# MEMORANDUM

# State of Alaska

Department of Law

TO: Joseph L. Perkins, P.E.
Commissioner
Department of Transportation

DATE: January 6, 1999

FILE NO.: 665-98-0098

TELEPHONE NO.: 451-2811

SUBJECT: Legality of Project Labor Agreements

FROM: Paul R. Lyle
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**INTRODUCTION**

The Department of Transportation and Public Facilities (department) is exploring the use of a specification in selected rural airport construction contracts that requires successful bidders to enter into project labor agreements. The agreements would require the contractor to obtain workers for that project exclusively through a union or trade council job referral system that would recruit and train workers, "including those in the immediate community," to perform work on the project. You have asked whether project labor agreements may be lawfully required in airport construction contracts in rural communities. While our opinion is tailored to this specific issue, the analysis in this opinion applies to all departmental construction projects.

The draft specification we have reviewed appears to require the successful bidder to negotiate a project labor agreement after obtaining a construction contract. However, project labor agreements are usually negotiated between owners and unions before the contract is advertised for bids. *See, e.g., Building & Trades Council v. Associated Builders and Contractors*, 113 S.Ct. 1190, 1192-93 (1993) *("Boston Harbor"*). This approach is necessary in order to ensure a level competitive playing field for prospective bidders. Bidders cannot bid on a contract if they cannot ascertain the labor rules with which they will be required to comply once the contract is awarded. Therefore, this memorandum assumes that the department would undertake to negotiate with an appropriate trades council the terms of the project labor agreement before any rural airport construction project requiring use of a project labor agreement was put out to bid. The project labor specification would need to be revised to require the successful bidder to sign the project labor agreement as a condition precedent to the award of the contract.

**ISSUES PRESENTED**

Inclusion of this specification in airport contracts raises the following issues:

1. Do project labor agreements violate the Equal Protection Clause of the Alaska Constitution by discriminating against non-union workers or employers?

2. Do project labor agreements violate Alaska's procurement code because they:

   A) constitute a sole source contract under AS 36.30.300?

   B) constitute prohibited restrictive specifications for services or procurements under AS 36.30.060, 2 AAC 12.090 and 2 AAC 12.790?

**SUMMARY OF ADVICE**

The Alaska Supreme Court recently issued a decision in *Laborers Local #942 v. Lampkin*, 956 P.2d 422 (Alaska 1998) ("*Lampkin*"). The *Lampkin* decision directly addresses the equal protection issues raised by project labor agreements and establishes a framework for analyzing the procurement code issues.[1]

**1. Equal Protection**

Generally, project labor agreements that serve a legitimate and important state interest and that contain terms that are closely tailored to achieving or protecting that state interest will probably be deemed constitutional, even if they impair the right of non-union workers or employers to engage in economic endeavors. However, a project labor agreement that is focussed on creating regional hiring preferences would likely violate the constitution.

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[1] It is difficult to assess whether the proposed specification would pass scrutiny under the Alaska Constitution or the procurement code because the project labor agreement to which it refers has been neither drafted nor negotiated.

**2. State Procurement Code**

A constitutionally valid project labor agreement probably does not violate the procurement code's preference against the award of sole source contracts found in AS 36.30.300. However, such agreements may constitute *per se* violations of the prohibition against the inclusion of restrictive specifications found in AS 36.30.060.

Under AS 36.30.308, innovative procurement procedures may be developed and used, with or without competitive sealed bidding, to meet new or unique state requirements or to achieve the best value for the state. AS 36.30.308 may be a vehicle to test the department's first use of a project labor agreement. However, it is not designed to be a vehicle through which competitive bidding requirements may be regularly modified. The procurement regulations would need to be amended to specifically authorize the use of project labor agreements.

Assuming that project labor agreements are authorized under the procurement code, then the department will be required to demonstrate, on a case-by-case basis, that the terms of those agreements are closely tailored to fulfill the purposes underlying the competitive bidding requirements of the code. This will be a difficult task for the department in most construction projects. Project labor agreements that are not adequately supported by detailed findings before a project is put out to bid will be rejected by the courts. In addition, project labor agreements that have as their purpose "social policy making" will not be sustained by the courts.

**3. Recommendations**

We recommend that the department seek changes to the procurement regulations promulgated by the Department of Administration before attempting to use project labor agreements. We also recommend that a written record of decision be prepared for each project on which a project labor agreement is used. The record of decision should address the unique departmental needs or extraordinary challenges justifying use of the agreement and should demonstrate how the terms of the agreement meet those needs and the purposes underlying the competitive bidding requirements of the state procurement code. The state risks having project labor agreements stricken if an adequate record is not prepared before the agreement is negotiated and signed.

