

# Public Sector Project Labor Agreements

*AN OBJECTIVE REVIEW*

*Building and Construction  
Trades Department, AFL-CIO*

*National Constructors  
Association*



## Forward

Recently, the Associated General Contractors of America (AGC) commissioned and published a paper by its own law firm, entitled "*A Detailed Policy and Legal Analysis of Public Owner Project Labor Agreements*." That paper is misleading in so many respects that many, who are not familiar with the issues involved, will take it seriously. Moreover, it has been widely circulated, and its biased approach may cause some to lose sight of the fact that the United States Supreme Court *unanimously decided that public sector owners have the same right as private sector employers to establish the labor relations policies for the construction of their own projects.*

Portions of the AGC's *Analysis* are not merely misleading and biased, but untruthful as well. Indeed, on December 23, 1994, the Executive Director of the Construction Labor Research Council (CLRC), an organization upon which the AGC paper heavily relies, wrote to his Board of Trustees and advised them that "the [AGC] attorneys misused the information for their own purpose, attributing statements to CLRC which were never said and which are not true."

To present a more balanced picture, the Building and Construction Trades Department (BCTD) and the National Constructors Association (NCA) have prepared a detailed, objective critique of this *Analysis*. The Report that follows answers each and every question that could arise from a reading of the *Analysis*.

The AGC and its contractor members who have long worked with unions know that Project Labor Agreements (PLAs) do, in fact, offer enormous advantages to public works projects. The *Analysis*, however, ignores that knowledge and the preference of many of its own members, and fails to concede the controlling importance of rulings of the U.S. Supreme Court and other federal and state courts. For example, it attempts to downplay and avoid the unanimous Supreme Court decision in the *Boston Harbor* case, which held that allowing states and their agencies, when acting as property owners, to utilize the same labor policies on their projects as do private owners, "promotes the legislative goals that animated the passage of the Sections 8(e) and 8(f) exceptions for the construction industry." And, as recently as last month, the Appellate Division of the New York Supreme Court unanimously held that PLAs in two companion cases were "rationally based upon reasons which are consistent with the public interest promoted by the competitive bidding statutes." The New York decisions specifically relied on the U.S. Supreme Court's *Boston Harbor* opinion in concluding that, "regardless of whether the purchaser of contracting services is a public or private entity, PLAs have a valid purpose in accommodating conditions specific to the construction industry," an accommodation that "clearly advances the goal of the competitive bidding statutes to obtain the best work at the lowest possible price."

Across the nation, the Associated Builders and Contractors (ABC) and AGC are attacking PLAs indiscriminately, on behalf of their open shop members, in spite of the clear legal precedents supporting the use of PLAs. Their tactics have been litigation and misinformation, in order to gain some competitive advantage in an effort to win public sector jobs for their open shop members. These non-union contractors know, however, that they cannot provide the same quality of skilled craftwork, or the same number of trained and experienced craftworkers, because they do not hire workers who possess that level of skills or train workers to acquire them. Also, their continued attacks on PLAs as "union only" agreements have been directly and definitively rejected by the recent New York decisions, which found that PLAs do not limit bidding to union contractors and do not require "union only" labor.

This Report addresses, in rigorous detail, every contention that has been raised in the AGC's *Analysis*. As the Report demonstrates, PLAs provide an economical, efficient way for public owners to ensure that their own projects are built with a steady supply of skilled, productive craftworkers, and with labor harmony. PLAs thus provide the public owner with a construction management tool long used by major private corporations, a tool which has been unanimously endorsed by the U.S. Supreme Court as advancing the purposes of Federal labor law, and similarly endorsed as consistent with State procurement law policies requiring the selection of the most qualified contractors at the lowest price to do the job in the manner considered best by the public owner.

This Report was written to present a complete and accurate picture. We urge everyone, but especially those public representatives charged with purchasing construction, to read it carefully. We are confident that the readers will be left with a better understanding of Project Labor Agreements as well as a favorable disposition toward their use in the public sector.

