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Attorney Client Privileged/ Attorney Work Product

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RE: Opinion Letter

Issue Presented:

Provide an analysis explaining the impact of Del. River Joint Toll Bridge Comm'n v. George Harms Constr. Co., No. A-1484-20 (App. Div. Apr. 4, 2023) (the "Del. River Joint Commission Case") on project labor agreements ("PLA") in New Jersey.

Facts:

At the center of this dispute is an underlying question of whether the Delaware River Joint Toll Bridge Commission (the "Commission") had the power and authority in 2016 to mandate the use of a PLA on the construction of the Scudder Falls Bridge. The Commission was created by an interstate compact in 1934-35 between New Jersey and Pennsylvania, which was incorporated in parallel legislation enacted by each state and then approved by Congress pursuant to the Compact Clause of the United States Constitution.

In 2016, the Commission sent out a notice advertising the Scudder Falls Bridge job for bidding and notified contractors that a PLA would be used that limited contractors to only using two local building and construction councils and their affiliated local unions. Is response, George Harms Construction Co., Inc. ("George Harms") wrote to the Commission and explained that the proposed PLA would violate federal law because it would prevent the George Harms from using

its chosen union, which was the United Steel Workers (USW), on the project.

However, the Commission denied George Harms request and the company was denied the Scudder Falls Bridge job. The project was ultimately awarded to another company that submitted a bid that was $69 million more than the estimated price for the project.

On December 2, 2016, the dispute landed in New Jersey's trial level court when the Commission filed a single count verified complaint against George Harms seeking a declaration that its use of the PLA was authorized by New Jersey law. George Harms responded by filing counterclaims against the Commission alleging that it violated New Jersey's competitive bidding laws, the George Harm's First Amendment rights to freedom of association, freedom from coerced association, and its right to organize and bargain collectively.

In October of 2020, George Harms moved for summary judgment and the Commission cross-moved for summary judgment. In December of 2020, the trial court granted the Commission's motion for summary judgment and ruled that the Commission's conduct of mandating a PLA on the Scudder Falls Bridge job was "cloaked with a presumption of regularity."

George Harms appealed the decision, and on April 4, 2023, the New Jersey Appellate Division Court ("Appellate Court") reversed the trial court's decision because the Commission's compact clause did not permit it to mandate the use of PLAs on the Scudder Falls Bridge job. The Appellate Court further pointed out that the Commission could not use public policy arguments to support its conduct since the laws of New Jersey and Pennsylvania treat PLAs differently.

Analysis:

At the center of this dispute was an underlying question of whether the Commission had the power and authority in 2016 to mandate the use of a PLA on the construction of the Scudder Falls Bridge that connects Pennsylvania and New Jersey. To resolve this dispute, the Appellate Court took a deep dive into New Jersey and Pennsylvania's historical treatment of PLAs. Notably, the Appellate Court emphasized that both New Jersey and Pennsylvania have a strong policy favoring open and competitive bidding of public contracts. This decision sets forth a clear requirement that New Jersey's public entities must be either expressly authorized to mandate PLAs in their formation documents, or they must be authorized to do so under New Jersey's current PLA laws.

This is especially true in situations where bi-state entities are involved. This decision holds that bi-state agencies do not have an inherit right to mandate PLAs. The Appellate Court's decision explains that the Commission did not have the power and authority to mandate the use of a PLA on the Scudder Falls Bridge job because the compact between New Jersey and Pennsylvania that formed the Commission did not explicitly grant it the power to mandate a PLA on that job. The Appellate Court also noted that the Commission could no longer excuse its conduct by saying that mandating PLAs are "cloaked with a presumption of regularity" because New Jersey and Pennsylvania's laws do not treat PLAs the same.

The Appellate Court's decision to remand the case back to the lower court to consider whether damages should be awarded to George Harms is significant because it puts all public entities on notice that they may have to pay significant damages in the future if they improperly mandate PLAs on their projects. The Appellate Court also points out that while the public policy stated in the PLA used by the Commission was to allegedly promote competitive bidding, the Commission's use of a PLA on the Scudder Falls Bridge job resulted in the winning bid going to a company that submitted a bid that was $69 million over the estimated price for that project.

Conclusion:

While this case does not abolish the use of PLAs in New Jersey, it does create new restraints on their use by New Jersey's public officials. This case also opens the door for companies to seek damages against public entities that improperly use PLAs on public projects. If you have any questions about the topics raised herein or about any other labor relations matter, please do not hesitate to contact the UTCA or its attorneys at Tobia & Lovelace Esqs., LLC at (Office) 973-746-6000 or (Cell) 201-638-0990 for further information.

By: Othiamba N. Lovelace, Esq. and Ronald L. Tobia, Esq.