The Attorney General has previously advised that project labor agreements may violate the procurement code and the rights of non-union workers under the Equal Protection Clause of the Alaska Constitution. 1990 Inf. Att'y Gen. (Jan. 19; 661-90-

0255). Based on the *Lampkin* decision, we rescind that portion of our January 19, 1990, advice that addresses equal protection concerns raised by the use of project labor agreements. That portion of our January 19, 1990, advice addressing the possible illegality of project labor agreements under state procurement regulations remains in effect.

**ANALYSIS**

**A. Project labor agreements are constitutional if they serve legitimate state interests and the provisions of the agreement are closely related to those interests**

The Alaska Supreme Court recently addressed the constitutionality of project labor agreements in *Laborers Local #942 v. Lampkin*, 956 P.2d 422 (Alaska 1998). The court in *Lampkin* defined a project labor agreement as:

> a pre-bid contract between a construction project owner and a labor union (or unions) establishing the union as the collective bargaining representative for all persons who will perform work on the project. The PLA provides that only contractors and subcontractors who sign a pre-negotiated agreement with the union can perform project work. A PLA thus generally requires all bidders on the project to hire workers through the union hiring halls; follow specified dispute resolution procedures; comply with union wage, benefit, seniority, apprenticeship and other rules; and contribute to the union benefit funds. In return for a project owner's promise to insist in its specifications that all successful bidders agree to be covered by a PLA, the union promises labor peace through the life of the contract.

*Lampkin*, 956 P.2d 427 at n. 1 (quoting *New York State Chapter, Inc. v. New York State Thruway Auth.*, 666 N.E.2d 185, 188 (N.Y. 1996)).[2]

[2] Pre-hire labor agreements generally constitute an unfair labor practice under the National Labor Relations Act (NLRA), 29 U.S.C.A. § 158. Project labor agreements are permitted in the construction industry under specific statutory exceptions. 29 U.S.C.A. §§ 158(e) and 158(f).

In *Lampkin*, the Fairbanks North Star Borough (borough) negotiated a project labor agreement with a local trades council representing fourteen craft unions in the Fairbanks area. The agreement, which covered the renovation of Lathrop High School, (1) established a non-discriminatory job referral system, (2) recognized unions as the sole bargaining representatives for pay and conditions of employment, (3) required non-union employees to pay periodic union dues and fees, and (4) required all employers on the project to make contributions to union fringe benefit funds. 956 P.2d at 427-28. The agreement also permitted flexible scheduling; eliminated shift differentials, double pay on Sundays, premium pay and some paid holidays; and prohibited strikes or other disruptive activities against project employers. *Id*. The borough's contract specifications required the successful bidder and all subcontractors to sign the project labor agreement. *Id*.

The court held that the project labor agreement did not violate the Equal Protection Clause of the Alaska Constitution or the borough's procurement code.[3] The court's analysis of these issues is instructive in determining how the proposed project labor agreement specification for rural airports would be viewed by the Alaska courts.

**1. Equal protection and project labor agreements**

The Alaska Supreme Court applies a "sliding scale approach" in assessing state equal protection claims brought under the Alaska Constitution. *Lampkin*, 956 P.2d at 429-30. Under this approach, the court balances the importance of the individual interest impaired by the state's action against the governmental interest underlying the state's action. Depending upon the importance of the individual interest at stake, the purpose underlying the state's action must be somewhere between "legitimate" and "compelling."

If the state's interest is at least legitimate, then there must be a nexus between the state's interest and the means the state chooses to achieve or protect that interest. Again, depending on the importance of the individual interest at stake, the nexus between a state interest and the means chosen to achieve it must fall somewhere between a "substantial relationship" (the minimal level of scrutiny) and the "least restrictive means." *Lampkin*, 956 P.2d at 429-30.

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[3] *Lampkin* also held that the project labor agreement did not violate the takings or freedom of association clauses of the Alaska Constitution. 956 P.2d at 436-37.

In *Lampkin*, the court recognized as "important" the right of non-union workers and employers to engage in economic activity and assumed that the project labor agreement impaired that right. *Id*. at 430. The court then went on to determine the borough's interest in requiring the successful bidder to sign the agreement and whether there was a "close" nexus between that interest and the terms of the agreement. The court held that the borough's project labor agreement did not violate the right to equal protection under the Alaska Constitution. Although the rights of non-union employees were impaired by the project labor agreement, the borough's interest in entering into the agreement was important and the terms of the agreement were very closely related to accomplishing that interest. *Id.* at 431-32.[4]

The court found that the borough's interest in requiring the successful bidder to sign the project labor agreement was important because the Lathrop School renovation was "the largest and most complex construction project in [the borough's] history" and that the project had "special requirements" which presented "special challenges" to the borough. 956 P.2d at 431, 435. If the project were not completed on time and within budget, all residents of the borough would be harmed, especially Lathrop students whose education would be disrupted. *Id.* at 431. The court found a very close relationship between this important borough interest and the terms of the project labor agreement. The agreement ensured that construction would be scheduled and performed with as little disruption to classes as possible. *Id.*

