

## PA Appellate Court Strikes Down Project Labor Agreement for First Time—Saves Taxpayers Millions

PennDOT recently awarded the second phase of a local state highway improvement project to Allan Myers, L.P., one of the top nonunion construction and materials companies building infrastructure projects throughout the mid-Atlantic. At first glance, there is nothing special about the project or the award. But, a closer look reveals that the award comes on the heels of a bid protest that resulted in a landmark Pennsylvania appellate decision that has garnered national attention. For the first time, a Pennsylvania court struck down the lawfulness of a project labor agreement (PLA), finding that it violated Pennsylvania's competitive bidding laws. As a result, the pool of potential bidders on Pennsylvania public projects — both union and nonunion — remains competitive and will save taxpayers millions.

In August 2017, the Pennsylvania Department of Transportation (PennDOT) issued a bid solicitation for the Markley Street project. As a condition of bidding, PennDOT required all bidders to agree to sign a PLA that required all craft labor personnel to be hired through 11 local unions in the Building and Construction Council of Philadelphia and Vicinity. As a result, certain union and nonunion contractors were effectively shut out of the bidding process. The solicitation was met with multiple legal actions by union and nonunion prequalified bidders. In response, PennDOT decided to withdraw the solicitation.

Four months later, in December 2017, PennDOT reissued the Markley Street project solicitation. The revised solicitation included the same PLA requirement, but with a new provision that singled out one class of contractors — union contractors signatory to a collective bargaining agreement with the United Steelworkers — such that this class of bidders would be permitted to utilize its own workforce without following the hiring hall obligations or union security provisions that the PLA required of all other bidders.

Allan Myers — along with J.D. Eckman, Inc. — believing that the bid solicitation violated Pennsylvania's competitive bidding requirements, filed a bid protest with PennDOT. PennDOT denied the bid protest, and Myers appealed to Pennsylvania's Commonwealth Court — a unique intermediate appellate court.

Allan Myers raised four issues that the court combined into three. First, Allan Myers argued that PennDOT's use of the PLA violated Pennsylvania's competitive bidding laws because three classes of bidders — union contractors, nonunion contractors, and United Steelworkers contractors — were not placed on equal footing in their ability to bid the work. Second, Allan Myers argued that PennDOT abused its discretion by relying on a biased and flawed report to justify use of the PLA. Third, Allan Myers argued that the PLA violated the State Highway Law and its corresponding regulations because it deprived PennDOT of the ability to qualify bidders in accordance with the criteria mandated by law. Ultimately, the court addressed only the first argument, which rendered the other issues moot.

Three prior Commonwealth Court decisions — two by three-judge panels and one unpublished decision by a single judge — had all upheld PLAs.<sup>1</sup> But, in January 2019, in a 7-0 *en banc* opinion authored by the court's president judge, the court held that the PLA violated Pennsylvania's competitive bidding laws. The court's analysis includes at least three impactful statements now governing PLAs in Pennsylvania.<sup>2</sup>

First, the court ruled that the PLA favored contractors under agreement with United Steelworkers, and for this reason alone, there was no common standard on which bids could be based. As mentioned above, the PLA permitted United Steelworkers contractors to use their own workforce



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without hiring from local unions. But, all other contractors — union or nonunion — were required to hire a particular workforce. According to the court, this exemption tilted the playing field by favoring a certain class of bidders while creating uncertainty for others.

Second, the court ruled that because the PLA did not guarantee that the local unions would accept Allan Myers' existing workforce, the PLA "effectively precluded a nonunion contractor, such as Allan Myers, from participating in the bid solicitation." Thus, the court recognized an argument that had been rejected in prior cases and provided nonunion contractors with arguments for protesting future solicitations that include PLAs.

Third, the court ruled that the use of a PLA is permitted where the contracting agency can establish "extraordinary circumstances." Boilerplate "time is of the essence" language is inadequate. For example, in prior cases that upheld PLAs, there were critical deadlines. In *Pickett*, a convention center project had to be completed by a date certain because of state funding demands tied to an anchor tenant. In *Sossong*, a school building project required completion before the beginning of the school year. In *Hawbaker*, the timing of a prison project was critical because of safety concerns related to a growing inmate population. But, in the *Allan Myers* case, PennDOT had not demonstrated any critical deadlines or other extraordinary circumstances.

Finally, although the court's holding made it unnecessary to consider whether PennDOT acquired appropriate federal approval for the PLA, the court's numerous references to the issue highlights another likely flaw in the solicitation. Because the project was federally funded, use of a PLA required approval by the Federal Highway Administration. The original August 2017 PLA was approved by the FHA. But, PennDOT never sought FHA approval of the revised December 2017 PLA. Had PennDOT complied, FHA likely would not have approved the PLA because under the governing regulations, the FHA will not approve a PLA that permits strikes. The Markley Street PLA stated that all local unions "agree that there will be no strikes or other work stoppages." But, because United Steelworkers contractors could use their own work force, these contractors were bound by this provision. Thus, the PLA did not actually prevent strikes.

The *Allan Myers* decision has both immediate and long-term implications. At a micro level, the court's ruling saved the public \$4.7 million on the Markley Street project, representing nearly a 20 percent savings. The three lowest bidders on the job were all effectively precluded from bidding under the original bid solicitation. After the lowest bidder withdrew, Allan Myers was the low bidder and was awarded the work for \$23.9 million.

On a broader level, the *Allan Myers* decision creates a higher hurdle for state agencies to utilize PLAs on public projects. The contracting agency must now demonstrate extraordinary circumstances, and must be able to show that nonunion contractors are not "effectively precluded" by the PLA. This adds Pennsylvania to the growing list of states with bolstered protections for the purpose and integrity of competitive bidding.

While *Allan Myers* addresses PLAs, there are many other angles to consider in the ongoing struggle between union and nonunion labor. For example, a recently passed New Jersey law that became effective in May requires that all contractors performing work on public projects demonstrate that their workers have completed or are participating in a federally approved apprenticeship program. Thus, to continue working on public projects, nonunion contractors may need to incur significant costs to create and maintain a program to comply with the federal rules. With higher legal hurdles to PLAs, issues like the apprenticeship programs may become the next legal battleground for competitive bidding.

A copy of the Commonwealth Court decision can be accessed [here](#).

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**The purpose of this alert is to provide notice to all participants in Pennsylvania public construction projects of the significant implications of Allan Myers on use of PLAs in Pennsylvania, and potentially in other states. Please contact us if you would like to discuss the case and its effects in more depth, or to have us provide advice on the potential for a bid protest or any other matters related to public projects in Pennsylvania or on other state and federal projects.**

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<sup>1</sup> See *A. Pickett Constr., Inc. v. Luzerne Cty. Convention Ctr. Auth.*, 738 A.2d 20 (Pa. Cmwlth. 1999); *Sossong v. Shaler Area Sch. Dist.*, 945 A.2d 788 (Pa.

Cmwlth. 2008); *Glenn O. Hawbaker, Inc. v. Dep't of Gen. Servs.* (Pa. Cmwlth., No. 405 M.D. 2009, filed Dec. 1, 2009) (unreported single-judge opinion).

<sup>2</sup> PennDOT appealed the Commonwealth Court's decision to the Pennsylvania Supreme Court. But, following Allan Myers' answer to the petition for allowance of appeal, PennDOT withdrew its appeal.