ARTICLES

PROJECT AGREEMENTS AND COMPETITIVE BIDDING: MONITORING THE BACK ROOM DEAL

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I. Introduction

The Supreme Court decision in *Building and Construction Trades Council v. Associated Builders and Contractors*[1] seems to be a straightforward application of settled preemption doctrines under the National Labor Relations Act ("NLRA")[2]. The litigants asked the Court to determine whether the Massachusetts Water Resources Authority ("MWRA") could require a contractor to execute a project labor agreement on the Boston Harbor clean-up. The project agreement provided that the contractor must utilize building trade unions for all work. The Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("Associated Builders and Contractors") challenged the MWRA's bid specification, arguing that it was preempted by the NLRA. In a unanimous decision, the Court rejected the argument and ruled that where a public body functions like a private entity in the marketplace for construction services, it does not regulate labor.[3]

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1 507 U.S. _, 113 S.Ct. 1190 (1993) [hereinafter *Boston Harbor*].

2 29 U.S.C.A. § 151 (West 1995).

3 113 S.Ct. at 1199. The Court, quoting Chief Judge Breyer in his dissent in the Court of Appeals, stated:

> When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.

Shortly after the Court rendered its decision, the New Jersey Turnpike Authority ("Turnpike Authority") rejected all bids on a portion of its Turnpike Widening Project for the purpose of rebidding the job with a project agreement requirement.[4] Specifically relying on the *Boston Harbor* decision,[5] the Turnpike Authority sought to grant exclusive representation to the building trades for the duration of the Widening Project. The apparent low bidder, George Harms Construction Co., Inc. ("Harms"), challenged the new bid specification as illegal under the Turnpike Authority's low bid requirement.[6] Agreeing, the New Jersey Supreme Court ruled that the bid specification was "not now consistent with the policies of our State's bidding laws."[7] The New Jersey Supreme Court indicated, however, that the use of a project agreement may be appropriate where standards exist to govern their use.[8]

This article proposes the use of state public bidding laws to check the back room deals struck between unions and local public bodies. The Supreme Court's analysis in *Boston Harbor* creates an enormous incentive on the part of labor unions to organize public jobs through political maneuvering that cannot be organized through economic pressure on the contractor. Such "top down" organization does not, as the U.S. Supreme Court presupposed, necessarily result in concomitant gains for the public fisc. There are losses associated with the inefficiency of craft union contractors, the resources expended to strike deals with politicians and the reduction of the bidding pool. The challenge, of course, is to articulate when, if ever, the use of project agreements is compatible with public bidding.[9]

Id.

[4] George Harms Constr. Co., Inc., v. Turnpike Auth., 644 A.2d 76, 79 (N.J. 1994).

[5] Boston Harbor established that the NLRA's sections 151 through 169 "did not preempt the use of project-labor agreements by state agencies acting as market participants in the construction industry." 113 S.Ct. at 1199.

[6] *Harms*, 644 A.2d at 92.

[7] *Id.* at 94.

[8] *Id.* at 96. Project labor agreements, according to the court, serve important purposes in major, long-term construction projects. Specifically, such agreements are useful in "preventing the expiration of collective-bargaining agreements of the different crafts during the term of the construction contract or resolving disputes among several crafts working on the projects . . . ." *Id.* at 95.

[9] Although the New Jersey low bid statutes seem to require the award of contracts to the lowest responsible bidder without regard to union affiliation, the N.J. Supreme Court seemed to indicate that the Turnpike Authority had the power to require the

Part II of this article discusses the framework for competitive bidding in New Jersey. Also, the major doctrines governing competitive bidding for public construction are reviewed, in addition to the introduction of some decisions interpreting these provisions. For purposes of the argument presented by this article, Part II emphasizes a recurring theme: the judicial mandate to construe the bidding statutes strictly and with sole reference to the public good.

Part III-A analyzes the competing assumptions underlying bidding schemes and the assumptions relied upon by the Supreme Court in the *Boston Harbor* decision, finding them inconsistent. It advances the thesis that the Supreme Court's private entity analogy is lacking and that its decision increased the incentives for union labor to expend resources to organize public construction jobs. State competitive bidding schemes stand on firmer ground because they acknowledge the incentives to expend resources to limit the competition for government largesse and the potential for favoritism in public contracting.