**2. Equal protection and the proposed project labor agreement for rural airport construction**

If the proposed project labor specification were challenged in court on equal protection grounds, the court would most likely rule that non-union workers, non-union employers and non-residents of the concerned village have an important right to pursue economic activity. *Lampkin*, 956 P.2d at 430 & n. 5. The state would be required

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[4] The Attorney General has previously advised that project labor agreements may violate the procurement code and the rights of non-union workers under the Equal Protection Clause of the Alaska Constitution. 1990 Inf. Att'y Gen. (Jan. 19; 661-90-0255). Since *Lampkin* holds that project labor agreements drawn for legitimate governmental purposes do not violate the constitutional rights of non-union workers, we rescind that portion of our January 19, 1990, advice that addresses equal protection concerns. That portion of our January 19, 1990, advice addressing the possible illegality of project labor agreements under the state's procurement regulations remains in effect for the reasons stated *infra* p. 11-16.

to demonstrate an important and legitimate interest in requiring successful bidders to sign the project labor agreement. The state's interest would have to be important enough to justify the impairment of individual rights caused by the use of the agreement. *Lampkin*, 956 P.2d at 430. Therefore, before entering into a project labor agreement, the department must articulate and demonstrate real, substantial and legitimate state interests related to construction of the project sufficient to justify the use of the agreement.

As stated above, the court in *Lampkin* repeatedly emphasized the fact that the Lathrop project was the largest and most complex in the borough's history with special requirements that "unquestionably presented special challenges" to the borough. The court also emphasized the borough's need to ensure timely completion and flexible scheduling to minimize the impact on students. 956 P.2d at 427, 431, 435. The court was impressed by the fact that the borough obtained significant labor concessions in order to complete the project on time and within budget. *Id.* at 431. The department should be prepared to demonstrate similarly compelling purposes for entering into a project labor agreement if its proposed agreement is to have a chance of passing constitutional scrutiny. Other project-specific factors which may constitute "important state interests" justifying the use of a project labor agreement are listed *infra* on pp. 18-19.[5]

In light of past legal precedent, a project labor agreement may not have as its focus or goal the establishment and enforcement of regional hiring preferences. *Lampkin*, 956 P.2d at 430 n. 5; *State, Dep't of Transp. & Labor v. Enserch Alaska Constr., Inc*., 787 P.2d 624, 633-34 (Alaska 1989) ("*Enserch*"). Regional hiring preferences have been declared unconstitutional under the equal protection clause. *Enserch*, *id.* The department may not accomplish indirectly through a project labor agreement that which it may not accomplish directly in its contracts. *Enserch*, *id.* Noting that the court will analyze state actions for "conceal[ed] underlying objectives.").[6]

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[5] The factors listed *infra* on pp. 18-19 are those that justify the use of project labor agreements under the state's procurement code. These same factors may also establish the "important interests" justifying the impairment of individual rights under a state equal protection analysis. *Lampkin*, 956 P.2d at 435 n. 17 (recognizing that the analysis of the validity of the project labor agreement under the procurement code is "fundamentally similar" to the analysis of its validity under the equal protection clause because of the overlap between the state's interests in both contexts).

[6] The use of the project labor agreement in *Lampkin* was expected to result in increased regional hiring because of restrictive union residency requirements. *Lampkin*, 956 P.2d at 441

(….continued)

The *Lampkin* decision should not be understood as a general endorsement of project labor agreements under the equal protection clause. Because the constitutional right of non-union workers and employers to engage in economic activity is an important one, the department will always be required to identify legitimate and important countervailing state interests related to a construction project that are effectively addressed in a project labor agreement closely tailored to meet those state interests. As indicated in *Lampkin*, this balancing of individual and governmental interests will have to be accomplished by the department on a project-by-project basis.

### B. Project labor agreements and the state's procurement code

Assuming the proposed project labor agreement survives constitutional scrutiny, it must next be determined whether the agreement is permitted under the state's procurement code. In our opinion, the state procurement regulations now present a greater barrier to the use of project labor agreements than does the equal protection clause of the constitution.

In determining whether the project labor agreement violated the borough's procurement code, the court in *Lampkin* engaged in "a careful analysis of the borough's procurement code's language." *Id.* at 433. The department should expect the court to take the same approach in analyzing the state's procurement code. Before undertaking a detailed analysis of the state's procurement code some general observations about the validity of project labor agreements under competitive bidding statutes are necessary.

Although project labor agreements have been upheld under the competitive bidding laws of other states, courts recognize that they have "an anticompetitive impact on the bidding process." *See, e.g.*, *New York State Thruway*, 666 N.E.2d at 188.

