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Healy Clean Coal Project
Labor Agreement

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I. INTRODUCTION

I have reviewed and researched the issue of whether the Alaska Industrial Development and Export Authority ("AIDEA" or the "Authority") may require successful bidders on the Healy Clean Coal Construction Project ("HCCP" or the "Project") to enter into Project Labor Agreements ("PLA's"). AIDEA is considering including, as part of its bid specifications for the Project, the requirement that successful bidders enter into a PLA with the Fairbanks Building & Construction Trades Council AFL-CIO and its affiliated local unions (the "Council"). The form of the PLA would be included in the bid specifications.[1]

Generally, the PLA would include: (1) recognition of the Council and its affiliated organizations as the exclusive bargaining agent for construction employees on the project; (2) specified procedures for resolving labor disputes; (3) a requirement that all employees be subject to union security

[1] Because AIDEA has not decided whether a PLA will be used for the Healy Project and therefore the terms of the PLA have not yet been determined, it is impossible to predict all the legal issues which could arise with respect to particular PLA provisions. Accordingly, this opinion will not address specific provisions of the PLA but instead will focus on the legal issues affecting PLA's generally and government bid specifications requiring such agreements. Assuming AIDEA decides to enter into a PLA with respect to the HCCP, detailed legal analysis of the specific PLA provisions will be required as that agreement is negotiated. By way of example, if a PLA included union trust fund contribution provisions, issues under the Employee Retirement Income Security Act could be implicated. See 29 U.S.C.A. § 1144 (West 1985).

provisions compelling them to become union members within a short period following commencement of their employment; (4) use of the Council's employee referral procedures to supply the labor force;

(5) a no-strike commitment on the part of the Council; and (6) a requirement that all sub-contractors on the project be bound by the PLA.[2]

It is my understanding that AIDEA is considering the PLA for the HCCP in an effort to ensure labor stability during construction of the Project. Construction is estimated to last more than three years. Since the Project will occur in a period in which other significant construction projects are anticipated in the state, a PLA could help to ensure a stable pool of skilled workers for the HCCP, thereby promoting timely completion. It is also believed that a PLA could help to avoid labor unrest in light of the long-term nature of the project.[3]

We believe that, if a PLA is properly structured and supported by legitimate proprietary goals of the Authority, AIDEA could include a bid specification requiring successful bidders on the HCCP to enter into a PLA with the Council.

II. FEDERAL LAW ISSUES RELATED TO PROJECT LABOR AGREEMENTS

A. Preemption under National Labor Relations Act

Under the National Labor Relations Act ("NLRA"), employers in the construction industry, unlike other employers, are permitted to enter into pre-hire PLA's. See 29 U.S.C.A. § 158(e) and (f) (West 1973). The Authority in this case, however, cannot rely on these provisions of the NLRA to support a

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[2] These general provisions were included in a proposed PLA submitted to Governor Walter Hickel together with a letter dated July 28, 1993, promoting use of a PLA on the Project.

[3] The Council in promoting a PLA for the HCCP has advanced other justifications for the use of PLA's, including the ability to enforce resident hire restrictions. See Letter from the Council to Governor Walter Hickel, July 28, 1993. AIDEA advises that it is not considering these other potential benefits for the PLA but instead is focusing on the economic benefit to the HCCP itself.

PLA for two reasons. First, under the NLRA states are excluded from the definition of "employer." 29 U.S.C.A. § 152 (2) (West Supp. 1994). Second, in this case, AIDEA would not be acting as an employer, even if it was not excluded from such status under 29 U.S.C.A. § 152 (2) (West Supp. 1994). Instead, AIDEA will be acting as a project owner, engaging the services of a contractor.[4] Thus, there is no specific authorization in the NLRA for AIDEA's use of a PLA.

Because there is no express statutory authorization for government use of PLA's, several legal challenges have been brought in an effort to restrict their use under various NLRA preemption doctrines.[5] The United States Supreme Court recently addressed these NLRA preemption issues in Building and Construction Trades Council v. Associated Builders and Contractors, 113 S. Ct. 1190 (1993).