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# Public Sector Project Labor Agreements

## *An Objective Review*

### I. THE POLICY ARGUMENTS ABOUT PLAS

**The Legal Foundations for PLAs were Established by Congress in 1959 and Endorsed for the Public Sector by the U. S. Supreme Court in 1993.**

A Project Labor Agreement (PLA) is a special kind of collective bargaining agreement found commonly and exclusively in the construction industry. It has a number of unique characteristics. First, it is a *pre-hire* agreement, enabling employers to bid on jobs with full knowledge of what their employment costs will be, and assures them a ready supply of skilled employees through the referral systems commonly found in these agreements. Second, a PLA establishes the basic terms and conditions not only for a single employer *but for all the contractors and subcontractors who will be operating on the project site*. Along with the pre-hire aspect of the agreement, this system permits the project owner or manager to know from the beginning what the overall costs and conditions will be, while at the same time, establishing common labor conditions applicable across the entire worksite, for the duration of the project. In 1959, both these aspects of project labor agreements were endorsed by Congress when it passed Sections 8(e) and 8(f) of the National Labor Relations Act, reflecting the policies and practices long used on both privately and publicly-funded projects.<sup>1</sup>

Thirty-four years later, in *Building & Construction Trades Council, Etc., v. Associated Builders & Contractors of Mass./R.I.*, 113 S.Ct. 1190

(1993)—the “*Boston Harbor*” case—the Supreme Court made clear that nothing in the NLRA precludes public entities, when acting as property owners, from utilizing these same policies on their own projects as do private owners. In fact, the Court found that allowing the states and their agencies to use PLAs “promotes the legislative goals that animated the passage of the § 8(e) and 8(f) exceptions for the construction industry.” 113 S.Ct. at 1197. Based on the broad policies applicable to the construction industry, the Court concluded that “[t]o the extent that a private purchaser may choose a contractor based on that contractor’s willingness to enter into a pre-hire agreement, a public entity *as purchaser* should be permitted to do the same.” *Id.* at 1198 (emphasis in original).

Thus, while the AGC attempts to paint public owner PLAs as some newly-imagined device, which prevents workers and businesses from “insist[ing] on their private legal rights to choose their own labor status and still compete for public project awards and employment,” (*Anal.* at iv), the unanimous Supreme Court decision made clear in *Boston Harbor* that to the extent the PLAs place limits on these “rights,” those limits have long been understood to be entirely legal in the private sector, and are equally valid in the public sector. Similarly, AGC’s statement that “public entities have no business in determining the labor policies of private contractors” (*Anal.* at 4), misses the point. What public entities—like private project owners—are in fact determining are the policies they believe will best serve their own interests during the construction of their own projects.

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<sup>1</sup> The publicly funded projects included many owned by the federal government, dating back to the construction of the Grand Coulee Dam in 1937-38 and the Shasta Dam in 1940. [U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects* 14 (1980).] The Labor Department study also noted the benefits provided by PLAs to contractors and owners.



5. Jobs are more likely to be completed on schedule because of the contractors' access to an immediate supply of skilled craft workers referred through union hiring halls—in contrast to the shortage of skilled employees in the non-union sector;<sup>6</sup>
6. In addition to effective labor relations, increased productivity results from the skills of union workers trained through joint labor-management apprenticeship programs;<sup>7</sup>
7. In some cases wage adjustments are regulated for the length of the project;
8. And, where state law allows, workers' compensation premiums are lowered through the collectively-bargained Alternative Dispute Resolution (ADR) and managed care procedures.

### The Broad Scope of the Boston Harbor Decision.

In *Boston Harbor*, the Supreme Court held that the action of the Massachusetts Water Resources Authority, incorporating the PLA into its bid specifications, was not preempted by the NLRA because the state was acting as a proprietor, rather than as a regulator. AGC attempts to undermine the significance of this decision by stating, on several occasions, that *Boston Harbor* "addressed only a technical legal point . . . and [only] with respect to a very exceptional 10-year, court-ordered, \$6.1 billion mega project." (*Anal.* at iv.) That description gives a very distorted view of the Supreme Court's decision.

In fact, *Boston Harbor* is a broad affirmation of the equal rights of private and public owners

to operate under the construction labor p formulated by the Congress. The Supreme expressly held that the type of PLA in the before it was entirely legal in the private sect and that the NLRB's General Counsel had so found in that very case. The Court went on to hold that applying the same rules in the private and public sectors "promotes the legislative goals that animated the passage of the §§ 8(e) and 8(f) exceptions for the construction industry," 113 S.Ct. at 1197, exceptions through which Congress intended to accommodate the specific and unique conditions prevalent in that industry.

In short, nothing in the Court's decision limits the application of its holding to projects of a particular scope. Rather, the question of which public projects warrant a PLA, and which do not, is a judgment the Supreme Court intended to be made by the public owner.