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([6]….continued)

n. 8 (Matthews, J., dissenting). The borough was very careful not to rely on that expectation as one of the reasons for entering into the project labor agreement in the first place. *Id.* In fact, the superior court ruled that it would have been improper to rely on regional hire as a reason for entering into the agreement. *Id.* It would be a mistake to read into the majority opinion in *Lampkin* a general lack of concern for regional hiring issues in the Alaska Supreme Court. However, if an increase in regional hire occurred as a consequence of entering into an otherwise legitimate project labor agreement, that increase in regional hire may not, of itself, render the agreement unconstitutional.

However, project labor agreements are permitted under competitive bidding laws because there are "also efficiencies to be gained" through their use. *Id. See also, Lampkin*, 956 P.2d at 435. The *Lampkin* opinion did not address the validity of project labor agreements under the state's procurement code. *Lampkin*, 956 P.2d at 432 n. 12. However, the analysis of the borough's procurement code in *Lampkin* is instructive.

The *Lampkin* decision adopted the approach used by the New York courts in analyzing whether project labor agreements are permissible under that state's competitive bidding statutes. 956 P.2d at 435. Quoting with approval from *New York State Thruway*, 666 N.E.2d 185, our court stated:

> [Project Labor] agreements "are neither absolutely prohibited **nor absolutely permitted** in public construction contracts" under the state's procurement code. . . . [A] "PLA will be sustained for a particular project where the record supporting the determination to enter into such an agreement establishes that the PLA was justified by the interests underlying the competitive bidding laws."
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> . . .
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> [A] "*post hoc* rationalization . . . cannot substitute for a showing that, prior to deciding in favor of a PLA, the agency considered the goals of competitive bidding." The crux of the . . . concern [is] that the agency show "something more" than a generalized "desire for labor stability so that work will be completed on time."

*Lampkin*, 956 P.2d at 433 (emphasis added). Like the New York courts, the Alaska Supreme Court has adopted a case-by-case approach to scrutinizing project labor agreements for compliance with the state's procurement code. Each project labor agreement will be analyzed to see whether the benefits to the state of entering into a project labor agreement comport with the goals of the competitive bidding process.[7]

[7] It would be up to the department to determine in the first instance whether the use of a project labor agreement comports with the state's procurement code and related regulations. If that determination were challenged, the court would review the determination to see whether the department's decision had a reasonable basis. *Lampkin*, 956 P.2d at 432 n. 11.

With these general considerations in mind, we turn to a detailed analysis of Alaska's procurement code and its implementing regulations. The validity of project labor agreements in public construction contracts may be called into question under AS 36.30.300, AS 36.30.060, 2 AAC 12.090 and 2 AAC 12.790.

**1. Sole source contracts (AS 36.30.300)**

A project labor agreement entered into between the department and a labor organization may be challenged as a sole source contract under the state procurement code. The state code, like the borough code at issue in *Lampkin*, permits sole source contracting under certain circumstances.[8] Neither code absolutely prohibits sole source contracts. The state code allows for sole source contracting where "it is not practicable" to award by competitive procedures and it is in the state's best interest. The borough code requires a good faith finding that "there is only one source" before sole source contracting procedures may be used. To the extent that there is any difference between these code provisions, it appears that the state code is more lenient.

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[8] The borough procurement code at issue in *Lampkin* provides, in relevant part:

> A contract may be awarded without competition when the purchasing agent determines in writing, after conducting a good faith review of available resources, that there is only one source for the required supply, service or construction item.
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> FNSB Ord. 16.30.040.

The sole source provision of the state's procurement code, AS 36.30.300(a), provides, in relevant part:

> A contract may be awarded for . . . construction without . . . competition in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer . . . determines in writing that
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> (1) it is not practicable to award a contract by competitive sealed bidding . . . and
> (2) award of the contract under this section is in the state's best interest.

In *Lampkin*, the court held that:

> [t]he provision of the [borough] procurement code governing sole source procurement is implicated only when a contract is "awarded without competition." FNSB [Ord.] 16.30.040. Even assuming that the PLA affected competition as Lampkin asserts, it cannot be construed as limiting bidding to any particular contractor.

*Lampkin*, 956 P.2d at 435.

Like FNSB Ord. 16.30.040, AS 36.30.300 applies only when a contract is to be awarded without competition. The supreme court would probably rule that an otherwise legitimate project labor agreement does not violate the state procurement code's limitation on sole source contracting so long as the construction contract containing the project labor agreement specification is advertised for competitive sealed bidding.

**2. Restrictive specifications**

In determining whether the project labor agreement at issue in *Lampkin* violated the borough code's prohibition against restrictive specifications, the court required the borough to demonstrate that it had "a reasonable basis to determine that the PLA furthered the interests underlying the Borough's procurement code." *Lampkin*, 956 P.2d at 435.[9] The court applied a deferential standard of review in analyzing this issue. *Id*. at 432, n. 11. Nevertheless, even under a deferential standard of review, the state would have to establish why the project labor agreement meets the state's needs while furthering the interests underlying competitive bidding. *Id*. at 435. In addition, as stated above, the courts will engage in "a close textual analysis" of the regulatory language in deciding whether project labor agreements violate the code. *Id*. at 434. The court in *Lampkin* held that the borough code's prohibition against the use of restrictive specifications did not preclude the use of project labor agreements. *Lampkin*, 956 P.2d at 434-35 & n. 18.