The Building and Construction Trades Council case involved the clean-up of Boston Harbor undertaken by the Massachusetts Water Resources Authority ("MWRA"), an independent state government agency. As part of the bid specifications for that project, the successful bidder was required to abide by the provisions of a PLA which had been negotiated by an agent of MWRA with the Building and Construction Trades Council. An organization representing nonunion construction industry employees brought suit to enjoin enforcement of the bid specification, claiming, among other things, that the PLA was preempted by the NLRA. 113 S. Ct. at 1194.

The Supreme Court held that the PLA was not preempted by the NLRA. The Court's decision rested on the distinction between the state as a regulator and the state as a market participant. The Court noted that the NLRA preempted the state from regulating within certain particular zones of activity. 113

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[4] Because AIDEA is not acting as an employer with respect to the HCCP, the provisions of the Alaska Public Employment Relations Act, AS 23.40.70 et seq., do not apply to the proposed PLA.

[5] While the NLRA contains no express preemption provision, the United States Supreme Court has articulated NLRA preemption doctrines that restrict state action and regulation in certain protected areas. Building and Constr. Trades Council v. Associated Builders and Contractors, 113 S. Ct. 1190, 1194 (1993).

S. Ct. at 1195-96. The Court stated:

> A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.
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> Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor regulation, not all legitimate state activity that affects labor. . . .

113 S. Ct. at 1196 (emphasis in original).

The Supreme Court found that the MWRA was pursuing proprietary interests in entering into the PLA in order to ensure an efficient project. Since the MWRA was not acting as regulator with an interest in setting policy, the court concluded that the PLA was not preempted by the NLRA. 113 S. Ct. at 1199.

As in the Building and Construction Trade Council case, AIDEA is considering a PLA in order to ensure an efficient and timely project. The reasons being considered by AIDEA do not support a finding that it is attempting to act as a regulator setting labor policy. Accordingly, we believe that incorporation of a PLA with respect to the HCCP is not preempted by the NLRA.[6]

B. Federal Antitrust Issues

Another issue which must be addressed in the context of

[6] Some of the reasons advanced by the Council in support of a PLA, such as the promotion of local hire, could be seen as policy or regulatory goals. Accordingly, were AIDEA to adopt these reasons, consideration should be given to whether AIDEA will have left the role of market participant and become a labor regulator, thereby running afoul of the NLRA. We have been advised that, in considering a PLA for the HCCP, the Authority is focusing only on its proprietary goals of ensuring a smooth and efficient project.

a PLA bid specification is application of the Sherman Antitrust Act, 15 U.S.C.A. § 1 (West 1985). The Sherman Act proscribes "every contract, combination in the form of trust or otherwise, in restraint of trade or commerce." Id. An opponent of the PLA could argue that the bid specification and the PLA itself unlawfully reduce competition in the construction industry by precluding non-union contractors from participating in the Project. Such a challenge would likely fail.

The bid specification being considered with respect to the HCCP would not, in fact, preclude nonunion contractors from submitting bids or participating in the project. Instead, any contractor, irrespective of previous union affiliation, would be permitted to bid on the project. The successful bidder would be required to enter into the PLA with the union for purposes of the HCCP only. In addition, the contractor's employees would be required to join the union for purposes of the HCCP. These requirements do not limit competition with respect to the project or prevent nonunion contractors or employees from fully participating. Accordingly, we do not believe the bid specification or PLA would be an anticompetitive device violating the Sherman Act.

Further, because AIDEA is a state entity, it is immune from antitrust claims under the state action doctrine. Parker v. Brown, 317 U.S. 341 (1993); Interface Group, Inc. v. Massachusetts Port Auth., 816 F.2d 9, 12-13 (1st Cir. 1987). In addition Section 8(e) of the NLRA and the nonstatutory antitrust exemption provided to labor organizations would operate to thwart any anti-trust challenges brought against the Council and the PLA itself.[7] 29 U.S.C.A. 158(e) (West 1973), Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616 (1975).

In Associated Builders and Contractors, Inc. v. City of

[7] The United States District Court in the Building and Construction Trade Council case reached similar conclusions. Associated Builders and Contractors v. Massachusetts Water Resources Auth., No. 90-10576-MA (U.S. District Court, D. Mass., Apr. 11, 1990). See also Associated Builders and Contractors v. Massachusetts Water Resources Auth., 935 F.2d 345, 349 (1st Cir. 1991). Because of the procedural posture of that case, however, it was not necessary for the Circuit Court of Appeals or the United States Supreme Court to address the antitrust issues.