With that background, Part III-B analyzes the legal status of project labor agreements after the *Boston Harbor* decision. Part III-B also examines the judicial attitudes toward project labor agreements and "union only" requirements and concludes that the *Boston Harbor* decision punctuates a troublesome judicial tolerance of "union only" requirements.[10] This has resulted in a powerful union "top down" organizing tool which results in the special problems raised in this section.

Finally, Part IV offers factors for consideration when applying a low bid statute to a project labor agreement requirement on public jobs. We explore the benefits of project labor agreements used in the private sector and the potential costs of their use on public jobs. Using the policies and assumptions discussed in the previous sections, it is argued that the costs associated with the use of pro-

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use of project agreements if sufficient standards exist to govern their use and it did not designate a sole labor source. *Harms*, 644 A.2d at 95. This assumes that this power can be used in conjunction with competitive bidding. We are skeptical of such a concept.

10 Although we are troubled by the potential costs associated with exclusive reprsentation granted by the state, the decision is consistent with the continued refusal of the federal courts to examine how the state spends its money. *See infra* note 35 and accompanying text.

ject agreements arising from back room deals are rarely outweighed by their benefits and that the judiciary has an open invitation, via low bid statutes, to break the deal. Also, where the local public body seeks to unionize an entire public job with craft labor, it should be forced to justify its decision on economic terms—particularly because both the use of project agreements and the low bid statute are justified by reference to cost.

For purposes of this Article, a project labor agreement or project agreement is any agreement between a construction industry employer and a labor union which governs a specific project and contains a subcontracting clause. Typically, an employer recognizes a particular union or union group as the exclusive bargaining agent for all employees on the project and agrees not to contract with any entity which does not have a collective bargaining agreement with the designated union.[11] It is commonly accepted that such agreements are used to ensure job site stability, fix labor costs, and facilitate harmony among workers.[12] Their validity is secured by the construction industry proviso to section 8(e) of the National Labor Relations Act.[13]

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11 *Harms*, 644 A.2d at 84. In *Harms*, for example, the Turnpike Authority required contractors and subcontractors working on the Widening Project to enter into a project labor agreement with the New Jersey BCTC, an AFL-CIO organization composed of several different unions that each represented various crafts. *Id.*

12 HERBERT R. NORTHRUP, OPEN SHOP CONSTRUCTION REVISITED 44 (1984). Perhaps counterintuitively, project agreements often benefit the private construction employer. *Id.* at 45, 57. According to some literature, private construction employers force concessions from labor in return for the granting of exclusive representation. *Id.* at 282-83. *See also* MCNEILL STOKES, LABOR LAW IN CONTRACTORS' LANGUAGE 196-97 (1980) (explaining how project agreements flourished in the late 1960s and the 1970s as a result of inflated union construction labor costs).

13 29 U.S.C.A. §158(e) (West 1974) states in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

Id. *See also* National Woodwork Mfrs. v. NLRB, 386 U.S. 612, 641-42 (1967).

II. Competitive Bidding

New Jersey's competitive bidding statutes are comprised of legislation intended to ensure that public bodies pay the lowest possible price when contracting for goods and services. The statutes generally provide that any contract of significant size must be awarded by public bidding to the lowest bidder. The main competitive bidding statute in New Jersey is the Local Public Contracts Law,[14] but many government agencies are subject to separate bidding requirements which essentially contain the same provisions.[15] This article takes its purchase from the low bidding statute for the New Jersey Turnpike Authority,[16] but the "[a]voidance of any potential for contract manipulation is a central theme of all public-bidding doctrine."[17]

The purpose of low bidding statutes in general is to "guard

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14 N.J. STAT. ANN. § 40A:11-1 (West 1993).

15 N.J. STAT. ANN. § 18A:18A-1 (West 1989) (which governs purchases by local school districts). *See also* N.J. STAT. ANN. § 4:26-5z (West 1994) (South Jersey Food Distribution); N.J. STAT. ANN. § 18A:64A-25.3 (West 1989) (County Colleges); N.J. STAT. ANN. § 27:25-11 (West 1994) (New Jersey Transit Corp.); N.J. STAT. ANN. § 32:11D-95 (West 1990) (Delaware River Basin Commission).