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[9] The court held that the borough code did not require "unfettered competition." *Lampkin*, 956 P.2d at 434. Therefore, some limits on competition could be tolerated. Although the project labor agreement restricted competition to some degree, it was not "unduly restrictive" in light of the borough's minimum needs. *Id*. at 434-35.

**a. The restrictive specification prohibition in the state code**

The prohibition against restrictive specifications in state contracts is found at AS 36.30.060(c), which provides, in part:

> Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and non-restrictiveness of specifications apply to all specifications . . . .

The state's **statutory** prohibition against restrictive specifications is more lenient than the borough code construed in *Lampkin*. The borough code requires specifications to be drafted in a manner that encourages "**maximum free and open competition** in satisfying the borough's **minimum** needs"[10] while the state code requires only that specifications "promote **overall** economy" and be drafted to "**encourage competition** in satisfying the state's needs." AS 36.30.060(c) (emphasis added). Both codes provide that specifications may not be "unduly restrictive." *Id.*; FNSB Ord. 16.35.010.

The use of the phrases "overall economy," "encourage competition" and "unduly restrictive" in AS 36.30.060(c) indicate that the state procurement code does **not** require unfettered competition. Some limitation on competition is authorized when it is demonstrably in the state's best interest. *Lampkin*, 956 P.2d at 435 (noting that "the lessened competition [created by a project labor agreement] may produce other aspects of efficiency.")(citation and inner quotes omitted).

This conclusion is supported by AS 36.30.170(a), which requires contracts to be awarded only to the "lowest responsible and responsive bidder." *See also* 2 AAC 12.180(c) and 2 AAC 12.500. Project labor agreements have been upheld under competitive bidding laws which require only that contracts be awarded to the lowest responsible bidder. *See* cases cited *infra* note 16.

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[10] FNSB Ord. 16.35.010, quoted in *Lampkin*, 956 P.2d at 432 n. 13.

Thus, the state **code** does not appear to prohibit the use of project labor agreements. The supreme court would most likely rule that project labor agreements are permissible under AS 36.30.060 given its ruling in *Lampkin* which construed the narrower language of the borough code.

**b. The restrictive specification prohibition in state regulations**

However, the state's procurement **regulations**, which serve to interpret the procurement code, contain far more limiting language than either AS 36.30.060(c) or the code construed in *Lampkin*.

Two sections of the state's regulations address restrictive specifications. The first, 2 AAC 12.090 provides, in relevant part:

> Except for specifications relating to procurements [for the making of small purchases], **all** specifications must describe the requirements to be met **without having the effect of exclusively requiring a proprietary** supply, **service**, or construction item, **or procurement from a single source, unless no other manner of description will suffice.**

(emphasis added). The second regulation, 2 AAC 12.790 provides:

> **Contractual terms** and conditions **may not have the effect of unnecessarily** limiting competition or **exclusively requiring a proprietary** supply, **service**, or construction item **or procurement from a single source unless no other requirement will suffice.**

(emphasis added). The labor required to construct a public airport may be classified either as the provision of a "service" or as a "procurement."[11] In either case, the procurement regulations that interpret AS 36.30.060(c) prohibit the use of contractual terms that **unnecessarily** limit competition or that have the **effect** of exclusively requiring

[11] The word "'procurement' means buying . . . or otherwise acquiring . . . construction; it also includes **functions that pertain to the obtaining of . . . construction**, including description of requirements, [and] selection and solicitation of sources . . . ." AS 36.30.990(15)(emphasis added).

a proprietary service or a procurement from a sole source. These regulations are binding on the department and have the force and effect of law. *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 and n. 31 (Alaska 1980).

**(i) Project labor agreements may constitute *per se* violations of 2 AAC 12.090 and 2 AAC 12.790**

This office has previously advised that project labor agreements may violate the procurement code. 1990 Inf. Op. Att'y Gen. at 2 (Jan. 19; 661-90-0255). Project labor agreements may be construed as exclusively requiring a proprietary service by requiring that all project labor be hired from the job referral system established by the trades council. The agreements may also be construed as having the effect of exclusively requiring labor to be procured from a single source, *i.e.*, the trades council job referral system. Thus, it is possible that the court would construe a project labor agreement as a *per se* violation of the procurement regulations.[12]

Under the regulations, single source labor requirements are permissible **only** if the department can demonstrate that "no other requirement will suffice." 2 AAC 12.090; 2 AAC 12.790. Demonstrating that only centralized hiring through a union hiring hall would suffice as the labor source for rural airport construction would probably be an insurmountable hurdle for the department. Rural airports in Alaska have been successfully constructed for many years and with no apparent labor difficulty. If the supreme court were to construe project labor agreements as *per se* violations of the state procurement regulations, then the agreements would be unenforceable regardless of how beneficial they may be in terms of meeting the state's legitimate needs.