Seward, 966 F. 2d 492 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit addressed antitrust challenges to a work preservation clause. In that case, the City of Seward had entered into a collective bargaining agreement ("CBA") with the City's electrical workers' union. The City decided to contract out a transmission line renovation project to a private contractor. To protect the interests of the City's employees who were represented by the union, the union negotiated with the City to add a work preservation clause to the CBA. The clause limited bidding on the project to those contractors who would agree to enter into a labor agreement with the union for purposes of the project. 966 F.2d at 493.

Trade associations representing nonunion contractors brought suit to enjoin enforcement of the clause. Among other challenges, the contractors claimed that the work preservation clause violated the Sherman Antitrust Act. 966 F.2d at 494.

In rejecting the antitrust challenge, the court noted that the work preservation clause at issue was permitted under labor law. The court went on to state that "[i]t would be inconsistent to approve such an agreement under labor law, but strike it down under antitrust law." 966 F.2d at 499. Similarly, it is unlikely that a court would strike down, on antitrust grounds, the use of a PLA which is generally permitted under labor law for construction projects. See 29 U.S.C.A. § 158(e) and (f) (West 1973).

C. Federal Equal Protection/Due Process Issues

Another issue that must be considered is whether the proposed PLA bid specification violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment to the United States Constitution. For the reasons discussed below, we believe that a properly structured PLA bid specification is constitutionally permitted.

In City of Seward, the Ninth Circuit Court of Appeals also addressed constitutional challenges to the work preservation clause at issue in the case. The court rejected each of these challenges. 966 F.2d at 499. The nonunion contractors had claimed that the clause violated the Equal Protection Clause because it constituted state action favoring union contractors over nonunion contractors. Id.

In rejecting this claim, the court found that the discrimination between union and nonunion contractors satisfied the rational basis test under the Equal Protection Clause.[8] The court concluded that "[i]t is just as rational for a public employer to favor union contractors pursuant to a work preservation clause as it is for a private employer to do so."[9] 966 F.2d at 499.

The court in City of Seward also rejected the trade association's federal due process challenge to the work preservation clause, finding that "as wishful bidders the Contractors have no constitutionally protected property interest in the city's power line renovation project."[10] City of Seward, 966 F.2d at 499.

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[8] As noted below, however, a properly structured PLA does not necessarily discriminate against nonunion contractors.

[9] It should be noted that the Alaska Constitution's equal protection clause provides equal or greater protection than does the federal constitution. See State v. Enserch Alaska Const., Inc., 787 P.2d 624, 631 (Alaska 1989). Accordingly, a PLA bid specification that satisfies the state equal protection analysis set forth below would also satisfy the Equal Protection Clause of the United States Constitution.

[10] It is likely that the Alaska courts would reach a similar conclusion if a challenge to a PLA bid specification were brought under the due process clause of article 1, section 9, of the Alaska Constitution. "It is a basic tenet of due process that its prerequisites are state action and the deprivation of an individual interest of sufficient importance to warrant constitutional protection." Estate of Miner v. Commercial Fisheries Entry Comm'n, 635 P. 2d 827, 829 (Alaska 1981). We believe that the Alaska courts would find that wishful bidders of the HCCP have no interest warranting constitutional protection. See State, Dep't of Natural Resources v. Universal Educ. Soc'y, 583 P.2d 806, (Alaska 1978) (mere application for mining lease did not create constitutionally protected interest); but cf. Estate of Miner v. Commercial Fisheries Entry Comm'n, 635 P. 2d at 829 (Alaska 1981) (applicant for gear permit who had previously fished in the fishery had a property interest entitled to due process protection).

Although the City of Seward case concerned the validity of a work preservation clause, we believe the federal courts would render the same result if federal equal protection or due process challenges were brought in the context of a PLA bid specification.[11] In each case, the government requires contractors to enter into a labor agreement with a union for purposes of a specific project. Accordingly, the Ninth Circuit's analysis in City of Seward is equally applicable to a PLA bid specification.

[11] In fact, the United State District Court in the Building and Construction Trades Council case reached similar conclusions in rejecting equal protection and due process challenges to the bid specification and PLA in that case. Associated Builders and Contractors v. Massachusetts Water Resources, No. 90-10576-MA (U.S. District Court, D. Mass., Apr. 11, 1990). See also Associated Builders and Contractors v. Massachusetts Water Resources Auth., 935 F. 2d 345, 349 (1st Cir. 1991). Because of the procedural posture of that case, however, neither the United States Supreme Court nor the Court of Appeals was required to address these challenges.

