PLA: PUBLIC LOSES, AGAIN

THE CASE AGAINST PROJECT LABOR AGREEMENTS & FOR FAIR & OPEN COMPETITION IN CONSTRUCTION

ANALYSIS OF PROJECT LABOR AGREEMENTS PREPARED BY
THE MERIT CONSTRUCTION ALLIANCE OF MASSACHUSETTS, INC.

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"Massachusetts's public construction laws are amongst the most open and fair laws in the country with respect to construction procurement and workforce wages. These laws were implemented to create a level playing field for all contractors eligible to work on public construction projects. PLAs create barriers to entry that eliminate the equality of opportunity that is central to the Commonwealth's public construction process."

GOVERNOR CHARLES D. BAKER

in a 2021 letter to the state Legislature

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Project Labor Agreements require contractors to employ union workers referred by the union local. PLAs "effectively render" merit shop contractors "unable to compete for work" by imposing untenable contractual obligations. As a result, PLAs stifle competition and run counter to the goals of the Massachusetts public construction statutes.

Massachusetts courts have struck down numerous PLAS imposed by municipal entities and forced rebidding where all qualified bidders – union and merit shop – faced no artificial advantage or disadvantage. Legality aside, PLAs are detrimental public policy that:

- Increases the cost of construction.
- Amounts to systemic discrimination against merit shop contractors and their employees, including most minority and women owners and employees.
- Would require merit shop contractors to act as irresponsible employers and dismiss their full-time workforce and hire temporary union workers in order to perform the work.
- Blocks taxpaying construction professionals from a fair opportunity to compete and work on public construction funded with their own tax dollars.
- Has repeatedly been shown to fail to deliver on its promises – including the guarantees of no strikes.

The following pages offer an analysis of PLAs and examples of their consequences under the following headings:

- State laws & agencies successfully govern public construction.
- Mass. courts have struck down PLAs on municipal projects.
- PLAs lock out nonunion construction workers.
- PLAs block merit shop contractors from bidding.
- MBE and WBE contractors are harmed by PLAs.
- PLAs reduce competition & increase costs.
- When utilized, PLAs have failed to deliver on the promised benefits.
- Real world examples expose benefits of removing PLAs.

STATE LAWS & AGENCIES SUCCESSFULLY GOVERN PUBLIC CONSTRUCTION

State and federal laws and regulations, enforced by state and federal agencies, provide the legal requirements, rules, and oversight for public construction, not PLAs. Laws and regulations govern workers' rights, pay rates, and safety. They ensure qualified, and experienced contractors are hired.

Prevailing Wage Law

The Mass. Department of Labor Standards issues prevailing wage information for construction projects and other types of public work. The Prevailing Wage Law directs the DLS to set rates based on collective bargaining agreements, so there is no need for a PLA to set wage rates. On all public construction in Massachusetts, all workers receive Prevailing Wage, whether union or nonunion.

"DLS issues prevailing wage schedules to cities, towns, counties, districts, authorities, and state agencies. Workers must receive these hourly wage rates when working on a public project."
(Source: Mass. Department of Labor Standards.)

> "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 costs for public projects, and any firm, whether union or not, merely needs to be prequalified by DCAMM to submit a proposal."
>
> **(Source: Report to the Worcester Redevelopment Authority, "Project Labor Agreements on Chapter 149a Projects," Jan. 23, 2019, by Keith Martin, Skanska USA Building.)**

MASS. COURTS HAVE STRUCK DOWN PLAS

Massachusetts courts have rejected PLAs on municipal projects as undermining the purpose of Chapter 149 by restricting competition and increasing project costs.

SUPREME JUDICIAL COURT

The Supreme Judicial Court called PLAs "anti-competitive" and established a limited set of circumstances for use on public projects. This has been interpreted by lower courts that PLAs are "presumptively anti-competitive and consequently prohibited from use on most public construction projects."

In *John T. Callahan & Sons, Inc., v. City of Malden, 430 Mass. 124 [1999]*, the SJC decision stated:

- *"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."*
- *"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."*

In 2018, the Supreme Court ruled in *Janus v. AFSCME* that a public employer cannot force an employee to join or financially support a union as a condition of employment. Considering the Janus decision, it's a fair question to ask whether a public entity can circumvent the court's ruling by mandating the employees of private vendors join organized labor. This amounts to the government requiring employees of contractors and subcontractors to give up their First Amendment rights while doing the government's work.