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[12] It is difficult to find cases striking down project labor agreements as *per se* violations of competitive bidding laws. New Jersey appears to be alone in making that determination, although even the New Jersey Supreme Court seems to be softening that view. Compare *George Harms Constr. Co. v. New Jersey Turnpike Auth.*, 644 A.2d 76 (N.J. 1994) with *Tormee Construction v. Mercer County Improvement Auth.*, 669 A.2d 1369, 1372 (N.J. 1996). In any event, the *Lampkin* decision rejected the New Jersey approach. *Lampkin*, 956 P.2d at 433-35. In fact, one court recently observed that "the overwhelming majority of courts have upheld [project labor agreements]." *Assoc. Builders v. San Francisco Airports Comm.*, 68 Cal.Rptr.2d 737, *review granted*, 951 P.2d 1182 (1998). However, as stated above, those cases generally construe competitive bidding statutes requiring only that contracts be awarded to the lowest responsible bidder. We have found no decisions construing language parallel to Alaska's stringent regulatory prohibition against restrictive specifications.

**(ii) Potential solutions**

There are three possible solutions to this potential problem. First, since the regulations are presently more restrictive than AS 36.30.060 and are intended to interpret it, the department could seek to change or clarify the regulations to specifically authorize the use of project labor agreements on construction projects where the department finds them to be in the state's best interest. Second, the department could request the legislature to amend the procurement code to specifically authorize the use of project labor agreements.[13]

Third, the department may attempt to justify the project labor agreement as an "innovative procurement" under AS 36.30.308 and 2 AAC 12.575.[14] Under AS 36.30.308(a), the department may use an innovative procurement process, "with or without competitive sealed bidding," when the commissioner

> determines in writing that it is advantageous to the state . . . in the procurement of new or unique requirements of the state, new technologies, or to achieve the best value.

*See also* 2 AAC 12.575(a). An innovative procedure approved by the commissioner must also be approved by the Department of Law and must comply with the public notice requirements of AS 36.30.130. *See* AS 36.30.308(b) & (c); 2 AAC 12.575(b).

By requiring the department to demonstrate how an innovative procurement procedure will achieve the "best value" or meet "unique" state needs, AS 36.30.308 effectively parallels the requirements of the *Lampkin* decision. Both *Lampkin* and AS 36.30.308 require the department to establish a reasonable basis for determining that a project labor agreement furthers the interests underlying the competitive bidding laws.

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[13] In *Lampkin* the supreme court was impressed by the fact that both the executive and legislative branches of borough government had endorsed the use of the project labor agreement for the Lathrop project and had determined that the agreement would best serve the borough's interests. *Lampkin*, 956 P.2d at 435 & n. 19.

[14] 2 AAC 12.575 is a recent addition to the procurement regulations, effective November 29, 1997.

Use of the innovative procurement procedure may be inappropriate if the department's intent is to make project labor agreements a regular feature of rural airport construction projects. The statute's terms imply that the legislature intended AS 36.30.308 to be used sparingly. Alaska Statute 36.30.308 may form a legal basis for the state's first project labor agreement without the need to immediately amend the procurement regulations, if the department can meet all of the statutory prerequisites for its use. However, we must stress that the innovative procurement statute may not be used by the department to avoid constitutional strictures associated with project labor agreements.

We recommend amendments to the procurement regulations before negotiating a project labor agreement. The amendments, which would have to be promulgated by the Department of Administration, should clarify the department's authority to use project labor agreements on a case-by-case basis when they are determined to be in the state's best interest. Such amendments would ensure the viability of project labor agreements under the procurement code and could also set out objective standards by which to determine whether a project labor agreement is appropriate for use in a particular project.

However, even if the procurement regulations are changed, it will be difficult for the department to justify the use of project labor agreements on most construction projects. In order to justify the use of a project labor agreement, the department will have to demonstrate the existence of some unique feature or extraordinary challenge that is adequately addressed by the terms of the agreement. This point is discussed below.

**(iii) Project labor agreements must be rationally related to the interests underlying competitive bidding requirements**

As stated above, assuming project labor agreements are authorized under the procurement code, then under the test enunciated by the court in *Lampkin*, the state will be required to demonstrate that it has

> "a reasonable basis to determine that the [project labor agreement] further[s] the interests underlying the [state's] procurement code."

*Lampkin*, 956 P.2d at 435.

The *Lampkin* decision described the purposes underlying the competitive bidding laws as follows:

> [W]e have stated generally that the purposes of competitive bidding are
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> > to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices practicable.
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> > . . . [T]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.