### PLAs Are Not Top-Down Organizing Tools, as Claimed by AGC.

AGC's portrayal of PLAs as "top-down organizing tools" for construction unions makes little sense.<sup>8</sup> A 1993 Business Roundtable so-called "white paper" is cited in an attempt to prove AGC's point. The report criticizes construction unions for responding to a loss of membership and market share by initiating various programs to increase market share. Those efforts, by unions and fair contractors, are a legal and economically sound response to those losses. The Roundtable describes many organizing efforts in a grossly distorted manner, labeling them with such pejoratives as "pressure," "harassment," "violence," etc. These labels are even applied to union efforts to assure that federal and local safety

<sup>6</sup> "Skilled Labor Shortages in Construction: Real or Imagined?" 40 [BNA] Construction Lab. Rep. S-3 (Dec. 21, 1994).

<sup>7</sup> Much of that increased productivity is due to the skills received by workers through joint labor-management apprenticeship programs. Currently, building trades unions and the construction industry spend over \$300 million to provide the best available training systems on both the national and local levels. More than one thousand training facilities exist, and approximately 170,000 apprentices a year pass through the intensive training programs offered. In addition, nearly one-half million foremen and workers participate in upgrade training programs in these same facilities.

In contrast, the non-union sector continues to face a critical shortage of skilled workers, with no comparable training programs in place. See *Wall Street Journal*, January 27, 1994. That is also the conclusion of the report, "Skilled Labor Shortages in Construction: Real or Imagined?" 40 [BNA] Construction Lab. Rep. S-3, S-5 (Dec. 21, 1994).

<sup>8</sup> The AGC claim that "many PLAs appear to have been written by the unions themselves, with no discernible management involvement" (*Anal.* at 2) is simply untrue. Most are drafted by attorneys for the public entities or by the project or construction managers retained by the public entities. The overwhelming majority of the rest have resulted from legal input from both sides, after face-to-face negotiations.

and health laws, which protect employees and the public alike, are enforced; that there is compliance with environmental requirements; and to communicate with the public. Ironically, union efforts to increase the competitiveness of their contractors through varying strategies, including PLAs, are attacked by the Roundtable as a "growing threat to competitiveness."

While the Business Roundtable attacks the use of PLAs as a means of increasing market share, the Roundtable itself, in a series of reports in the 1970s and 1980s, urged that owners should gain control of construction costs, and suggested a list of provisions that owners should require in agreements for construction of their projects. This campaign for construction economy and efficiency led owners to take a more active role in developing construction programs for their projects, and to require their contractors to use Project Labor Agreements.<sup>9</sup>

Finally, the Roundtable paper's conclusion that PLAs are often the result of pressure tactics is simply unsupported and untrue. Owners—whether private or public—have an understandable economic interest in how their projects are built, and if PLAs do not serve their own economic interests, they will not enter into or adopt them.

The *Analysis* also claims that the required use of a hiring hall for some or all of a nonunion contractor's workforce under a PLA will have as a "predictable consequence" that many open-shop construction firms will avoid working under PLAs. But that is not a result of coercion or dictation by a union or the PLA; it is a matter of an individual contractor's own choice. (It is also untrue; see, e.g., footnote 3.) The United States Supreme Court, in the *Boston Harbor* case, aptly answered that complaint this way:

"Confronted with such a purchaser [who chooses only contractors who are willing to use pre-hire agreements], those contractors who do not normally enter such agreements are faced with a choice.

They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement." (*Boston Harbor*, 113 S.Ct. at 1198.)

In short, the Supreme Court has refused to condemn PLAs simply because they present some contractors with choices they would prefer not to make.

### **AGC's Fallacious Claims About The "COMET" Program.**

There is no merit to the claim that public owner PLAs assist the unions' "COMET" organizing initiative. The COMET program educates local union members as to the benefits of organizing other workers in their trade. The exercise of a legal right should not be condemned. One of the basic policies of the National Labor Relations Act is the right of employees to organize, join unions and bargain collectively through representatives of their own choosing.

The *Analysis* attempts to make a case that unions use public PLAs to aid in "salting" programs. (Salting is a term used to describe the effort of union members to get jobs on open-shop projects.) That point is raised twice in this discussion. And yet, at pages 2 and 4 of the *Analysis*, the reader is told that PLAs deprive open-shop contractors of the right to use their own employees and force them to "jettison" their own workforces. If that is the case, how can "salting" possibly succeed? The *Analysis* has undercut its own arguments by its directly conflicting (and unsupported) claims.