LOWER COURT RULINGS

BROCKTON: In 2002 and again in 2005, *(Enterprise Equipment, et al v. City of Brockton; and Millis Plumbing, Inc., et al, v. City of Brockton)* the Superior Court ruled that Brockton could not impose a PLA on the city's so-called Twin Schools projects. In her 2002 ruling in the *Enterprise* case, Judge Nonnie Burns concluded:

> "Project Labor Agreements are presumptively anti-competitive and consequently prohibited from use on most public construction projects."

Judge Burns' correct conclusion in the Brockton case that PLAs are "…prohibited from use on most public construction projects" was a direct result of her analysis of the SJC's ruling in *Callahan v. City of Malden*, the case often cited by PLA supporters.

BRAINTREE: In September 2021, a Norfolk Superior Court judge cited high-court precedent in a ruling that ordered the immediate removal of a PLA.

The court concluded the PLA would increase construction costs, *"thereby undermining the legislature's intent that the competitive bidding statute protect the public fisc by lowering public project construction costs."*

The judge ruled PLAs harm merit shop contractors who, by definition, are not signatory to organized labor.

> "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."

PLAS LOCK OUT NONUNION CONSTRUCTION WORKERS

In Massachusetts, 83.8% of construction workers are employed by merit shop contractors in 2022.

No one, including the MCA, would think it fair to lock out union labor from an opportunity to work on a public project. So why is it acceptable to deny nonunion labor the same opportunity?

A PLA requires contractors to employ union workers referred by the union local. Typical language follows along this line:

"The Contractor recognizes the Union as the sole and exclusive bargaining representative of all craft employees working within the scope of this PLA on the Project." (Source: UMASS-Boston PLA p. 9, 10/20/2010)

In Massachusetts, 83.8% of construction workers are employed by merit shop contractors in 2022, according to data from unionstats.com, the only reliable internet database tracking union membership utilizing U.S. Census Bureau data. In New England, merit shop workers were 89.7% of the construction workforce.

Merit shop employees have made a personal choice to work for merit shops and not join organized labor. They should not be penalized by their government for making this choice.

Merit shop construction workers benefit from full-time employment, competitive pay, health insurance, retirement plans, employer-paid holidays, vacation and sick leave, and numerous other benefits. If belonging to organized labor was such a great deal, it stands to reason more would join – but the statistics make clear they prefer merit shop employment.

PLAs deny merit shop employees the opportunity to work on public projects they are helping to finance with their tax dollars.

PLAS BLOCK MERIT SHOP CONTRACTORS FROM BIDDING

PLAs "effectively render" merit shop contractors "unable to compete for work," as concluded by Norfolk Superior Court Judge Paul Wilson in his 2021 ruling against a PLA in Braintree. That includes minority- and women-owned contractors who tend to be merit shop.

Claims that nonunion contractors can bid on PLA projects are disingenuous. While PLAs do not overtly state "nonunion contractors need not apply," the onerous terms and conditions of PLAs have that very effect.

Merit shops operate the same as traditional companies with full-time employees. Rather than layoff their workforce after completion of a project – a common practice in the union sector – merit shops maintain employment levels and move the employees to the next project.

Under a PLA, nonunion contractors would be required to obtain most or all workers from the union hiring halls. What are they supposed to do with their loyal, permanent employees? Their employees include minorities, women, and veterans. Are they supposed to lay them off?

PLA is public policy that encourages an employer to fire its employees. In no other area of contracting for services do public entities contemplate imposing such an irresponsible requirement on winning bidders.

The union hiring hall assigns workers to a project. A contractor does not select the workers. Suggestions that merit shop employees join a union for the duration of a project fail to understand how the union system operates.

