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VIA ELECTRONIC MAIL

Bobby Briant
Utility & Transportation Contractors Association
bobby@utcanj.com

Re: ***Delaware River Joint Toll Bridge Commission v. Harms***

Dear Bobby:

The UTCA has asked asked Cohen, Seglias, Pallas, Greenhall & Furman, P.C. to provide an opinion letter addressing the impact the recent *Delaware River Joint Toll Bridge Commission v. Harms* decision will have on UTCA's industry. As discussed further below, as a result of the *Delaware River Joint Toll Bridge Commission v. Harms* decision, bi-state entities performing work on behalf of both New Jersey and Pennsylvania will not be able to dictate or mandate, through a project labor agreement, the unions qualified to perform work on any given project, which leaves, although not explicitly stated by the Court, that decision to the contractors performing the work on any project subject to competitive bid.

Background

On April 4, 2023, a panel of three appellate judges held that George Harms Construction Co., Inc. ("Harms") shouldn't have been barred from bidding on the Scudders Fall bridge replacement contract project, located on the Delaware River.

The Delaware River Joint Toll Bridge Commission (the "Commission"), a bi-state entity created by an interstate compact between New Jersey and Pennsylvania for the purpose of building and maintaining Delaware River Bridges, had informed potential bidders on the bridge project that they would be requiring the use of a Project Labor Agreement ("PLA"). Under the PLA, a contractor and all of its subcontractors were required to hire their workforce through two local unions, Mercer-Burlington Counties and Vicinity Building Trades Council, AFL-CIO and Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO, with the exception of up to 25% of the workforce, which could be hired from other unions or non-union laborers.

Harms, who wanted to bid on the project, had an agreement with the United Steel Workers, a national labor union. Harms and the United Steel Workers sent a letter to the Commission asking them to include the United Steel Workers in the PLA because they had a "Harmony Agreement" with AFL-CIO's Building and Construction Trades Department, which allowed workers from the two unions to work side by side on the same projects. The Commission did not respond to the letter.

When Harms subsequently threatened to seek an injunction to prevent the project from moving forward until the Commission added the United Steel Workers to the PLA, the Commission turned to the courts, filing a complaint alleging that it would suffer irreparable harm if Harms were successful in obtaining an injunction. Harms, in turn, filed a counterclaim and moved for an injunction – however, the court denied Harms' application, and allowed the PLA to stand. The Commission ended up receiving only one bid for the project, for $396 million – despite the fact that Harms would have done the project for $325 million. Harms then appealed the trial court decision, bringing the case in front of the panel of three appellate judges.

On Appeal

Courts have previously held that a bi-state agency created by interstate compact will "not [be] subject to the unilateral control" of either participating state. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994). Thus, because neither New Jersey or Pennsylvania could dictate the policy of the Commission, and, because the compact itself was silent as to the validity of PLAs, the appellate panel looked to the two states' treatment of PLAs. The appellate panel utilized the *Ballinger* complementary and parallel, substantially similar test. The *Ballinger* test asks "whether or not the laws of the two states, either common law or statutory law, are substantially similar[.]" *Ballinger v. Del.River Port Auth.*, 172 N.J. 586, 599 (2002). If the states' laws are not substantially similar, the test then turns on "whether the bi-state agency impliedly consented to unilateral state regulation," *Sullivan v. Port Auth. of N.Y. & N.J.*, 449 N.J. Super. 276, 285 (App. Div. 2017), *certif. denied*, 232 N.J. 282 (2018).

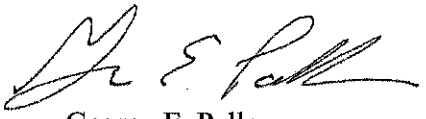
As noted in the appellate decision, while the New Jersey Project Labor Agreement Act, N.J.S.A. 52:38-1 to -7, explicitly authorizes the use of PLAs, there is no similar Pennsylvania statute in place. As also noted in the appellate decision, "current Pennsylvania case law disfavors PLAs unless the project involves 'extraordinary circumstances' and the PLA treats union and nonunion contractors evenly." (quoting *Allan Myers, L.P. v. Dep't of Transportation*, 202 A.3d 205, 214-216 (Pa. Commw. Ct. 2019); *see also Phila. Warehousing & Cold Storage v. Hallowell*, 490 A.2d 955, 957 (Pa. Commw. Ct. 1985) (requiring "[b]idders for a public contract to be 'on an equal footing' and enjoy the same opportunity for open and fair competition"); *J.D. Eckman, Inc. v. Dep't of Transp.*, 202 A.3d 832, 835 (Pa. Commw. Ct. 2019). Thus, New Jersey and Pennsylvania have not enacted complementary or parallel legislation regarding PLAs under the *Ballinger* test. Further, the Commission did not consent to the unilateral state regulation under the *Ballinger* test, nor did the Commission have the power to enforce mandatory PLAs under the compact. Thus, as found by the appellate panel, the Commission did not have the power to approve,

use, or enforce the PLA in question, and therefore had failed to state a claim upon which relief could be granted in their original complaint.[1]

Conclusion

The appellate panel explicitly stated that their decision was not condemning the use of project labor agreements outright, and recognized that these types of agreements may even be beneficial in certain circumstances. Additionally, this decision does not affect how either New Jersey or Pennsylvania state entities treat project labor agreements – as discussed above, project labor agreements are expressly permitted under New Jersey Law, while Pennsylvania disfavors them absent extraordinary circumstances. However, moving forward, the Commission, in addition to any other New Jersey/Pennsylvania bi-state entity whose compact does not explicitly allow for the use of project labor agreements, will not be able to enforce any such agreements or to require contractors to use certain labor unions in order to be eligible to bid on their projects as there is no authority to do so. Therefore, bi-state entities performing work on behalf of both New Jersey and Pennsylvania cannot dictate or mandate, through a project labor agreement, the unions qualified to perform work on any given project, which leaves, although not explicitly stated by the Court, that decision to the contractors performing the work on any project subject to competitive bid. Should the UTCA have any further questions about the matter, please do not hesitate to contact me.

Very truly yours,



George E. Pallas

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[1] While the appellate panel did not cite public policy as a basis for their decision, they took it into account, noting that while both New Jersey and Pennsylvania favor competitive bidding of public contracts, and while the compact creating the Commission stated in pertinent part that "it is in the best interest of the public . . . to require the commission to competitively bid contracts in accordance with the public policies of [New Jersey and Pennsylvania][,]" the use of the PLA resulted in only one bid for the bridge project – a bid that was $69 million over the estimated project price. N.J.S.A. 32:8-3.8(d); 36 Pa.C.S.A. § 3401.11(4).