*Lampkin*, 956 P.2d at 434 quoting *McBirney & Assoc. v. State*, 753 P.2d 1132, 1135-36 (Alaska 1988), and *Gostovich v. City of West Richland*, 452 P.2d 737, 740 (Wash. 1969).

The Alaska Supreme Court's approach to analyzing project labor agreements in *Lampkin* is consistent with the approach taken in *New York State Thruway*, 666 N.E.2d 185, a case heavily relied upon in the *Lampkin* decision. In *New York State Thruway*, the court held:

> [There are] two central purposes of New York's competitive bidding statutes, both falling under the rubric of promoting the public interest: (1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts. Generally, **when a public entity adopts a specification in the letting of public work that impedes the competition to bid for such work, it must be rationally related to these twin purposes. Where it is not, it may be invalid.**
>
> . . . The public authority's decision to adopt such an agreement for a specific project must be supported by the record; the authority bears the burden of showing that the decision to enter into the [project labor agreement] had as its purpose and likely effect the

> advancement of the interests embodied in the competitive bidding statutes.

666 N.E.2d at 190 (emphasis added).

If the department proceeds with a project labor agreement, with or without first seeking to amend the procurement regulations, then it should be prepared to demonstrate the state's specific needs for the agreement. In addition, the department should be prepared to demonstrate the rational relationship between the terms of the agreement and the twin goals of obtaining the best work at the lowest price and the prevention of favoritism, fraud or improvidence in the award of the contract. It will be especially important for the department to demonstrate how the agreement "promotes overall economy" for the project in order to comply with AS 36.30.060(c).

It would be advisable for the department to prepare a record of decision that sets out, in writing, the specific state needs (unrelated to regional hire) that would be met by the terms of a project labor agreement.[15] An agreement could then be negotiated with a trades council that satisfactorily meets those needs. If the department does not first seek to have the Department of Administration change the procurement regulations, it will also be necessary for the department to explain why the state's needs cannot be met through any less restrictive specification than one mandating that project labor be acquired from a single source and why no other manner of project hiring will suffice. 2 AAC 12.090; 2 AAC 12.790.

Examples of cases upholding the use of project labor agreements under competitive bidding laws include those where:

(1) the construction project is very complex;

(2) the project is to be constructed over an unusually long period;

(3) there has been a history of labor strife on past projects concerning the same facility;

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[15] The record of decision envisioned here would be similar to the decisional document prepared in state condemnation cases. *See Ship Creek Hydraulic Syndicate v. State*, 685 P.2d 715 (Alaska 1984).

(4) there are demonstrable cost savings or other efficiencies flowing from a project labor agreement;

(5) the owner-agency is operating under court-mandated deadlines;

(6) there is some unique feature of the project that necessitates the use of an agreement;

(7) "[t]he project unquestionably present[s] special challenges" to the owner-agency, *Lampkin*, 956 P.2d at 435;

(8) the project requires multiple general contracts or an unusually large number of contractors or subcontractors;

(9) the scope of the project could result in conflicts between competing labor unions regarding jurisdiction over the same type of work.[16]

As stated earlier, *post-hoc* rationalizations for the adoption of a project labor agreement will not be tolerated by the supreme court. *Lampkin*, 956 P.2d at 433; *New York State Thruway*, 666 N.E.2d at 193-94. A generalized "'desire for labor stability so that work will be completed on time'" will also be insufficient to sustain the use of a project labor agreement under the procurement code. *Lampkin, id*. (quoting *New York State Thruway, id.*).

Project labor agreements that "have as their purpose social policy making, such as remedying racial and gender bias, will not be sustained." *New York State Thruway*, 666 N.E.2d at 194. In addition to being unconstitutional, a project labor

[16] This list of factors is not exhaustive. The department may be able to identify other factors that, standing alone or in combination, justify the use of a project labor agreement. The cases from which the above list is derived are: *Boston Harbor*, 113 S.Ct. 1190; *Lampkin*, 956 P.2d 422; *New York State Thruway*, 666 N.E.2d 185; *Assoc. Builders v. San Francisco Airports Comm.*, 68 Cal.Rptr.2d 737; *Assoc. Builders v. Metropolitan Water District of So. Cal.*, 69 Cal.Rptr.2d 885 (Cal. App. 1997) *review granted*, 951 P.2d 1182 (1998); *Enertech Electrical, Inc. v. Mahoning County Commr's.*, 1994 WL 902493 (D.C.N.D. Ohio 1994); *Assoc. Builders v. Mass. Water Resources Auth.*, 1990 WL 86360 (D. Mass. 1990) (the district court decision affirmed in *Boston Harbor*); *Utility Contractors Assoc. v. Commr's of Mass. Dep't of Public Works*, 1996 WL 106983 (Mass. Super. 1996).

agreement which solely or primarily addresses regional hiring preferences may be viewed by the supreme court as related more to "social policy making" than to the purposes underlying the competitive bidding requirements of state law.[17]