Under a PLA, non-union contractors would be forced to exclude their apprentices enrolled in registered nonunion apprenticeship programs. *"Contractors shall employ apprentices who are registered with the Joint Apprenticeship of the Parties and shall employ qualified journeymen."* (UMass-Boston PLA, p. 11)

"Government-mandated project labor agreements, or PLAs, typically require companies to agree to recognize unions as the representatives of their employees on that job, use the union hiring hall to obtain most or all workers, obtain apprentices exclusively from union apprenticeship programs, follow union work rules and pay into union benefit and multi-employer pension plans that any nonunion employees permitted on the project will be unlikely to access unless they join a union and vest in these plans. This forces employers of nonunion workers to pay 'double benefits' into existing plans and union plans, and places firms opposed to these costly provisions at a significant competitive disadvantage."

Statement of the National Black Chamber of Commerce.

MBE AND WBE CONTRACTORS ARE HARMED BY PLAS

PLAs stop merit shops from bidding, and most minority- and women-owned construction companies are merit shop. A PLA is a systemic barrier that blocks minorities and women from working on a project and building wealth from good-paying jobs.

It's really that simple.

And yet public officials continue to flirt with PLAs, which means they embrace blocking minority- and women-owned construction firms from bidding.

'VERY FEW' MBES & WBES ARE UNION SHOPS

The 2010 DCAMM Disparity Study quoted a construction-firm owner as saying:

> "You find very few of these companies that are union. Okay. And there are lots of MWBE companies out there, but you can't access them if you're doing a union job because people tend not to go union."

The directory of DCAMM-certified construction companies includes 71 women-owned, 37 minority-owned and 9 veteran-owned companies. While data does not exist showing what percentage are nonunion or union, a PLA will certainly harm those that are nonunion – and anecdotal evidence suggests the majority are merit shop.

Even if they wanted to sign with organized labor, signatory contractors are required by organized labor to meet significant demands that have the effect of barring small contractors, as explained by a minority contractor in the 2017 DCAMM Disparity Study:

> "Union requires a $50,000 bond and a million other type of requirement[s] that eliminate small companies to qualify to become a signatory. we are MBE, DBE for a reason; we don't have the resources like other contractors."

PLAS HARM DIVERSITY EFFORTS, RATHER THAN HELP

With only 16.2% of the state's construction workforce and "very few" MWBEs, organized labor's PLAs are not the solution to worksite diversity. Rather, DCAMM has a robust program to set goals for MWBE contracting and workforce participation, as detailed in the 2020 Supplier Diversity Report.

> "Historically, the unions are not as able to guarantee a diverse workforce."
>
> **Skanska Building USA, in a report to the City of Worcester.**

MEMBERS OF THE MINORITY COMMUNITY HAVE PUBLICLY OPPOSED PLAS:

- *"[C]laims that a PLA can be a tool to ensure minority construction workers and businesses are used on a public project is a farce,"* stated Harry C. Alford, president & CEO of the National Black Chamber of Commerce.

- *"Government-mandated PLAs are opposed by the NBCC because almost all minority-owned contracting firms are not affiliated with unions. African American-owned contracting firms are typically small businesses and employ their own core workforce of skilled construction workers who are not unionized and are generally more diverse than construction workers coming from union hiring halls."* (Harry C. Alford, president & CEO of the National Black Chamber of Commerce.)

- *"98% of Black and Hispanic construction companies are non-union shops. Thus, a Project Labor Agreement greatly limits the opportunities for Black and Hispanic firms,"* said John Harmon, Sr., IOM, Founder, President & CEO of the African American Chamber of Commerce of New Jersey.
    - *"The possibility of Black and Hispanic labor is greatly suppressed. It is beyond disappointing when we see diversity clauses added to legislation that is fundamentally harmful to minority communities."*
    - *"The diversity language within this bill is a guise of permissive language that has absolutely no benefit to the African American community within the state."*

- *"These PLAs promise 'local hire' and outreach to minority neighborhoods, but the unions' promises have always been empty,"* wrote Shane Harris, a San Diego activist.

PLAS REDUCE COMPETITION & INCREASE COSTS

As previously established, PLAs reduce competition from responsible merit shop employers and create a monopoly for organized labor. Stifling competition reduces the number of bidders which results in increased project costs because of higher bid prices.

PLAs and other union-only schemes increase the cost of public construction by approximately 10-20% - or more - according to numerous studies comparing PLA and non-PLA project costs.

