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.

Id. at 133. When inclusion of a PLA in a public construction contract is challenged, the awarding authority – here, Braintree – “bears the burden of demonstrating that it adopted a PLA to further the purposes of the competitive bidding statute.” *Id.* at 132.

2. The Test for Injunctive Relief

“A party seeking a preliminary injunction must show that (1) success is likely on the merits; (2) irreparable harm will result from denial of the injunction; and (3) the risk of irreparable harm to the moving party outweighs any similar risk of harm to the opposing party.” *Cote-Whitacre v. Dept. of Public Health*, 446 Mass. 350, 357 (2006) (Spina, J., concurring), citing *Packaging Industries Group v. Cheney*, 380 Mass. 609, 616-17 (1980). When a party seeks to enjoin the actions of a public body performing an important public function, there is a

substantial public interest that also must be considered. *Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984).

a. Likelihood of Success on the Merits

Whether plaintiffs have established a likelihood of success on the merits depends on whether Braintree, which bears the burden of justifying the PLA, will be able to prove that the PLA meets the two-prong test of *Callahan*. As indicated by *Callahan's* opening observation that “PLAs on public construction projects are not *absolutely* prohibited,” 430 Mass. at 131 (emphasis added), Braintree’s burden is heavy. Braintree’s arguments on both prongs fail to carry that burden.

Braintree first must show that the South Middle School construction project is of such size, duration, timing and complexity that the goals of the competitive bidding statute cannot be achieved without a PLA. In making this argument, Braintree focuses not on the construction of the South Middle School itself, but rather on its broader plan to create enough room at the two middle schools to accommodate Braintree’s fifth graders. This broader plan, Braintree suggests, is similar to that in *Callahan*, where Malden was undertaking a five-year project to replace all its kindergarten through sixth grade elementary schools by closing nine schools, demolishing three of them, and building five new schools that would serve kindergarten through eighth grade. *Callahan*, 430 Mass. at 126. In *Callahan*, nonunion contractors (including two of the plaintiffs in this case) challenged the inclusion of PLAs in the construction documents for what the Supreme Judicial Court called “the first phase of the project . . . the construction of the first two schools.” *Id.* at 127. The Court held that the City’s project met the requirement of sufficient “size, duration, timing, and complexity.” *Id.* at 133.

However, this case is distinguishable from *Callahan* in two important respects. First, although Braintree's project affects students at eight schools (the two middle schools and the six elementary schools), Braintree will not be doing any construction at six of those eight schools (the elementary schools). To *avoid* the need for construction work that would physically expand the elementary schools, Braintree has decided to limit its construction work to the two middle schools.

Second, Malden adopted a PLA during the first phase of a project involving construction of five new schools and demolition of three existing schools (as well as closure of six other schools, although it is not clear whether Malden would be undertaking construction at those locations). Braintree, by contrast, is adopting a PLA only for the last phase of its two-phase project, after having chosen not to include a PLA in the contract documents for phase 1, the expansion and upgrading of the East Middle School. Because of that choice, the PLA here would apply only to the construction of one school.

Although *Callahan* was careful “not [to] articulate a bright-line, litmus-test standard for determining when the use of a PLA is appropriate,” *id.* at 136, the court did note, “In most circumstances, the building of a single school will not, in and of itself, justify the use of a PLA.” *Id.* Braintree suggests that the PLA is justified here because of additional factors beyond the building of a single school, namely the (non-construction) ramifications of a construction delay on the fifth graders in two elementary schools. That is not enough, I conclude, to take this “building of a single school” out of the realm of “most circumstances,” in the words of the Supreme Judicial Court. The remaining portion of Braintree's original project – the construction of South Middle School and the transfer of the fifth graders from two elementary schools into the new school – is simply not of sufficient size, duration, timing and complexity to overcome the

anti-competitive effects of a PLA.

Braintree's arguments regarding the second *Callahan* test fare no better. Braintree also bears the burden of demonstrating that it "undertook a careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals." *Id.* at 133. Here, the Committee conducted only two discussions before voting to include the PLA in the construction documents. Below I will quote at some length from the minutes of those two meetings, which are Exhibits A and B to the Taub Affidavit.

The first discussion was brief, and consisted only of the Committee Chair expressing her desire to "start having discussions on [a] project labor agreement," and then questioning Braintree's consultant about "how a PLA could be incorporated in the project." The consultant's response, which was not lengthy, informed the Committee that the previous administration had considered but rejected a PLA for the East Middle School project, without describing the factors considered then or the reason that a PLA was not employed in that case. The consultant also noted that, by reducing the overall pool of eligible subcontractors, a PLA "could ultimately affect the cost of the project." I infer, and I assume that the Committee members inferred, that the effect would be in the upward direction, thereby undermining the legislature's intent that the competitive bidding statute protect the public fisc by lowering public project construction costs. No Committee member asked the consultant if he was saying that the PLA would increase costs, and if so by how much. Instead, the discussion was tabled until the next Committee meeting.