There can be no "generic" project labor agreement applicable to all rural airports. *See, e.g.*, *Lampkin, Boston Harbor*, *New York State Thruway* and other cases cited in note 16, *supra*. The department will need to negotiate separate agreements for each project that are tailored to each project's unique requirements or special challenges and will have to be prepared to demonstrate how the agreement is rationally related to the goals underlying competitive bidding.[18]

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[17] In addition, although project labor agreements are generally permissible under the NLRA, they are permissible only where the state acts as a "market participant" rather than as a "labor regulator." *Boston Harbor*, 113 S.Ct. 1190; 1994 Inf. Att'y Gen. at 3-4 (Apr. 4; 661-94-0325). We have previously advised that project labor agreements entered into primarily to foster policy or regulatory goals of government may constitute unlawful state regulation of labor activity under the NLRA because the NLRA preempts state regulation of labor issues within "certain protected zones of activity." *Id.* at 3-4 & n. 6; *Boston Harbor*, 113 S.Ct. at 1196.

[18] Project labor agreements have also been challenged under competitive bidding laws as unauthorized "bidder pre-qualifications." Alaska's bidder pre-qualification statute is found at AS 36.30.110(b). These challenges have been rejected on the basis that project labor agreements are part of the contract requirements and do not preclude any statutorily qualified bidder from submitting a bid for the project. *Utility Contractors*, 1996 WL 106983 at *14-*15; *Assoc. Builders*, 69 Cal.Rptr.2d 885. The Alaska Supreme Court would likely follow these decisions.

In one case, a project labor agreement was challenged as a "regulation" unlawfully promulgated in violation of administrative procedures requiring public notice and hearings prior to adoption. The court rejected the challenge on the basis that the project labor agreement applied only to a single project and was not a requirement of "general application" to all state contracts. *Utility Contractors*, 1996 WL 106983 at *17-*18. Alaska would likely follow this ruling. AS 44.62.640(3) defines a "regulation" as an order or standard of "general application" that "affects the public or is used by the agency in dealing with the public." A project labor agreement applicable to a single project does not purport to govern the public generally. *See, e.g., Kodiak Seafood Processors Ass'n. v. State*, 900 P.2d 1191, 1197 (Alaska 1995)(permit which did not implement a statute or policy and which did not "govern the actions of any individuals" other than the permittees was not a regulation).

Finally, project labor agreements have been challenged as violating the NLRA, the Sherman Antitrust Act, 15 U.S.C.A. § 1, the Employee Retirement Income Security Act,

(….continued)

**CONCLUSION**

A project labor agreement that focuses upon the establishment and enforcement of regional hiring preferences will likely not pass constitutional muster in Alaska. Project labor agreements that pass constitutional scrutiny may be *per se* violative of the state procurement code regulations prohibiting restrictive specifications.

Before attempting to use project labor agreements, we recommend that the department seek a change in the procurement regulations to clarify that project labor agreements are authorized when the department determines their use to be in the state's best interest.

Even if the procurement regulations are amended to clarify that project labor agreements are authorized, the department must be prepared to justify their use prior to putting a project out to bid and should do so through a written record of decision. The record of decision should demonstrate, on a case-by-case basis, how the agreements are rationally related to both the underlying goals of competitive bidding and the unique needs or special challenges of the projects on which they are used.

If you have any questions concerning this advice, please do not hesitate to contact us.

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([18]….continued)

29 U.S.C.A. § 1144(a) (ERISA) and the due process and equal protection clauses of the U.S. Constitution. These challenges have been rejected by the courts. *See, e.g., Boston Harbor*, 113 S.Ct. 1190 (rejecting NLRA challenge); *Minn. Chapter of Assoc. Builders and Contractors v. County of St. Louis*, 825 F.Supp. 238, 243-44 (D.Minn. 1993)(rejecting ERISA and federal constitutional challenges); *Phoenix Engineering v. MK Ferguson*, 966 F.2d 1513 (6th Cir 1992) *cert. denied*, 113 S.Ct. 1577 (1993)(rejecting NLRA challenge); *Mass. Water Resources Auth.*, 1990 WL 86360 at *3 *aff'd*, 935 F.2d 345, 349 (1st Cir. 1991) (rejecting NLRA, Sherman Act and ERISA challenges); *Assoc. Builders and Contractors v. City of Seward*, 966 F.2d 492 (9th Cir. 1992) *cert. denied*, 113 S.Ct. 1577 (1993)(rejecting NLRA, Sherman Act and federal constitutional challenges); *See also*, 1994 Inf. Att'y Gen. at 5 (Apr. 4; 661-94-0325) (State entities are "immune from [Sherman Act] antitrust claims under the state action doctrine"); *but c.f.* note 17, *supra*., regarding NLRA limits on regulatory actions that the state may take when using project labor agreements.