A study of Connecticut school construction found PLAs raised the final costs by 19.84 percent. (*The Effects of Project Labor Agreements on School Construction in Connecticut*, by Burke and Tuerk, January 2020.)

> "Municipal leaders everywhere need to rethink the whole idea of entering into PLAs for school and 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."
>
> **David G. Tuerck, Executive Director, Beacon Hill Institute**

Worcester and Lowell rejected PLAs and chose fair and open competition in 2019.

"According to our consultant a PLA would add 10-15% on to construction costs. With an estimated $270.5 million in construction costs, this would equate to $27-40.5 million added to the project, exclusively funded by the City and residents," said then-Lowell City Manager Eileen Donoghue, May 23, 2019, memo to the Lowell City Council.

The Worcester Redevelopment Authority asked its construction consultant, Skanska Building USA for an opinion on a PLA, and rejected a PLA on the new ballpark. Skanska wrote:

- *"PLA's cost more, historically, and this has been cited in the 2003 and 2017 studies by the Beacon Hill Institute."*
- *"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."*

HOLYOKE VETERANS HOME

A legislatively mandated PLA on the Holyoke Veterans Home construction project was partially responsible for fewer bidders, said the project manager during a public meeting in October 2023.

"It's been difficult to get enough bidders in some trades. ***We've had some stiff challenges with*** *the scale of the project, its location, and even a little bit,* ***the PLA****. It's all had a cumulative effect on the team's efforts. At times it seems like we've been swimming upstream during a rainstorm,"* said the official with the state's Division of Capital Assets Management and Maintenance, during a recorded meeting at the 13:03 mark.

As of November 2023, the project had:

- Experienced a lack of contractors interested in prequalifying for the project. DCAMM had to extend the deadline to apply for prequalification to recruit more contractors.
- Of 49 prequalified subcontractors in 10 trades, only 27 submitted bids – 45% of prequalified bidders did not submit bids.
- Zero bids were received for the masonry, electrical and HVAC work. No contractors were interested in being prequalified, let alone bid.
- One bid was received for Miscellaneous and Ornamental Iron.
- Two bids were received for Waterproofing, Damp-proofing and Caulking; Resilient Floors; Roofing and Flashing; and Glass and Glazing.
- Only 5 of the 27 bids were from minority- and women-owned business enterprises. Of those, two MWBEs were winning bidders – roofing & flashing and resilient floors. One veteran-owned business enterprise won the bid for waterproofing.

PLAS MIGHT SOLVE UNION-ONLY PROBLEMS. The problems that a PLA allegedly solves are problems created by organized labor. Strikes, jurisdictional disputes and grievances may be hallmarks of organized labor, but unheard of by merit shop employees. And there is no guarantee a PLA will prevent the issues, as we have seen examples of strikes on PLA projects.

"When a PLA is in place, it grants a union leader the power to call all the shots and determine which locals get total and complete control of multibillion-dollar public and private construction projects. Those in charge decide what it's going to cost in labor to get the job done. They become the ultimate power brokers, controlling numerous jobs and commanding the loyalty of countless beneficiaries down the line...

"We have long been taught that monopolies are harmful and drive up the cost of business while potentially sidelining the best and brightest workers. It's time we acknowledge that such excessive powers granted by the government are abhorrent, leading directly to corruption."

KEVIN BARRY, DIRECTOR OF THE CONSTRUCTION DIVISION OF THE UNITED SERVICE WORKERS UNION IN QUEENS, IN A NEW YORK POST OPINION COLUMN.

WHEN UTILIZED, PLAS HAVE FAILED TO DELIVER ON THE PROMISED BENEFITS.

Since PLA advocates claim PLAs guarantee costs, timelines, labor supply and quality, it is fair to examine those claims. In a review of PLA language from multiple projects, there is no evidence of provisions that guarantee schedules, price, or quality, nor provisions that provide consequences for failure to adhere to the PLA.

ONLY GUARANTEE: HIRING UNION ONLY

Organized labor sells PLAs to ensure local hiring, but PLAs offer no such guarantees.