### **The Benefit of PLAs to Public Owners.**

The *Analysis* offers a lengthy argument in an effort to prove that public owner PLAs increase construction costs and do not benefit public entities. As we have shown above, that claim is fallacious. And, the argument offered by the AGC is based on a number of flawed premises:

<sup>9</sup> During this period, Walt Disney World, General Motors, Toyota, and the oil companies which own the TransAlaska Pipeline were among the private companies using PLAs for major projects, *inter alia*, based upon the rationale suggested by the Roundtable.

a) First, the *Analysis* quotes from a book published by the National Association of State Purchasing Officials. The quote simply cautions NASPO members to remain abreast of policies which may limit their procurement decisions and is concerned (by its own terms) with "legislation" or "regulation" affecting public procurement. A PLA adopted by a public owner for its own project is not regulation or legislation. The BCTD and NCA believe, in keeping with the *Boston Harbor* decision, that the best approach is for a public entity to decide for itself, for its own construction projects, whether it will benefit from the use of a PLA.

b) The *Analysis* cites a 1972 publication of Professor D. Quinn Mills, entitled *Industrial Relations and Manpower in Construction*. The quoted material, however, in fact supports public sector PLAs. Referring to public construction, Mills states that such public initiatives "must, if they are to be successful, adapt themselves to the mode of operation of the private system." (Emphasis added.) That is precisely the teaching of the Supreme Court in *Boston Harbor*, and strongly affirms the view that the system of pre-hire PLAs that is lawful in the private sector should likewise be available to owners in the public sector. Similarly, the brief reference to "government legislation or decree, without the consent of the affected parties," does not apply to, let alone support, AGC's position. PLAs represent full consent—the owner, his principal contractor and the unions representing prospective employees must all agree before a PLA may come into being.

c) The *Analysis* attempts to bolster its position by citing as an example a decision by the U. S. Army Corps of Engineers to reject the use of a PLA for dormitory construction at West Point. The *Analysis* fails to mention,

however, that the Corps of Engineers would have had to declare a national defense exception under the War Powers Act to use a PLA. It is hard to quarrel with the conclusion that the building of a dormitory is not necessary for the national defense. (But, that situation is in contrast to the INEL project, discussed immediately below, where the use of a PLA was found necessary for the national defense.)<sup>10</sup>

d) The *Analysis* focuses on a GAO report on the Department of Energy's Idaho National Engineering Laboratories (INEL), a nuclear testing facility project in Idaho, including quotes from that report. The *Analysis*' examination of this project is, in fact, out of focus. The first quoted paragraph relies only on the "belief" of certain nonunion contractors, and to "alleged" union practices. The second quoted paragraph is hardly damning; it concludes only that some questions concerning costs have been raised and "should be evaluated" by the DOE. (*Id.*) It is also interesting to note that in the official recommendation to the Secretary of Energy, the report recommends "that the Secretary of Energy determine whether provisions in the Agreement, as discussed in this report, remain desirable from a public policy prospective." *Id.* (Emphasis added.)

Additional facts should be considered, however, to provide a fuller and fairer picture of the INEL PLA:

- (1) First, as the GAO report notes (page 1) before the PLA was executed, a number of work stoppages had occurred. As with all other PLAs, one of the benefits obtained by DOE was an unrestricted no-strike provision;
- (2) The report and its exhibits also reveal that, like other PLAs, the Agreement does not bar nonunion contractors from bidding on or obtaining work at

<sup>10</sup> In fact, many major Federal projects, from the nuclear research facility at Oak Ridge, Tennessee, to the Cape Kennedy Space Center to the Ballistic Missile Sites in the upper mid-west, were built under PLAs which had been encouraged and supported by the Federal government.

the INEL site. During the period examined, from October 1, 1986, through December 31, 1990, 30% of the contracts awarded by DOE went to nonunion contractors (pages 4, 18);

