

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

July 19, 2010

Honorable President and Members
of the City Council of Baltimore
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Attn: Karen Randle
Executive Secretary

Re: City Council Bill 10-0455
Community Partnership Agreements

Dear President and City Council Members:

You have requested the advice of the Law Department regarding City Council Bill 10-0455. City Council Bill 455 requires community partnership agreements for certain construction projects financed or funded by or through the City; defines certain terms; specifies the minimum contents of an agreement; provides for the creation of a model agreement; requires certain annual reports; provides for the automatic termination of the ordinance; and generally relates to community partnership agreements.

Bill 455 requires that the City include in all contracts for construction projects with a total cost of \$5,000,000.00 or more in which the City has a certain financial role, a provision that requires contractors to enter into "Community Partnership Agreements" with the City and certain unions. The bill does not define "Community Partnership Agreement" but dictates its minimum contents. Each Community Partnership Agreement must require contractors to use the hiring halls of the signatory union as their first source of employees for 48 hours. The Agreement must also contain a no-strike clause and must require the signatory unions to "exert their best efforts" to recruit local workers for their hiring halls.

Local Hiring Preference:

The bill's requirement that signatory unions "exert their best efforts" to recruit local workers to their hiring halls combined with the requirement that contractors use those hiring halls exclusively

for 48 hours on covered projects, results in a hiring preference for local workers. The Law Department has consistently advised the City that a direct preference for hiring Baltimore residents for City funded work would run afoul of the Privileges and Immunities Clause of the Constitution and would interfere with the City's Charter-mandated procurement process.

The Supreme Court in *United Bldg. and Const. Trades Council v. Camden*, 465 U.S. 208, 220 (1984), a case addressing a law similar to this one, held "a city's efforts to bias employment decisions in favor of its residents on construction projects funded with public monies" "discriminates against a protected privilege." *Camden*, 465 U.S. at 221-2. The Court held "[t]he opportunity to seek employment with such private employers is 'sufficiently basic to the livelihood of the nation.'" *Id.* at 221 (quoting *Baldwin*, 436 U.S. 371, 388 (1978)).

The fact that the bill requires the unions to "exert their best efforts" to recruit local workers to their hiring halls, as opposed to using quotas, is of no legal consequence. The *Camden* law was changed from a quota to a "goal" with which developers and contractors must make 'every good faith effort' to comply." *Id.* at 214. Like the law in *Camden*, the purpose of Bill 455 is to give local (union) workers first dibs on City projects. The fact that nonresidents could potentially join those hiring pools is also of no consequence.

"[S]tatutes or ordinances mandating local hire in publicly funded projects are meeting a negative response based on both Commerce Clause and the Privileges and Immunity clause rationales." 3 Local Government Law §22:12. "Residence in the area has been rejected as a basis for an award of a public construction contract where the award is based solely on the reasoning that a local firm will use local contractors, local labor and will patronize local supply houses." 13 McQuillin Mun. Corp. §37:104. Although there is authority in some jurisdictions to the contrary, it is factually distinguishable and/or the challenge brought was not based on the Privileges and Immunities Clause.

Furthermore, a local hiring preference would not withstand a Commerce Clause challenge if the City did not have a "proprietary interest" sufficient to make it a "market participant" under the law. Bill 455 defines "covered construction project" as one that the "City finances, in whole or in part, through a [TIF] or a tax abatement program" or "...that is funded, in whole or in part, through state or federal grants or loans administered by the City." § 23-1 (D). The City must bear substantial economic risk on a project to be considered a "market participant" sufficient to survive a Commerce Clause challenge. Playing a minor financial part in a project is not enough. As written, Bill 455 would require the City to enter into these agreements, thereby participating in preferential hiring in situations where it would not be considered a "market participant." This could be challenged as a violation of the Commerce Clause.

Even if the bill were stripped of the local hiring preference, it still violates the Charter and would likely be struck down by courts as preempted by the National Labor Relations Act ("NLRA").