III. STATE LAW ISSUES RELATED TO PROJECT LABOR AGREEMENTS

A. State Constitution Equal Protection Challenges

The equal protection clause of the Alaska Constitution prohibits government action which unlawfully discriminates against differing classes of persons. Alaska Const. art. I, § 1; see also Ketchikan Gateway Borough v. Breed, 639 P.2d 995, 995-96 (Alaska 1981). Not all government action which discriminates, however, violates the protections of the state constitution. Wickersham v. State, Commercial Fisheries Entry Comm'n, 680 P.2d 1135, 1141 (Alaska 1984).

In State v. Enserch Alaska Construction, Inc, 787 P.2d 624 (Alaska 1989), the Alaska Supreme Court set forth the analysis to be applied to state action affecting individual rights.

> [W]e first determine the importance of the individual interest impaired by the challenged enactment. We then examine the importance of the state interest underlying the enactment, that is, the purpose of the enactment. Depending upon the importance of the individual interest, the equal protection clause requires that the state's interest fall somewhere on a continuum from mere legitimacy to a compelling interest. Finally, we examine the nexus between the state interest and the state's means of furthering that interest. Again depending upon the importance of the individual interest, the equal protection clause requires that the nexus fall somewhere on a continuum from substantial relationship to least restrictive means. The equal protection clause thus requires that all enactments be substantially related to a legitimate state interest. Some enactments are held to higher standards, and may even need to be the least restrictive means of achieving a compelling state interest.

787 P. 2d at 631-32.

In order to apply the Enserch equal protection analysis to the proposed PLA bid specification it is important to more closely examine how a PLA would operate, what classes might

arguably be affected by discrimination, and what individual interests might be impaired. Most likely, a PLA would be challenged as unfairly discriminating against nonunion contractors in favor of union contractors. Upon closer examination, however, it becomes apparent that a PLA for the Project would not adversely affect nonunion contractors or prevent them from fully participating on the project.

PLA's in general and the PLA proposed by the Council in this case do not prevent nonunion contractors from bidding on or fully participating in projects covered by the PLA.[12] Instead, employees of the contractor that is the successful bidder on the project, whether the contractor is union or nonunion, are required to join the union and permit the union to act as bargaining representative with respect to the project covered by the PLA. A properly structured PLA limits union representation to only the project covered by the PLA and not other projects in which the contractor may participate. Further, even on projects covered by a PLA, employees are permitted, through the voting process, to decertify the union's representation and continue to work on the project. See 29 U.S.C.A. § 158 (f), 159(c) and (e) (West 1973).

Accordingly, all contractors regardless of union affiliation are accorded similar treatment in bidding and participating on projects covered by a PLA.

Another possible class that could be adversely affected by adoption of a PLA are the employees themselves. While a contractor's existing employees are initially required to join the union, as noted above, under a properly structured PLA such employees may vote to decertify the union and continue to participate on the project. Thus, a nonunion contractor's employees may, through the voting process, remain unaffiliated.

Of greater concern is a PLA's effect on individuals seeking work on the project. Many PLA's, including the PLA proposed by the Council, require new employees on the project to be hired using the union's job referral systems. While the specifics of the job referral systems utilized by the Council are unknown, a union job referral system could be designed that would

[12] See proposed Project Labor Agreement for HCCP submitted with letter from the Council to Governor Walter Hickel dated July 28, 1993.

give preference to existing union members. Such a system would effectively discriminate against those prospective employees who are not currently members of the union, thereby restricting those employees from fully participating on the project. We believe that such a system would run afoul of the protections afforded by the Alaska Constitution's equal protection guarantees.[13]

A PLA that requires employers to utilize a union referral system which gives preference to existing union members discriminates against nonaffiliated employees who wish to participate in the HCCP. Applying the Enserch analysis, the individual interest which would be affected under such a scenario is the opportunity of nonunion employees to work on the HCCP.