- (3) The GAO report itself found two perfectly legitimate reasons to answer the allegation that lower wage rates were charged for private construction outside INEL, and that wage rates under the Agreement may have been above Davis-Bacon rates: (a) the difference was largely due to an allowance for construction workers' travel to the site, an allowance that was necessitated by the site's remoteness, and (b) the INEL wage rates and the Davis-Bacon rates were adjusted at different times, resulting in a time lag in making adjustments to the Davis-Bacon rates applicable at the INEL site (report at pp. 4, 6, 21);
- (4) Finally, responding to some nonunion contractor complaints that they were placed at a disadvantage by having to use union hiring halls, the GAO reported (at page 23) that two-thirds of the unions surveyed allowed nonunion contractors to take their permanent employees on the site without going through a hiring hall. Only those workers who were replaced or added to the permanent crews were to be obtained from those unions' hiring halls.
- e) Finally, in support of its claims that PLAs are not cost-effective, the *Analysis* cites a study conducted by the Construction Labor Research Council in Washington, which the *Analysis* admits is an employer-sponsored research group. In addition to the fact that the CLRC disavows some of the *Analysis*' use of their data, there

appears to have been no effort to conduct the CLRC study within generally accepted conditions for research. It was based on a review of only four existing or proposed public PLAs, which the study states were picked on a "random" basis, although the criteria employed to assure "randomness" are not articulated. The four agreements were compared with the conditions in local area collective bargaining agreements and with the National Heavy & Highway Construction Project Agreement. This employer-sponsored study concluded that, based "on the face of the Agreement[s]," the public agencies failed to receive any benefit. (*Anal.* at 8, *emphasis added.*)<sup>11</sup>

However, when one examines the CLRC study, which appears as Exhibit 6 to the *Analysis*, many questions are raised about its results. For example, the CLRC report finds that economic gains under public PLAs are "minimal or non-existent," despite its further finding that the growing use of project agreements in the private sector "ha[s] resulted in reducing the cost of union construction."<sup>12</sup>

The study also omits the well-documented benefits to owners resulting from the better safety record compiled by union contractors. In regard to the area of relative safety records, according to the "Analysis of Construction Fatalities—the Occupational Safety and Health Administration's (OSHA) Database, 1985-1989," published in November, 1992, 72% of construction fatalities suffered during that period occurred on nonunion work sites, whereas union work sites accounted for only 28% of the fatalities. Moreover, the National Constructors Association (NCA) reports a lost-time injury rate that is 75% below the national average for

<sup>11</sup> It must be noted that, in the great majority of states that have prevailing wage laws, as is the case with all federal work, the wage costs will be uniform for union and nonunion contractors alike.

<sup>12</sup> For example, in the *N.Y. State Thruway* case, cited above, the N.Y. Appellate Court noted that the reasons for using a PLA for that project "relate[d] to the efficient, safe and timely completion of the project." reasons which it found were "consistent with the competitive bidding systems' goal of obtaining the lowest responsible bidder." (Slip Op. at 5)

construction. These lost-time injury rates have been falling over the last decade, and reflect the increasing contribution of joint labor-management safety programs to construction safety.

In short, the CLRC study neglects numerous factors that demonstrate savings to the owner over the life of the project. Moreover, as cited earlier, the Executive Director of CLRC feels his organization's "findings" were misused, and in a letter to the attorney who authored the AGC *Analysis* he specifically disclaims a conclusion by CLRC "that PLAs may well waste public resources."

## II. THE LEGAL ISSUES CONCERNING PLAS

Approximately one-half of the *Analysis* is devoted to an examination of various legal issues affecting public PLAs. Like the first half of the *Analysis*, this discussion consists primarily of inaccurate statements woven together to produce a misleading result. And, although AGC has set forth a series of theories which could be advanced to challenge PLAs, a careful reading reveals that even the AGC doubts they would prevail. For the convenience of the reader, the following discussion will track the format used by the *Analysis*.

- A. **The *Boston Harbor* case.** The discussion of the holding of the unanimous Supreme Court decision in *Boston Harbor* omits mention of other portions of the decision which demonstrate that the Court dealt with broad labor policy issues in the construction industry in addition to drawing its proprietary/regulatory distinction. The Court spoke of public owners generally, not just the Massachusetts Water Resources Authority, and all public projects, not just Boston Harbor, when it said:

It is evident from the face of this statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress

intended to accommodate conditions specific to that industry. Such conditions include, among others, the short term nature of employment which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long standing custom of pre-hire bargaining in the industry. [Citations omitted].

There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that the private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as purchaser should be permitted to do the same. . . In the absence of any expressed or implied indication by Congress that a state may not manage its own property when it pursues its purely proprietary interest, and where analogous private conduct would be permitted, this Court will not infer such a restriction. (113 Supp. Ct., at 1198.)

