Commonwealth Court Strikes Down PennDOT PLA

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In two unanimous decisions of the Court sitting en banc, Commonwealth Court recently ruled that PennDOT could not impose a requirement that all bidders and subcontractors sign a Project Labor Agreement (PLA) before they could bid or work on a project in Montgomery County for improvements to SR 202, known as the Markley Street Project. The two landmark decisions (J.D. Eckman, Inc. v. PennDOT and Allan Myers, L.P. v. PennDOT), have dramatically altered the legal landscape for PLAs on public projects in Pennsylvania.

The facts giving rise to the bid protests began in the summer of 2016, when PennDOT first made the determination that it hoped to impose a PLA on one of its larger projects in Eastern Pennsylvania. The decision to consider a PLA by PennDOT was somewhat surprising, as traditionally the primary reasons why proponents of PLAs suggest that a PLA should be imposed is due to concerns over possible work stoppages, and there was nothing to suggest that any PennDOT project had ever been significantly delayed by a strike. Prior to imposing the PLA, PennDOT sought advice from many sources, including the Building Trades of the Greater Philadelphia Area. PennDOT subsequently decided in late-November 2016 to move forward with imposing a PLA on the Markley Street Project.

Ultimately, PennDOT advertised the Markley Street Project for competitive bids in August 2017. The bid documents included a requirement that the successful bidder execute a PLA with the Building Trades that agreed that in exchange for the local unions agreement not to strike during the course of the project, that the successful bidder and all of its subcontractors agree to hire all craft labor through the hiring halls of the Local Unions.

PennDOT's PLA requirement resulted in instant litigation. In early-August 2017, several different lawsuits were filed in Commonwealth Court by various taxpayer groups, and three different administrative bid protests were filed with the Secretary of Transportation. The taxpayers that filed suit included, among others, trade associations representing non-union contractors, several non-union contractors, and some contractors with a workforce represented by the United Steelworkers (USW). Several weeks after receiving those protests and taxpayer suits, PennDOT made the decision in late-August 2017 to withdraw the initial procurement.

Several months later, in December 2017, PennDOT rebid the project, but opted not to remove the PLA requirement. Instead, PennDOT revised the PLA to include an exemption for contractors with a workforce represented by the USW. Essentially, this exemption provided that USW contractors could use their own workforce and would not be required to hire through the union halls of the Building Trades. As a result of the updated PLA requirement in the rebid, two prospective bidders that routinely perform large projects in District 6-0, Eckman and Myers, filed administrative bid protests with the Secretary of Transportation. After considering the arguments raised by Eckman and Myers, the Secretary of Transportation eventually denied those protests in February 2018. Both Eckman and Myers subsequently appealed those denials to Commonwealth Court. While the appeal was pending, PennDOT opted not to proceed with bidding the job.

Commonwealth Court decided to hear the case "en banc," meaning that the full Court would hear the case rather than just a panel of three judges, which is how most cases are decided in Commonwealth Court. The fact that the Court decided to hear the case en banc demonstrated the importance of the issues before Commonwealth Court.

Eckman and Myers raised numerous legal arguments in support of their position that the PLA was illegal. First, both Eckman and Myers argued that the PLA illegally discriminated against non-union contractors

by precluding them from using their own workforce, as contractors cannot bid projects with an unknown workforce for obvious reasons. Moreover, non-union contractors cannot force their employees to join unions. Thus, it was clear that none of Eckman and Myers' current employees would be able to work on the project. Eckman and Myers argued that this requirement violated the previous rulings by Pennsylvania's Appellate Courts that a public body cannot discriminate on the basis of union affiliation.

Second, Eckman and Myers argued that PennDOT's attempt to revise the PLA to include the USW exemption made an even stronger case that PennDOT was not treating all bidders equally, and thus was violating some of the most fundamental concepts of public bid law, such as ensuring that a common standard be used and that there be a level playing field. Eckman and Myers argued that whether the contractors were affiliated with the Building Trades or the USW, all union contractors bidding the project would have a distinct advantage and follow a different set of rules than non-union contractors.

Third, Eckman and Myers argued that PennDOT abused its discretion in imposing the PLA because there was no reason whatsoever to do so. Not only did PennDOT not have a history of any projects being impacted by work stoppages, but PennDOT is unique in that it has a system of prequalification that ensures the competency of all contractors and subcontractors working on their projects. As such, PennDOT's stated goal that the PLA was intended to ensure a qualified workforce was without merit, as PennDOT was already assured a qualified workforce through its prequalification process. Finally, Eckman raised a number of other arguments in support of its position, including the fact that the PLA constituted an illegal sole-source contract.