16 N.J. STAT. ANN. § 27:23-6.1 (West Supp. 1994) entitled "Contracts; Standing Operating Rules and Procedures; Bid; Threshold Amount" provides, in pertinent part, as follows:

> a. The New Jersey Turnpike Authority, in the exercise of its authority to make and enter into contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers, shall adopt standing operating rules and procedures providing that, except as hereinafter provided, no contract on behalf of the authority shall be entered into for the doing of any work, or for the hiring of equipment or vehicles, where the sum to be expended exceeds the sum of $7,500.00 or, after June 30, 1985, the amount determined pursuant to subsection b. of this section, unless the authority shall first publicly advertise for bids therefor, and shall award the contract to the lowest responsible bidder; provided, however, that such advertising shall not be required where the contract to be entered into is one for the furnishing or performing services of a professional nature or for the supplying of any product or the rendering of any service by a public utility subject to the jurisdiction of the Board of Public Utilities of this State and tariffs and schedules of the charges, made, charged, or exacted by the public utility for any such products to be supplied or services to be rendered are filed with the said board.

Id.

17 *Harms*, 644 A.2d at 92. The *Harms* Court quotes Justice Francis who stated, "'In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forever more in such cases speculation as to whether or not it was purposely left that way.'" *Id.* (quoting Township of Hillside v. Sternin, 25 N.J. 317, 326 (1957)).

against favoritism, improvidence, extravagance and corruption" and "to secure for the public the benefits of unfettered competition."[18] In light of the prophylactic nature of the statutes, New Jersey courts have consistently held that their provisions should be interpreted strictly.[19] Thus, government bodies must carefully draw specifications for the goods or services for which they intend to contract. The contract solicitation must then be published,[20] and the contract must be awarded to the lowest responsible bidder meeting the specifications of the contract solicitation.[21] To invalidate an award for a deficiency in specifications, the irregularity need not result in actual fraud but must merely present such a possibility.[22]

Contracts for the construction of public improvements such as public buildings, roads, and park facilities, with rare exception, are let through competitive bidding. Such projects are often the most

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18 Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975). *See also* Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 533 (App. Div. 1983) (quoting *Terminal Construction's* tenet against "unfettered competition"); L. Pucillo & Sons, Inc. v. Mayor and Council of Boro of New Milford, 73 N.J. 349, 356 (1977) (agreeing with *Terminal Construction's* language, labeling it a "prophylactic measure"); Edward D. Lord, Inc. v. Municipal Util. Auth. of Lower Twp., 133 N.J. Super. 503, 507 (Law Div. 1975) (stating that taxpayers, not bidders, benefit since ultimately legislation is for the public good); Pied Piper Ice Cream, Inc. v. Essex County Park Comm'n, 132 N.J. Super. 480, 486 (Law Div. 1975) (delineating how a municipality's police power assures "public convenience" and the "general prosperity").

19 *L. Pucillo & Sons, Inc.*, 73 N.J. at 356; *Stano*, 187 N.J. Super. at 535.

20 N.J. STAT. ANN. § 40A:11-4 (West 1989) states that "[e]very [labor] contract or agreement . . . shall be made or awarded by the governing body" only after public advertising has been accomplished for the bids or bidding therefore. *Id.*

21 N.J. STAT. ANN. § 40A:11-6.1 (West 1989). This section, entitled "Award of Purchaser, Contracts or Agreements" states in pertinent part, "All purchases, contracts or agreements which require public advertisement for bids shall be awarded to the lowest responsible bidder." *Id. See also* Township of Hillside v. Sternin, 25 N.J. 317, 324 (1957) (qualifying that a bidder is not only the "lowest bidder" but also one who "conforms with specifications"); J. Turco Paving Constr., Inc. v. City Council of Orange, 89 N.J. Super. 93 (App. Div. 1965) (supporting a low bidder's right to seek judicial review of an award of a municipal contract to a higher bidder, if she has fully complied with the bidding statutes and the conditions expressed in the advertisement for bids, and who did not question the specifications).

22 *See* Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975); James Petrozello Co. v. Chatham Twp., 75 N.J. Super. 173, 181 (App. Div. 1962) (stating that unguided municipal power may lead to fraud and where such possibility is present, there is no need to prove actual fraud, favoritism, or collusion). *But see* Phifer v. City of Bayonne, 105 N.J.O.L. 524, 527 (1929) (stating that the "irregularity must be of a substantial nature—such as will operate to affect fair and competitive bidding").

important contracts entered into by a municipality or public agency.[23] Despite the commendable purpose of the competitive statutes, public bodies have attempted to circumvent their requirements in various ways. For example, public bodies often include a "*responsible bidder*" clause in their bid specifications.[24] Such clauses allow public agencies to create a window through which they can reject the lowest bidder and instead choose a different contractor on the somewhat subjective basis of "responsibility." Additionally, another means of evading the mandates of competitive bidding is through the use of project labor agreements.