In Enserch the Supreme Court examined a regional preference law that restricted the ability of nonresidents of a particular area from participating in certain public construction projects within the area. The court noted that the "right to work within a particular industry is an `important' right for state equal protection purposes." 787 P.2d at 632 (citation omitted). The fact that the restriction in that case only applied to public works construction and only applied to a portion of the employees participating in the public works project did not change the court's conclusion that the right affected in that case was "an important one" which required that the court "closely scrutinize the law." Id.

As in Enserch, a PLA on the HCCP which discriminates against prospective employees who are not affiliated with the union affects the rights of these employees to engage in an economic endeavor within a particular industry. We believe the Alaska courts would find that an important interest was implicated and would closely scrutinize the government's action. As noted by the Supreme Court:

> Close scrutiny of enactments impairing the important right to engage in economic endeavor requires that the state's interest underlying the enactment by [sic] not only legitimate, but

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[13] Such a system would likely violate the NLRA as well. See 29 U.S.C.A. § 158(a)(3),(f) (West 1973), National Labor Relations Bd. v. Local 269, Int'l Bhd. of Elec. Workers, 357 F.2d 51, 55 (1966).

> important, and that the nexus between the enactment and the important interest it serves be close.

787 P.2d at 633.

Under the Enserch analysis, the courts next examine the governmental interest advanced by the discriminatory PLA. In the case of the proposed PLA, as discussed above, the Authority is attempting to advance its interests as a project owner in ensuring a smooth and efficient project. While this goal is certainly legitimate, we believe that the court would find that it is merely a proprietary goal of the Authority and not an important regulatory goal of government. Cf. Enserch, 787 P.2d at 634 (state's interest in reducing social harms resulting from chronic underemployment was an important goal). Because the individual interest affected by a discriminatory PLA is important and the state's interest in advancing the discriminatory provision would not be classified as important, under the Enserch analysis we believe a PLA that discriminated in hiring based upon previous union affiliation would violate the equal protection clause of the Alaska Constitution.

Even assuming that the government interest being advanced by a discriminatory PLA were classified as important, under the Enserch analysis, a close nexus would be required between the Authority's goal and Authority's means of furthering the goal. We believe the court would find that the nexus in this case does not pass constitutional muster. This is particularly true in light of the fact that the Authority's interest in ensuring a smooth project could be equally advanced by a PLA which does not impose union referral systems that discriminate against employees with no previous union affiliation.

Thus, it is the opinion of this office that a PLA which favored existing union employees in hiring over employees with no previous union affiliation would be struck down as violative of the state constitution's equal protection provision.[14]

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[14] This conclusion is consistent with memoranda previously issued by this Office. See 1990 Inf. Op. Att'y Gen (Mar. 15, 1990; 661-90-0255); 1990 Inf. Op. Att'y Gen (Jan. 19; 661-90-0255); Letter from Assistant Attorney General Kathleen Strausbaugh to Sen. Patrick M. Rodey, Apr. 20, 1990. In each of these memoranda, this office concluded that an agreement which

We believe, however, that a PLA could be structured for the HCCP which would not have a discriminatory affect on employees who are not currently affiliated with the union. Such a PLA would ensure that, in hiring new employees for the project, a job seeker's previous union affiliation would not be considered.

B. Procurement

In a memorandum authored by Carolyn E. Jones of this office, 1990 Inf. Op. Att'y Gen. (Jan. 19; 661-90-0255), several issues were raised as to whether inclusion of a bid specification requiring a PLA violates the provisions of the state procurement act, AS 36.30. The HCCP, however, is exempt from the provisions of the State Procurement Code. AS 36.30.850(b)(22). As a result, the State Procurement Code does not present a bar to the use of a PLA for the HCCP.

IV. CONCLUSION

We believe AIDEA could require, as part of its bid specifications, that successful bidders enter into a PLA with the Council, the form of which would be included in the specifications. Properly structured, it is unlikely that such a bid specification and PLA would violate federal or state law. Bid specifications and PLA's such as the one being considered by AIDEA are not preempted by the NLRA so long as legitimate proprietary goals are advanced by the PLA. Further, it is likely that a PLA that did not discriminate against nonunion contractors or individuals not formerly affiliated with the union would not violate the Sherman Act or the United States or Alaska constitutions. Finally, because the HCCP is exempt from the State Procurement Code, the Code would not present a bar to the use of a PLA for the HCCP.

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discriminated against nonunion contractors or nonaffiliated employees would be subject to attack under the equal protection analysis described in Enserch.