The second discussion, which did not occur at the next meeting but rather six months later, was more robust. A proponent of the PLA, whom I believe was the Committee Chair, described a PLA to the other Committee members and asserted that a PLA was appropriate for a "project of this size, duration, timing and complexity." (Committee Chair Taub, whose affidavit

indicates that she also serves as Town Solicitor, obviously had in mind the first *Callahan* test.) She mentioned two specific interests that a PLA would serve in this case: “timely completion to meet the enrollment needs of the schools,” and “help increase workplace diversity.” She then noted that an earlier repair and renovation project at South Middle School had used a PLA and finished on time and within budget. She did not mention (and no one else mentioned) that Braintree had not included a PLA in the contract for East Middle School project, even though that project had been effectively completed that very month. (These minutes also note that another consultant from Hill International delivered a report on the status of the East Middle School project at the same meeting, “noting the building is ready for school to start.”)

Braintree’s Mayor then focused on the advantage of a PLA in getting the building trades to agree in advance to continue work without delay due to labor stoppage. He noted that the schedule for constructing South Middle School had a direct impact in correcting school overcrowding, and that on-time construction would create “parity” by providing the fifth graders who would be moved from two elementary schools to the new South Middle School with the technology advantages now available to the fifth graders who had just moved from the other four elementary schools to the newly upgraded East Middle School. The other specific factor cited by the Mayor was that a PLA would support a more diverse work force.

The only other comments recorded in the minutes are those of the Vice-Chair of the Committee, who reported “that in her opinion” a previous repair and renovation project at South Middle School was on time and on budget because of the PLA employed on that project. She expressed fear that “any scheduling or weather delays” – but not labor troubles – “will impact the outcome of the project.” Finally, she asserted that unions have the resources to “bring in more

trained people for all trades to correct delays,” and that a PLA would result Braintree’s knowing in advance the cost of a completed on-time project.

I conclude that the discussion described in the minutes is not the “careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals” required by *Callahan*. Although 13 committee members attended each session, only three of them spoke. All three of the speakers were proponents of a PLA, and all three of them held positions that might have inspired deference from the other 10 committee members. (One was the Mayor, one was the Town Chief of Staff and Town Solicitor and the Committee’s Chair, and the other was the Town Council President and Committee’s Vice-Chair). No member of the Committee expressed any opposition, or even asked any questions, as far as the minutes reveal.

Furthermore, a “careful, reasoned process” would certainly have included a discussion of why Braintree chose not to include a PLA in the other construction project that was part of its plan to move fifth graders to the middle schools. Such a process would certainly have included a discussion of the results of not having a PLA on that other project, which had been completed that very month. Such a process would have included a comparison of the complexity of the two projects, which may well have caused the Committee to conclude that the renovation and expansion of the East Middle School was more complex, and therefore more susceptible to delay, because it involved doing construction work in a fully occupied school rather than constructing a new building. Such a discussion would certainly have included a consideration of the fact that the East Middle School project, while encountering delays, had still been completed with the loss of only one school day over the two-plus years of construction.

And, if Braintree’s first goal in imposing a PLA is to avoid work stoppages due to labor troubles – as the Mayor suggested to the Committee before the vote to adopt a PLA, and as

Braintree’s counsel suggested more than once at oral argument before me – then a “careful, reasoned process” would certainly have involved someone asking whether labor troubles had delayed the East Middle School project at all. The answer to that question, the parties now agree, is “No.” Even though the teachers union contract expired during the middle of the East Middle School renovation and expansion project – which will be true again during the life of the South Middle School construction project – there were no picket lines erected by the teachers union (or any other municipal union whose contract expired during that time). Nor were there any labor disputes between the contractors on site and their employees.

I am not second-guessing the Committee’s decision to include a PLA in the project documents. Had the Committee discussed, or even mentioned, any of these considerations, it might well have reached the same conclusion, that a PLA was appropriate. The Committee’s error was not the decision it made, but rather its failure to engage in the “careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals” that the law requires. *Callahan*, 430 Mass. at 133.

b. Irreparable Harm

Irreparable harm, the second prerequisite for injunctive relief, poses a closer question.

The Plaintiff contractors are “open shops,” employing workers who are not union members. If they were to be successful bidders, the PLA would require that they do their work by using employees referred to them by the union hiring hall, with whom they may be unfamiliar. They would further be required to pay into union benefit funds, even if they already provide benefits to their own employees, thus essentially paying for benefits twice. In addition, the union-negotiated wages required by the PLA might well be higher than the prevailing wages that would otherwise be required on a public construction project. These factors, and others,

effectively preclude the plaintiff contractors from winning contracts on the South Middle School project, and so the Plaintiff contractors have decided not to submit bids.