III. The State's New Role in Top Down Organizing

Whatever legal problems arise from the use of project agreements on private jobs, the exclusive representation aspect of the agreement raises additional issues on public jobs. In addition to substantive labor law and antitrust challenges common in the private arena,[25] their use in the public sector has spurred equal protection and due process challenges.[26] Although the public user of

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[23] PANE, 34 NEW JERSEY PRACTICE § 204 (2d ed. 1993).

[24] *See generally* Matthew Cosenza, *Adverse Effects of the "Lowest Responsible Bidder" Clause in Public Contracts*, 98 DICK. L. REV. 259 (1994). *See also* Clemson Corp. v. McKeesport Area Sch. Dist., 487 A.2d 103 (Pa. Commw. Ct. 1985); Tri-County Motor Sales, Inc. v. Moore, 415 A.2d 439, 440 (Pa. Commw. Ct. 1980) (quoting § 802(a) of the Second Class Township Code as providing that "all township contracts . . . shall not be made except with and from the lowest responsible bidder"); Haughton Elevator Div. v. State Div. of Admin., 367 So.2d 1161, 1164 (La. 1979) (stating that "[t]he public work done by a public entity shall be advertised and let by contract to the lowest responsible bidder"); N.J. STAT. ANN. § 27:23-6.1(a) (West 1994).

[25] *See, e.g.*, Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982) (illustrating a conflict arising from a union's demand for a clause prohibiting Woelke from subcontracting work to anyone not affiliated with the union); Connell Construction, Inc. v. Plumbers & Steamfitters, 421 U.S. 616 (1975) (depicting a general contractor who signed a clause under protest alleging that it violated the Sherman Act and state antitrust laws); Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 862 (D.C. Cir. 1980) (holding that subcontracting agreements may be included in a "prehire agreement" between a labor organization in the construction industry), *cert. denied*, 451 U.S. 976 (1981); Chicago District Council of Carpenters (Polk Bros.), 275 NLRB (1985).

[26] Minnesota Chapter of Assoc. Builders v. St. Louis, 825 F.Supp. 238, 239 (D. Minn. 1993) (stating that ERISA does not preempt the requirements of a bid specification between a contractor and a county and thus no equal protection or due process violations ensue); Image Carrier v. Beame, 567 F.2d 1197, 1198 (2d Cir. 1977) (holding that city's policy whereby only printers employing union labor and exhibiting union label were permitted to bid for city's "flat-form printing" was not an unconstitutional denial to non-union printers of equal protection or due process), *cert. denied*, 440 U.S. 979 (1979). *See also* Associated Builders and Contractors, Inc. v. City of

construction services acts under different regulations and prohibitions than the private owner or contractor, the courts have granted great leeway to state government when it contracts with private entities.[27] The extension of this discretion arises from the questionable assumption that the local government unit acts to promote the efficiency of public construction.

A. *The Back Room Deal: Two Approaches*

In the *Boston Harbor* decision, the United States Supreme Court decided the preemption issue by resolving whether the MWRA acted as a typical proprietor in securing a project labor agreement.[28] According to the Court, MWRA sought to complete the Boston Harbor clean-up in the quickest, most cost effective manner.[29] Implicitly, the Court assigned profit as the motivating characteristic of a private entity purchasing construction services. The rational private entity, according to the Court, seeks to maximize its returns on labor expenditures.[30] In the Court's view, allowing the state to use project labor agreements gives the public owner the same benefits as private users of construction: a vehicle for the cost effective completion of a job.

Yet, low bid statutes are also commonly justified by reference to the public fisc.[31] Competitive bidding, it is argued, secures the most for the least. Unfettered competition results in the lowest price for the public.[32] Furthermore, judicial rhetoric calls for is-

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Seward, 966 F.2d 492, 493 (9th Cir. 1992) (holding that a work preservation clause did not violate equal protection).