To support its position, PennDOT argued that two prior "panel" decisions (consisting of three judges) of Commonwealth Court, as well as one single judge opinion, had previously allowed PLAs on public projects in certain circumstances, and thus PennDOT argued that PLAs were an accepted practice and there was no reason to disallow a PLA here. PennDOT further argued that it has broad discretion under the State Highway Law to draft construction specifications, and that the PLA requirement was simply a specification, and PennDOT should be given great deference as to what it can impose in a contract.

After hearing oral argument, the Court ultimately issued two unanimous decisions, both written by the President Judge, holding that the PennDOT bid process was illegal,

and cancelling the procurement. In ruling against PennDOT, Commonwealth Court first evaluated the law on competitive bidding, and noted that the Procurement Code required a bid process that resulted in a contract being awarded to the lowest responsible bidder. The Court further noted that competitive bidding in public contracts is mandated by the Pennsylvania Constitution, and that competitive bidding helps guard against favoritism, fraud, and corruption in the awarding of contracts, and the bid laws are put in place for the benefit of property holders and taxpayers and not for the benefit or enrichment of bidders. The Court further stressed that bidders for a public project must be on an equal footing and enjoy the same opportunity for open and fair competition.

The Commonwealth Court then analyzed the prior panel decisions relied upon by PennDOT in arguing that PLAs were permissible in Pennsylvania and distinguished those cases from the case before it. Specifically, the Court evaluated its prior panel decision in A. Pickett Construction Inc. v. Luzerne County Convention Center Authority, which involved the construction of a hockey arena in Wilkes-Barre in the late 1990s. In that case, the Court permitted the PLA to proceed, primarily because of concerns of work stoppages and the importance of meeting a hard deadline for the beginning of an AHL season. However, the Court in that case did note that discrimination against non-union firms in the public bid context is illegal, but it simply ruled that in that particular case discrimination had not been proved. After evaluating the Pickett decision, Commonwealth Court then noted that its other prior panel decision, Sossong v. Shaler Area High School, did not evaluate the discriminatory effect on non-union contractors, and thus was different from the instant case.

Commonwealth Court then analyzed the requirements of the PLA in question, and noted that although the PLA itself contained a commitment from the local unions affiliated with the Building Trades, there would be no strikes for other work stoppages; there was no evidence that the USW contractors were bound by this provision; and accordingly, the USW contractors could bid "in a completely different environment." Thus, the Court ruled that the USW contractors do not bid "on equal footing with other contractors," and also ruled that by requiring the winning bidder to hire all craft labor personnel through the local unions, the PLA introduced "uncertainty in bidding the job" for prequalified non-union contractors.

The Court next addressed PennDOT's argument under the State Highway Law and acknowledged that while PennDOT has the discretion to draft highway contract specifications, a public agency cannot "exercise its discretion contrary to the competitive bidding laws, which prohibit discrimination between union and non-union contractors in the award of public contracts." The Court then addressed PennDOT's argument that a PLA itself specifically indicated that all contractors, regardless of union affiliation, could bid the project. The Court ruled that "notwithstanding this lip service to the principle of competitive bidding, the PLA does not place non-union contractors on equal footing with union contractors."

The Court next addressed the issues raised by Eckman and Myers that working with a completely unknown workforce prohibited them from bidding the project. In ruling in favor of both Eckman and Myers, the Court stated in the Myers' Opinion that "Allan Myers cannot bid the project with an unknown workforce. The PLA has effectively precluded a non-union contractor, such as Allan Myers, from participating in the bid solicitation."

Finally, the Court distinguished its prior decision with the case before it, and stated: "Further, our precedents in Pickett and Sossong did not establish the broad principle that a PLA is appropriate so long as it contains the boilerplate language 'time is of the essence' and 'non-union contractors may bid.' The use of a PLA is permitted where the contracting agency can establish extraordinary circumstances, and PennDOT did not make that demonstration in this case."

Following the Court's decision in January 2019, PennDOT filed Petitions for Allowance of Appeal to ask the PA Supreme Court to hear the two cases. At the same time, PennDOT asked Commonwealth Court to "stay" the effect of its two opinions and allow the Project to proceed with the PLA. Before either Court could rule on those issues, PennDOT discontinued both actions, and thus the en banc decisions are now final.

The Eckman and Myers decisions will likely have far-reaching effects on the ability of public bodies to impose PLAs on public projects moving forward. Based on the unanimous decisions of Commonwealth Court, a public agency can only impose a PLA under the most "extraordinary circumstances," and an agency must affirmatively demonstrate that a PLA does not discriminate against non-union contractors in order to be able to require bidders to sign a PLA, which will obviously be a tough burden. Thus, any Commonwealth agency seeking to impose a PLA, or any local agency either seeking to impose a PLA or intending to enforce a "responsible contractor ordinance," will face a heavy burden in Court if a prospective bidder or taxpayer challenges the validity of that PLA.

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