### B. Preemption issues.

1. Despite the Supreme Court's unanimous ruling to the contrary, AGC continues to assert that a federal labor law preemption problem exists. However, its lengthy discussion of the *Alameda Newspapers* case is simply irrelevant to the issue of public entities acting as "proprietors." In the *Alameda* case, as in an earlier Supreme Court case, *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), the city was clearly acting in a regulatory capacity and was attempting to impose

a governmental resolution of a labor dispute between private parties. Neither case bears any relevance to the use of PLAs by public entities acting as owners for their own projects.

2. *ERISA preemption.* The *Analysis* devotes more than three full pages to its discussion of ERISA preemption, none of which is relevant to the typical PLA situation. (The ERISA issue was decided by the U. S. District Court, however, at the first stage of the *Boston Harbor* case, in favor of the unions, the project manager and Massachusetts Water Resources Authority.) Thus, the cases discussed on page 12 of the *Analysis* are irrelevant, since each involved a state law or regulation of general applicability, rather than an owner-specific PLA.

**C. State or Local Competitive Bid Statutes.**

The *Analysis* asserts that public PLAs "typically run counter to state and local competitive bidding laws" (*Anal.* at 2). The most recent, concise and definitive decisions on this subject, however, are decisively to the contrary:

We conclude that the purpose of [the state's procurement law] and this State's other bidding statutes is not to foster competition merely for the sake of having unfettered competition. Rather the competitive bidding required by the statutes is a means of achieving the more basic purpose of obtaining the best work at the lowest possible price while guarding against favoritism, improvidence, extravagance, fraud and corruption. [Citations omitted]. The statutes are not intended to benefit the bidders and should be construed and administered with sole reference to the public interest. . . We conclude that the [public

agency's] decision to use the PLA issue in this case is rationally based upon the reasons in the public interest promoted by the competitive bidding statutes.

*New York State Chapter, Inc. AGC, et al. v. New York State Thruway Authority, et al.*, decided by the Appellate Division of the New York State Supreme Court on December 22, 1994. (Slip op. at 4.)

Similarly, in *General Building Contractors of New York State, Inc., et al. v. Dormitory Authority of the State of New York*, also decided by the Appellate Division of the State Supreme Court on December 22, the Court held that even "assuming that the PLA requirement does result in some diminution of competition in the bidding process, the [*Thruway* case] holds that the requirement does not violate this state's competitive bidding statutes if it was imposed for reasons which are in the public interest promoted by the competitive bidding statutes." (Slip op. at 3.) The Court went on to hold that the public owner had concluded that the particular terms and conditions of the project labor agreement were necessary for the efficient, safe and timely completion of the project, and therefore the PLA was "consistent with the purpose of the lowest responsible bidder requirement of the relevant competitive bidding statute." (*Id.*)

These two New York State Appellate decisions make irrelevant the lower court decision referenced by the *Analysis* of *Empire State Chapter, ABC v. County of Niagara*. The *Jefferson County Board of Commission's* case, also referenced by the paper, was decided on stipulation of the parties, and not judicial analysis, and can hardly be considered persuasive authority of Ohio law. This should be contrasted with the Judge's opinion in *Enertech Electrical, Inc., v. Mahoning County Commissioners* (D. Oh.), F.Supp. , 1994

(pending on appeal before the U.S. Court of Appeals for the 6th Circuit, No. 94-3601) finding a PLA not to be a violation of the Ohio state bidding laws.