27 Alan Hyde, *Beyond Collective Bargaining: The Politicization of Labor Relations Under Government Contract*, 1982 WID. L. REV. 1, 3-19 (detailing the judiciary's "hands off" approach with respect to government procurement).

28 *Boston Harbor*, 113 S.Ct. at 1199.

29 *Id.*

30 *Id.* at 1197-98. According to the law and economics movement, all people act to maximize their own satisfactions. The court, however, can take no purchase from this perspective when it assigns the same desires to the local public body, because the satisfactions of public and private bodies are not necessarily the same. See *infra* note 39 and accompanying text.

31 *See, e.g.*, Terminal Const. Corp. v. Atlantic County Sewerage Auth. 67 N.J. 403, 409-410 (1975); Hillside Twp. v. Sterwin, 25 N.J. 317, 322 (1957).

32 *See, e.g.*, Skakel v. North Bergen, 37 N.J. 369, 378 (1962). According to the *Skakel* court,

> [t]he fundamental philosophy of our competitive bidding statutes is that economy be secured and extravagance, fraud and favoritism prevented. Wazen v. City of Atlantic City, 1 N.J. 272, 283 (1949). Such statutes are

sues arising under the bidding statutes to be resolved with sole reference to the public good. The bidding statutes save the public fisc by protecting the public from improvidence and corruption in the letting of public contracts.[33]

The bidding statutes and the courts interpreting them reject the notion that the public body acts solely in the public interest when letting public contracts.[34]

The unarticulated assumptions underlying competitive bidding and the *Boston Harbor* decision are in tension. The Supreme Court assumed that the MWRA acted in the public interest when it required the use of project agreements on the Boston Harbor clean-up.[35] On the other hand, the legislative underpinnings of competitive bidding and the judicial rules for interpreting them exhibit a strong distrust of the public owner in the letting of public contracts. Craft union only requirements in the form of a project agreement subcontracting clause strike viscerally at those underpinnings; their use tends to favor a certain class of bidders.

1. The Supreme Court Sets Up the "Back Room Deal"

In *Boston Harbor*, the U.S. Supreme Court sets up the back room deal by analogizing the MWRA to a private entity competing in the marketplace for construction services. Reasoning that a pri-

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> designed to safeguard the public good and should be rigidly enforced by the courts to promote that objective. Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957). This common good is best advanced by cultivating the most extensive competition possible under the circumstances and municipalities should organize their efforts in that direction. Asbury Park Press, Inc. v City of Asbury Park, 23 N.J. 50, 54 (1956).

Id.

33 Hillside Twp. v. Sterwin, 25 N.J. at 326.

34 Laws designed to protect against corruption and improvidence do not result from faith in the public body. There is no need to require public bidding and to construe such laws narrowly, if the public body consistently acted with sole reference to the public good.

35 The Court's entire analysis as to whether the project agreement promotes efficiency consisted of three sentences:

> There is no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost. As petitioners note, morever, . . . the challenged action in this case was specifically tailored to one particular job, the Boston Harbor clean-up project. There is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry . . . .

Boston Harbor, 113 S.Ct. at 1198.

vate owner in the construction industry may require a contractor to execute a project labor agreement, the Court held that the same options were open to the public employer. Furthermore, the exercise of the option by the MWRA was merely participation in, rather than regulation of, the labor market.[36]

This analysis, however, is problematic. The state's monopoly over public construction severely undermines the Court's analogy to the private owner because monopoly power over public construction creates incentives for labor to seek economic gains through political means, including back room deals, that labor could not gain through economic pressure against the private owner.[37] Although project agreements do not compel the contractor to obey substantive labor law provisions by the threat of losing access to largesse, open shop contractors are excluded from particular jobs that employ project agreements. Labor, therefore, profits by organizing public jobs through project agreements that it could not organize through economic pressures contemplated by the NLRA.[38] Furthermore, organization of the job may result in the elimination of competition from more efficient contractors. If the

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[36] *Id.* The Court viewed the project agreement as an opportunity for the MWRA to perform its function more efficiently: "To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same." *Id.* (emphasis in original).

[37] The limits of the analogy were not lost on the Court. In another case, the Court invalidated a state requirement, although the same requirement enforced by a private entity posed no preemption concerns. In Wisconsin Dept. of Indus. v. Gould, Inc., 475 U.S. 282 (1986), the Court held that when a State refuses to do business with persons who had violated the NLRA three times within five years, it regulated labor impermissibly. The Court did not premise its analysis on whether a private owner could refuse to purchase union labor for the same reasons—obviously it could. Instead, the Court found that the requirement was designed to deter labor law violations. *Id.* at 287.