> "Our residents are not getting the jobs. They are coming from out of town. They are busing people into work at our pier. How can that be?"
>
> **A New Bedford career center official quoted in local news coverage of a PLA on construction of offshore wind.**

TWO EXAMPLES OF PLA-GUARANTEED QUALITY

The Big Dig: over budget, not on time. When addressing the matter of workmanship and continued spiraling costs on the Big Dig, State Auditor Joseph DeNucci reported: "Not only have taxpayers paid for shoddy work, they are now paying for the repairs." *(Source: "Audit: Pike should Dig deeper to recover $$," The Boston Herald, July 31, 2007.)*

UMass Boston dorms. "In the first weeks of school, dorm elevators abruptly fell several floors with students inside. Water shot out of one toilet when you flushed another, students reported. The rooms are often stifling hot, but the showers are frigid." (Source: https://www.bostonmagazine.com/education/2018/11/12/umass-boston-dorm-problem/)

REAL WORLD EXAMPLES EXPOSE BENEFITS OF REMOVING PLAS

There are instances where we can fairly compare construction projects with and without PLAs. Instances where a project was bid with a PLA in place and then rebid without a PLA. The difference is revealing. They show the number of bidders increases and bid prices plummet without a PLA.

BRAINTREE MIDDLE SCHOOL JUDICIAL ORDER TO DROP PLA

The Braintree taxpayers saved more than $1 million in construction costs as a result of the lawsuit brought by MCA and industry allies against the Town of Braintree to remove the project labor agreement on the South Middle School Project, according to an MCA analysis.

When a judge ordered Braintree in September to redo the filed sub bids without a PLA, it offered a rare look at bids on the same work with and without a PLA. Without a project labor agreement, the number of bidders increased, and the total of the filed sub bids decreased when the second round was held in November.

With the PLA, the low bids in 14 filed sub bid categories totaled $25.8 million, and two months later, without a PLA, the low bids totaled $24.7 million. Five union contractors, when faced with competition from merit shops, submitted lower bids in November than they had in September for the same work. The most striking example is the union HVAC firm that submitted a second bid that was $793,000 lower than its first.

U.S. DEPT. OF LABOR JOB CORPS CENTER, MANCHESTER, N.H.

Between 2009 and 2012, the federal government proceeded with bidding on this project. According to public sources:

- Three general contractors bid under the PLA and when the PLA was removed and the project was rebid, nine general contractors bid.
- The winning bidder under a PLA bid again when the PLA was dropped, and that company's bid dropped by $3.6 million – on the same project.
- The original winning bidder, a union contractor based in Florida, did not win the bid on the New Hampshire project.

- A New Hampshire merit shop firm won the project with a bid $6M less than the original winning bid, a 16.47% savings for taxpayers.

THE GARAGE MAHAL

The city of Worcester and Lowell both completed $21 million parking garages in 2007. Worcester built 503 parking spaces, while Lowell built 900 spaces. Unlike Lowell, the Worcester project used only union contractors and labor to get 45% fewer spaces in what the Telegram & Gazette dubbed the "Garage Mahal."

FALL RIVER FORCED TO DROP PLA

In 2005, the City of Fall River imposed a PLA on that city's 5-school construction project. The Merit Construction Alliance was forced to file a lawsuit challenging the legality of the PLA to protect the interests of the merit shop community and Fall River taxpayers.

After several rounds of a sparse number of bidders, whose bids came in millions over budget, Fall River's mayor rescinded the PLA and re-bid the project allowing all qualified, responsible bidders, regardless of union affiliation, to participate. The results were predictable: the number of bidders doubled and bid prices plummeted, which left the mayor to publicly conclude, "With more bidders, you tend to get a better price."

About the Merit Construction Alliance of Massachusetts, Inc.

The Merit Construction Alliance advocates for fair and open competition in the construction marketplace. We believe building contracts should be awarded based on quality, value, safety, and adherence to budgets and timelines. The MCA encourages project owners to invite all qualified construction firms - non-union and union - to bid on a level playing field.

Open shop construction is the preferred choice in Massachusetts and the nation. The private and public sectors recognize the benefits of quality workmanship, competitive pricing, and attention to customer service – the hallmarks of merit shop contractors.