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PERSONAL FINANCE | 11/15/2013 @ 11:16AM | 1,125 views

Lawsuit Asks: Should Taxpayers Pay More For Labor Peace?

There's a price for peace on the job site. (Photo credit: Wikipedia)

Is labor peace so important that taxpayers should pay millions of dollars more for it? That's the question a New York appeals court will answer in proceedings beginning Tuesday, when contractors challenge state rules requiring them to agree to use union labor before they can even bid on a multimillion-dollar construction project.

Blasting contractor Lori Florian said she can't honor the "project labor agreement" on a state highway reconstruction project without jeopardizing public safety and her seven-employee business, Alpha Drilling and Blasting.

"I am in a specialized business — I trained my people myself," said Florian, 56, who started out delivering explosives with her ex-husband and gradually built a $1 million-a-year blasting firm. "My guys are highly trained and if I were to work under the PLA, I am now being sent people from the (union hiring) hall I don't know."

Florian won the bidding for a road project in Orange County, about 60 miles north of Manhattan, in 2011 along with general contractor Lancaster Development. Lancaster submitted a bid for $68 million, $4.5 million below the next-lowest contractor. The state rejected Lancaster's proposal, however, because the non-union shop refused to abide by the PLA, a pre-construction agreement between the state and unions specifying terms of work including wages and the use of union hiring halls for most employees. A state judge invalidated the bidding process in 2012, saying the PLA requirement violated state competitive-bidding laws.

Instead of dropping the PLA requirement, the New York Dept. of Transportation hired a consultant who concluded the labor agreement would save the state money. It opened the bidding again with the same requirement to hire union labor and Lancaster sued again, but a different judge threw out the case, saying the contractor didn't have standing to sue because it never submitted a second bid.

In theory, PLAs serve the taxpayers by guaranteeing the job will get done at agreed-upon wage rates and without wildcat strikes and other job actions that

could delay completion. They date back to the Depression, when factories and construction sites were the scene of fierce battles between labor and management. New York cited "Avoidance of Strikes, Lockouts and Picketing" as one justification for requiring contractors to use union labor. The Obama administration enshrined this view in a 2009 executive order requiring federal agencies to "consider requiring" PLAs in larger projects.

Today, however, "the purpose of PLAs is to exclude non-union contractors," said Jeremy Smith, a lawyer with Couch White in Albany, N.Y., who represents Lancaster. "No one can really argue with a straight face you're going to get better work at a lower price from union contractor."

Lancaster has drawn the support of minority contractors, who say PLA agreements perpetuate the discrimination that has long pervaded construction unions. In an affidavit submitted to the court, Harry C. Alford, president of the National Black Chamber of Commerce, said about 98% of black and Latino-owned construction companies are non-union and PLAs restrict the use of minority contractors on public projects.

"The outcome of this case is of vital importance to African-American-owned construction companies' and African-American construction workers' right to work in New York State," said Alford in his filing with the court.

Lancaster, for example, would have spent 16% of the contract value on women- and minority-owned firms, while the second-lowest bidder agreed to spend only 10%.

The case also comes as Depression-era labor laws are under higher scrutiny at the U.S. Supreme Court, where conservative justices have zeroed in on the conflict between individual rights and regulations designed to cut down on workplace strife by forcing workers to belong to unions or pay into union funds even if they don't.

In cases like *Communications Workers vs. Beck* in 1988 and last year's *Knox v. SEIU*, the court put strict limits on the ability of unions to steer dues toward political activities. On Wednesday, the court heard arguments in *Unite HERE v. Mulhall*, a case challenging management-labor agreements that one critic described as "two wolves agreeing to eat a sheep" because they facilitate union organizing drives even if individual workers oppose them.

"This element of individual rights has the potential to change the dynamic between management and labor in a way that hasn't happened before," said Marcia Goodman, a partner in Mayer Brown's Chicago office who specializes in employment law. For decades, she said, "one side pushes and the other side pushes back, while nothing has changed. This third element could change the dynamic."

Lancaster is hardly a newcomer to the state contracting business. Until it was blocked out of the bidding for the state road project, Smith said, the firm had performed every highway contract in Orange County in excess of $25 million. And it didn't get the work by paying its employees less. Under state "prevailing wage" laws, Lancaster is required to pay union-scale wages, currently $32.75 an hour plus $19 an hour in fringe benefits for laborers, and $39.75 an hour for operators of mechanical equipment.

Where Lancaster saves money, Smith says, is by avoiding union work rules that prevent an operating engineer, say, from picking up a shovel. Union contractors, he said, "have to add one extra employee for every six," to comply

with such work rules.

Lancaster also can pay its workers a more attractive combination of cash wages and benefits. Under union contracts, the $19 an hour in fringe benefits goes into union-controlled health and pension funds, which, in the case of construction unions, have a history of squandering money on dubious and corrupt investments. (See my story about how six regional construction unions in the Midwest ploughed $164 million into a crooked hedge fund, with disastrous results for their members.) Lancaster, instead, funds employee-controlled 401(k) plans and its workers don't have to pay union dues.

New York, in court filings, says Lancaster abandoned any right to sue over the bidding process when it refused to submit a second bid under the PLA requirement. New York Judge Henry Zwack agreed, dismissing Lancaster, Florian and a contractors' association as plaintiffs in January of this year. "Having failed to bid the project, petitioners have suffered no injury," Zwack ruled.

Smith said the judge got the law backward, however, since Lancaster sued to block the bidding process before it began. It would be nonsensical to claim Lancaster lost the right to sue for failing to bid after the suit was filed, he argues.

Lancaster also claims it couldn't bid under the PLA, since that would put it in the position of potentially violating state prevailing-wage laws. The PLA negotiated between unions and the state includes no-strike clauses, 10-hour workdays without overtime and a cap on wages over the life of the project. Prevailing wages, in contrast, are periodically updated according to union wages in the area on a variety of projects.

There's no question PLAs are legal. The Supreme Court upheld them in a 1992 decision involving the $6.2 billion Boston Harbor project, citing "the short-term nature of employment which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry." Under New York's PLA, contractors can keep 15% of their own employees.

The court also held the agreements are no different than similar requirements that private owners, like developers, might put into their bidding processes.

But while a developer in Manhattan might find it expedient to require union workers on a job site to prevent inflatable rats and banging pots and pans from disturbing the neighbors, New York law says public entities must comply with a few more ground rules. Before requiring a PLA, they must determine union labor results in taxpayers getting the best work at the lowest price, prevent corruption and favoritism in contracting, and prevent disruption and unrest on the work site.

Florian said she recently had to call the police to remove union picketers from a job operated by a non-union contractor.

The picketing "stopped us from doing our work," she told me. "We can't push the button on a shot when there's people in dangerous proximity."

But that's rare in the construction market in Orange County, she said. The PLA provision she sued over in 2011 "was a first for me to see in a contract."