The Court saves the analogy in *Boston Harbor* by limiting its application to those instances where the state acts as to maximize returns. The problem with the decision is that it offers little guidance on how to draw the distinction in real cases.

[38] A private competitor in any market has great incentive to create a monopoly because its private benefits outweigh the general harm caused by a monopoly. Although the higher prices of a monopolist market will exclude a percentage of consumers from the market, the monopolist's increased marketed share and prices more than accommodates for the harm.

By obtaining a project labor agreement, craft labor is able to exclude competition through the expense of garnering political gains. This translates to actual losses to the public: "The costs of acquiring a monopoly, whether by buying out a competitor or obtaining government protection from competition are real costs incurred to

state had to compete on the same footing as private entities for construction services, there would be little incentive for labor to expend resources outside of typical bargaining tactics. In view of the state's monopoly power over public construction, however, strong incentives exist for labor to profit through political action.[39]

The Court's effort to avoid this problem by asking whether the state acts like a typical proprietor is analytically shallow. The Court made no effort to develop the notion that the use of a project agreement ensures efficiency. By accepting this premise without rigorous analysis, the Court heads down an analytical cul de sac. There is no need to seriously analyze whether the MWRA acted like a typical proprietor because the Court assures the reader that only a typical proprietor would use a project agreement on the Boston Harbor clean up.[40]

A public entity that acts rationally seeks different ends than its rational private counterpart.[41] By way of example, a political entity

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obtain simple wealth transfers." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 7 (1988).

39 Hyde, *supra* note 27, at 2. Professor Hyde predicted the politicization of labor relations resulting from government's tendency to regulate labor through the granting of a subsidy by stating that "[a]s a result, unions representing employees of these state-supported enterprises have a special incentive to combine traditional economic pressures contemplated by the Wagner Act with less conventional political advances to the real power center—the subsidizing or contracting state." *Id.*

This article proceeds under the assumption that the deals struck between government and unions will not result from negotiations designed to foster the public interest but from the desire to perpetuate the political party in power. This will result in wealth transfers which are inconsistent with competitive bidding.

40 The court also assumes craft labor is the only labor available in the market. The advantages associated with the project agreement are inextricably linked to craft union contractors, because the threat of expiration of the existing collective bargaining agreements and jurisdictional disputes does not exist with open shop contractors. For an aggressive argument that craft labor is losing the economic war against open shop contracting, *see generally* NORTHRUP, *supra* note 12 and HERBERT R. NORTHRUP, ROBERT E. WILLIAMS, & DOUGLAS S. MCDOWELL, DOUBLEBREASTED OPERATIONS AND PRE-HIRE AGREEMENTS IN CONSTRUCTION: THE FACTS AND THE LAW, A SUPPLEMENT TO OPEN SHOP CONSTRUCTION REVISITED (1987), both published by the Industrial Research Unit, Univer. of Penn., the Wharton School of Business.

41 *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 353-55 (Harvard Univ. Press 1990). The author discusses the economic approach to law and some of its implications for understanding legal institutions. *Id.* at 353. Regarding legislators, for instance, the author states the assumption that nothing they do is motivated by the public interest as such, but by the desire to raise money to wage an effective campaign. *Id.* at 354. Thus, interest groups trade the votes of its members and financial support to candidates in exchange for favorable legislation. *Id.*

Note the extreme skepticism of the bidding statutes toward the motivations of

acts to ensure that its political party wins the next election. This may result from efficient government, low cost public projects and a profitable public fisc. More likely, however, it results from the transfer of wealth to interest groups in return for political support.[42] Because it is erroneous to assume that a public body will grant exclusive representation for the same reasons as a private party, the *Boston Harbor* preemption analysis only makes sense if the public body's use of a project agreement is rigorously analyzed for efficiency without any presuppositions as to their use.

Similarly, the concept of purpose is slippery.[43] The governing body may have multiple purposes in adopting a project labor agreement specification. For example, even if it wished to timely complete a project in the most efficient manner, the governing body may also wish to curry the favor of unionized labor or to favor local workers. Certainly, the Court articulated no compelling reasons for assuming a single motive on the part of the MWRA let alone a motive equivalent to that of a private firm.

