

Federal Lawsuit Challenges Fair Competition Legislation

November 16, 2011

Sticks & Bricks Newsletter - Fall 2011 Edition

This past summer Michigan Gov. Rick Snyder signed into law the Fair and Open Competition in Governmental Construct Act, which many trade councils and labor organizations believe violates their rights.

This somewhat controversial Act, which was covered in the previous issue of "Sticks & Bricks," has drawn the ire of opponents. They claim it hinders their ability to negotiate project labor and other pre-hire agreements with the state of Michigan and other governmental units as provided under the National Labor Relations Act (NLRA), and they are trying to have the courts put an end to the new law.

On Aug. 11, the Michigan Building and Construction Trades Council, AFL-CIO and the Genesee, Lapeer, Shiawassee Building and Construction Trades Council, AFL-CIO (collectively called plaintiffs) filed a complaint in federal court against Gov. Snyder, in his official capacity, challenging the newly passed legislation. The Act generally prohibits any governmental unit from awarding public construction projects, grants, tax abatements or credits based on whether the bidder, contractor or developer employs union or non-union laborers.

The case is currently pending before the Honorable Victoria A. Roberts in the U.S. District Court for the Eastern District of Michigan. A motion was filed on behalf of Gov. Snyder seeking to dismiss Plaintiffs' claims. Oral argument is currently scheduled for Jan. 4, 2012.

The plaintiffs' claim, in particular, alleges that the legislation is preempted by the NLRA, 29 U.S.C. § 151 et seq. The NLRA permits the use of pre-hire agreements within the construction industry. See, 29 U.S.C. 158(f). It further permits the use of pre-hire agreements that involve contracts and/or subcontracts in which the employer agrees to contract work only to those entities that agree to abide by a project labor agreement. Project labor agreements are pre-hire agreements negotiated between the construction trade unions and owners, contractors or construction managers, which govern labor relations, as well as the terms and conditions of employment on a construction project.

Specifically, the Act prohibits any government unit (i.e., the state of Michigan, counties, townships, cities, villages and school districts) from entering into a construction contract or otherwise funding a construction project involving a contract containing any of the following terms or conditions:

1. A term that requires, prohibits, encourages, or discourages bidders, contractors, or subcontractors from entering into or adhering to agreements with a collective bargaining organization relating to

the construction project or related projects.

2. A term that discriminates against bidders, contractors or subcontractors based on their status as a party or nonparty to, or the willingness or refusal to enter into, an agreement with a collective bargaining organization relating to the construction project or related projects.

The Act also further prevents governmental units from offering incentives, including grants, tax abatements or credits, on the condition that the recipient enter into a collective bargaining organization relating to the underlying project or a related project. However, government units are not prohibited from awarding such benefits to private owners, bidders, contractors or sub-contractors that enter into, or are a party to, an agreement with a collective bargaining organization. As long as the government unit does not require it as part of the conditions to the award or otherwise discriminate against such an entity based upon their willingness, or lack thereof, to enter into a collective bargaining agreement in connection with the project or a related project.

The plaintiffs also allege that the legislation substantially impairs “the obligations of contracts to which Plaintiffs are parties” in violation of the Contract Clause of the U.S. Constitution.

Specifically, the plaintiffs contend that the new legislation has rendered project labor agreements previously negotiated null and void with respect to work contracted after the law’s effective date of July 19.

It is unclear how the court will rule on the motion, but it is clear that the new legislation has fallen under significant criticism from unions. The legislation was originally touted as an attempt to spur economic development in Michigan by keeping constructions costs down. However, research conducted on the effect of utilizing a project labor agreement provides limited support for the contention that project labor agreements result in significantly higher costs.

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