Irreparable harm exists where the loss suffered by a plaintiff could not be remedied even if he ultimately wins the case. *Packaging Industries*, 380 Mass. at 616. By the time this case is decided on the merits, the construction project will be well underway, and perhaps completed, and so the “opportunity for consideration as a bidder would be forever lost.” *Modern Continental*, 391 Mass. at 837. Furthermore, the Plaintiff contractors’ “remedy at law for the damages incurred in preparing [their] bid[s] falls far short of being equivalent of the potential to win the contract.” *Id.*

Braintree responds, however, that nothing prevents the Plaintiff contractors from submitting bids, even if the PLA would disadvantage them in that bidding process. As Braintree notes, the *Callahan* court stated, “Although requiring all contractors to abide by the PLA may make bidding on projects less attractive to nonunion contractors, the requirement does not prevent them from bidding on, and being awarded, public contracts.” 430 Mass. at 138. However, the *Callahan* court was not discussing the concept of irreparable harm, or whether a nonunion contractor could establish it, because *Callahan* upheld the Superior Court’s unexplained *denial* of an injunction against inclusion of a PLA in the Malden school construction contracts. Today’s case requires me to confront a question not reached in *Callahan*: whether the PLA makes bidding on the South Middle School project so much “less attractive to nonunion contractors” that it deprives such contractors, as a practical matter, of the ability to work on this PLA-burdened project, thereby constituting irreparable harm.

Shortly after *Callahan*, a Superior Court judge concluded exactly that. In *Enterprise Equip. Co. v. Brockton*, 2002 Mass. Super. LEXIS 370 (Mass. Super. 2002), Judge Burnes held

that the practical difficulties imposed on nonunion contractors by inclusion of a PLA were serious enough that the plaintiff contractors “would lose their opportunity to bid for the City’s rehabilitation of [a public school] if the injunction were not granted.” *Id.* at *7. Although the question is a close one, I join Judge Burnes in concluding that the disadvantages imposed on the contractor Plaintiffs by Braintree’s use of the PLA effectively render those Plaintiffs unable to compete for work on the South Middle School project. Therefore Plaintiffs have established irreparable harm.

c. Balance of Harms

In the absence of an injunction, as a practical matter Plaintiffs will be unable to obtain work on the South Middle School project. Issuance of an injunction, on the other hand, will require Braintree to rebid the South Middle School project, adding, I was told at oral argument, about a month of delay. The planned completion date for the South Middle School project is August 18, 2021, less than a month before the beginning of the school year in which Braintree expects students to occupy the newly constructed building. However, the affidavit of Senior Project Manager Mary Mahoney of Hill International Inc., the Project Manager for Braintree, reveals that construction of the new South Middle School itself is to be completed by May 31, 2023, after which the summer will be devoted to post-construction tasks such as closing up the newly vacated old middle school; connecting new recreation fields, sidewalks, and landscape to existing features; paving; relocating rapid flashing beacon devices; and the like. Mahoney Affidavit ¶ 9.

In balancing the risk of irreparable harm to Plaintiffs against any similar risk of harm that Braintree would suffer from the issuance of an injunction, “What matters as to each party is not

the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits." *Packaging Industries*, 380 Mass. at 617. Here, Plaintiffs' likelihood of success is strong, because Braintree is unlikely to carry its burden on either of the two prongs of *Callahan*. Therefore it would take a powerful showing of harm to Braintree to outweigh Plaintiffs' harm. Fortunately, rebidding the project now, while it would certainly cause difficulties, would still permit completion of the new school itself well before the beginning of the aimed-for school year.

d. The Public Interest

By requiring a fair and competitive bidding process for public contracts, the competitive bidding statute serves important public interests. Public labor agreements are by their nature anti-competitive. See *Callahan*, 430 Mass. at 131. Because they undermine the public interests underlying the competitive bidding statute, they are permitted only "in limited circumstances," even if they are not "absolutely prohibited." *Id.* This case does not present one of the "limited circumstances" in which those public interests can be ignored.

This is so even though, by requiring rebidding using contract documents in the usual form for public construction projects, an injunction will cause a month's delay in Braintree's pursuit of its public interest in getting its new middle school built expeditiously. Unfortunately, Braintree chose to pursue that interest without considering its own very recent experience in renovating and expanding East Middle School, a project completed expeditiously, untroubled by labor-related delays, despite the absence of a PLA. I conclude that the public interest favors the issuance of a preliminary injunction here.

Conclusion and Order

For these reasons, I **ISSUE A PRELIMINARY INJUNCTION** requiring the Town of Braintree to open the South Middle School project for rebid without including a Project Labor Agreement in the project documents.



Paul D. Wilson
Justice of the Superior Court

September 10, 2021