- D. **Federal Competitive Bid Statutes.** The one court that has dealt expressly with this issue—the U. S. Court of Appeals for the 6th Circuit in the *Phoenix Engineering* case—has rejected a claim that a PLA for work for the Department of Energy violated Federal Competition in Contracting Requirements. In fact, the U. S. District Court opinion in the same case, cited by the Court of Appeals at 966 F.2d 1518, held that: “There is no inalienable right to work as a non-union contractor on publicly funded projects.”
- E. **Hot cargo and Pre-hire Issues.** The basic premise in the *Boston Harbor* decision, conceded by the *Analysis*, is that a public entity, in its role of purchaser, may act in the same manner as a private owner or purchaser, raising no hot cargo or pre-hire issues. Thus, in *Boston Harbor*, the agreement was specifically found not only by the Supreme Court, but earlier by the NLRB’s General Counsel, to be a valid pre-hire labor agreement under the NLRA.
- F. **Restraint of Trade (antitrust issues).** It is unclear what point the *Analysis* is trying to make in regard to restraint of trade on antitrust issues. What is clear is that there is no real legal issue. As long as the union(s) seeking a PLA have or even seek a “collective bargaining relationship” with a construction industry employer or with a public entity employing even a few construction employees, the rule of *Connell Construction*, 421 U.S. 616 (1975), does not apply. The courts have clearly held that an owner’s unilateral decision to use union labor does not raise anti-trust issues. See, for example, *Ehredt Underground, Inc. v. Commonwealth Edison and IBEW Local No. 196* F. Supp., (E.D. Ill., 1994).
- G. **State Constitutional and Local Charter or Ordinance Issues.** The *Analysis* references

no laws or constitutional provisions of general applicability which may create legal problems for public sector project labor agreements, even though the paper claims that there could be. In point of fact, there has been no ruling that PLAs violate any State constitutions, local charters or ordinances.

- H. **Administrative Rulemaking.** The *Analysis* “suggests” that certain state law requirements may mandate the use of rulemaking procedures by the public agencies considering the adoption of a PLA. If a state agency is under a legal duty to use a specified set of procedures in order to take an action, it obviously should do so. This, however, does not prevent the use of a PLA by the public agency.
- I. **Union Security (Union Dues) issues.** The *Analysis* next raises what has been to date a non-issue, membership dues. We are unaware of any PLA, or negotiation for a PLA, in which the meaning of membership dues has been an issue. Moreover, the discussion of this issue in the *Analysis* is based on a single NLRB decision which was reversed in late December, 1994, by the U. S. Court of Appeals for the District of Columbia Circuit, *International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers v. NLRB*, 148 LRRM 2071 (December 16, 1994).
- J. **Union Hiring Halls.** PLAs usually require that employees for the project be referred through the applicable local union hiring hall. Union hiring halls are prohibited by federal law from discriminating between union and non-union workers. Additionally, there is language in virtually every BCTD project labor agreement that explicitly calls for the non-discriminatory operation of hiring halls. Thus, as a legal matter, this is another non-issue.
- K. **Jurisdictional Issues.** The *Analysis*’ reference to jurisdiction issues begins with a faulty premise—that unions are

usually the authors of public PLAs—and adds a conclusory statement that some unions attempt to expand their jurisdiction under public PLAs to cover work they do not obtain in the private sector, thereby, raising the possibility of increased jurisdictional disputes. Because PLAs are written by owner representatives and signed by building trades unions collectively, there is little likelihood that this would occur. In addition, the policy of the BCTD clearly directs local councils to negotiate PLAs within existing boundaries of jurisdiction. Finally, in the event of the occasional jurisdictional dispute, virtually all PLAs provide an expeditious procedure to resolve any jurisdictional disputes that may arise without work interruption.

- L. **Derivative Contractor Liability.** This final portion of the *Analysis* again assumes erroneously that unions provide most PLA language. It claims that unions will frequently insert language making contractors liable for the nonpayment of wages and fringe benefits by their subcontractors. To the contrary, most PLAs do not contain such language. In fact, also to the contrary, in many PLAs unions forego the rights under their local collective bargaining agreements to strike a contractor or subcontractor who is delinquent in his wage or fringe benefit payments (with the principal contractor

often agreeing to assist with collection of proven delinquencies related to that particular project).

### III. CONCLUSION

In sum, project labor agreements for the construction of public works—by federal, state and local governments—have been used for at least six decades. They are lawful; they exclude no one; and they offer a number of important benefits to public owners in the construction of their projects. In addition, as the United States Supreme Court has declared, “the use of project labor agreements in the public as well as the private sectors promotes the legislative goals” that Congress intended when it amended the National Labor Relations Act thirty-five years ago in order to accommodate the particular characteristics and needs of the construction industry.

AGC's *Analysis* does nothing more than set up a series of strawmen, none of which can stand on its own. The BCTD and NCA continue to believe that public owners—like private owners—should have the option of determining for themselves what labor policies will best serve their own interests on construction of their own projects. Experience has shown that the use of project labor agreements for major projects, in both sectors, assures a level of quality and productivity that can be achieved only through utilizing a highly skilled and trained workforce, under contract terms geared to the conditions of the particular project.