Charter:

The bill restricts the Board of Estimates' authority to award contracts and determine the fiscal policy of the City. Section 11(a) of Article VI of the Charter states that "The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter." Bill 10-455 attempts to usurp the authority of the BoE by dictating which bidders are qualified to work on certain projects (only those willing or able to enter into these agreements). The City Council cannot by ordinance alter the authority granted in the Charter to the Board of Estimates. Furthermore, this law could have a negative impact on the ability of minority businesses to bid on City work, decreasing the effectiveness of the MWBE law. Bill 10-455, by requiring that all contractors on certain projects enter into what are essentially pre-hire collective bargaining agreements, restricting virtually all hiring, would impact the current bidding process significantly, thereby narrowing the Board's fiscal choices and potentially effecting the incentive to hire minority and women-run businesses for the same reasons.

Although there is an exception to the lowest responsible bidder standard in the Charter in Section 11(g)(1)(vi), which states that "notwithstanding the competitive bid provisions of this Charter, the Board of Estimates may adopt rules and regulations that establish uniform procedures for providing, on a neighborhood service, neighborhood public work, or neighborhood public improvement contract, limited bid preferences to responsive and responsible bidders who are residents of, or have their principal places of business in, that neighborhood", this exception was provided by Charter amendment and lies within the discretion of the Board of Estimates.

NLRA Preemption:

The bill is preempted by the NLRA. The NLRA preempts any local ordinance that regulates (*inter alia*) an area of labor relations that Congress intended to "be controlled by the free play of economic forces." *Bldg. and Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 34 (D.C. Cir. 2002) (quoting *Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)). "[T]he decisions of private employers and employees regarding whether or not, and with whom, to bargain" is an area of labor relations that Congress intended to be unregulated. *See Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73, 81 (D.R.I. 2000).

The "Community Partnership Agreement" that is required by Bill 455 is essentially a project labor agreement, or a pre-hire collective bargaining contract. Local governments generally may not require by regulation that private parties negotiate collective bargaining agreements. *See Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 281 (7th Cir. 2005); *Associated Builders & Contractors of Rhode Island*, 108 F. Supp. 2d at 84 (holding that a city's policy requiring execution of a "project labor agreement" in exchange for favorable tax treatment was preempted). Bill 10-455 requires certain private parties to enter into project labor agreements. Therefore, it would regulate "the decisions of private employers and employees regarding whether or not, and with whom, to bargain." *Assoc. Bld. & Contractors of R.I.*, 108 F. Supp. 2d at 81. Consequently, the bill would be preempted by the NLRA, unless it fit within the "market participant" exception, which it does not. *See Allbaugh*, 295 F.3d at 34.

Bill 455, in addition to requiring that contractors working on certain City projects enter into labor agreements, also dictates the terms of those agreements. Unlike the master agreement addressed in *Building & Construction Trades Council v. Associated Builders & Contractors of Mass.*, 507 U.S. 218 (1993) (the “Boston Harbor” case often cited by union proponents as validating project labor agreements), in which the public entity was under a court order to complete a project by a certain deadline in which it had a tremendous financial stake, Bill 10-455 applies to all projects of a certain value meeting certain financial descriptions and it therefore is a regulatory, rather than an economic measure. As stated in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), a case involving a restrictive labor peace law, “[the law] is a pretext to regulate the labor relations of companies that happen, perhaps quite incidentally, to do some county work.” *Id.* at 282 (emphasis added).

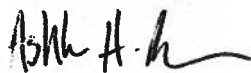
Furthermore, Bill 455 arguably applies to situations in which the City’s interest is taxation. This is simply “not sufficient participation in the marketplace to shield the action from federal preemption.” *See Assoc. Builders & Contractors of R. I.*, 108 F. Supp. 2d at 83. In assessing taxes, a government is performing its “primeval governmental activity”; it is not “exhibiting behavior analogous to that of private parties in the marketplace.” *Id.*

Union Preference:

“[U]nreasonable provisions limiting the contractor’s right to select employees to perform the work under a municipal contract are contrary to public policy and invalid. Thus, a provision in a contract that none but union labor shall be employed by the contractor ... is generally held void.” 10A McQuillin Mun. Corp. § 29:94 (3rd ed.). Bill 455 mandates that contractors on covered projects use union hiring halls as their primary source of labor. This obviously greatly restricts a private employer’s right to select employees.

For the reasons above, the Law Department does not approve the bill for form and legal sufficiency.

Sincerely yours,



Ashlea H. Brown
Assistant City Solicitor

cc: Angela Gibson, City Council Liaison, Mayor’s Office
George Nilson, City Solicitor
Elena DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Terese Brown, Assistant Solicitor