2. Competing Assumptions: *Harms v. The New Jersey Turnpike Authority*

By ruling that the MWRA acted as a typical proprietor in incorporating a union only requirement in its bid specification, the Supreme Court gave validity to certain assumptions. Whatever the reasons for these assumptions, the Court said nothing about the large body of statutory and judge-made law which accredits the competing assumption. Particularly, the concept of competitive bidding assumes that, without such schemes, the public construction owner is susceptible to corruption. In this section, the assumptions implicit in bidding schemes are explored. This is done in the context of the *Harms* case, because the New Jersey Supreme Court, in rendering its decision, disagreed with the presupposition that project agreements necessarily ensure efficient construction.[44]

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the public bodies charged with control of the bidding process to act in the public interest.

42 The idea for a project labor agreement in the Boston Harbor case came from a private entity. Thus, there is some indication that there was no back room deal between the MWRA and the trades.

43 See *Hyde, supra* note 27, at 2-5, and the authorities cited therein.

44 *See Harms*, 644 A.2d at 76, where the court seeks executive and legislative interventions on these issues.

In *Harms,*[45] the New Jersey Turnpike Authority, after receiving an apparent low bid from George Harms Construction Co., adopted resolutions rejecting all bids and requiring contractors and subcontractors to enter into project labor agreements "with the appropriate affiliated locals of the Building and Construction Trades Council of the AFL-CIO of the State of New Jersey."[46] These resolutions defined a project labor agreement as an agreement recognizing designated unions as the exclusive bargaining representative for all construction employees in exchange for the stipulation that no work stoppages, slowdowns, or disruptions would occur for the duration of the project.[47] According to the Turnpike Authority, such delays would have severely hampered efforts to comply with the Clean Air Act and risked the expiration of certain permits.[48]

Governor Florio quickly raised the stakes. Executive Order No. 99 required all State agencies to adopt project labor agreements with the building trades "whenever feasible and whenever such agreements substantially advance the interests of costs, efficiency, quality, safety, timeliness and the State's policy regarding minority- and women-owned businesses."[49] At that time, Governor Florio sought reelection and the building trades in turn endorsed the governor.[50]

Because the Turnpike Authority specifically relied upon the *Boston Harbor* decision as the basis for rejecting Harms' bid, the New Jersey Supreme Court asked whether the Boston Harbor decision preemptively determined the validity of the resolution. The analysis starts with the *Boston Harbor* Court's conclusion: "The theory of the *Boston Harbor* decision is that when a state acts as a market participant, it does not act as a regulator in areas of national labor policy that are preempted by the NLRA."[51] The Court then reasoned that since state law could prohibit a project labor agree-

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45 *Id.*

46 *Id.* at 79.

47 *Id.* at 83-87.

48 *Id.* at 79.

49 644 A.2d at 80.

50 Donald Warshaw & Dan Weissman, *Florio Blames Kean Administration for Financial Troubles, Tax Increase,* STAR-LEDGER (NEWARK), Oct. 6, 1993, at 15. Executive Order No. 99 was the Governor's quid pro quo for political support. *Id.*

51 *Harms,* 644 A.2d at 85.

ment, so could a private party.[52]

After concluding that the *Boston Harbor* decision did not preclude the state from prohibiting project labor agreements on public jobs, the Court then considered whether the Turnpike Authority had the statutory power to designate exclusive representatives.[53] In a meandering opinion, the court identified, but failed to come to grips with, the competing policies underlying agency discretion and the public bidding laws. Without analyzing the relative merits of these competing policies, the court accepted that the benefits of public bidding superseded the perhaps legitimate need for project labor agreements. The court seemed to conclude that, although the Turnpike Authority had the power to enter into project labor agreements, insufficient standards existed to guide the use of that power consistent with the public bidding laws.[54]

The Court's concern with such standards is wise. The policy justifications for the legislature's delegation of power to administrative agencies and the rhetoric of judicial deference to those powers is well worn in judicial opinions. Such agencies are considered to have special expertise in their particular area and are given broad latitude to accomplish their statutory mission. Conversely, for the delegation of power to be given legal effect, there must be sufficient standards to guide these agencies. This prevents the legislature from abdicating its political responsibilities, curbs the agencies' power, and facilitates judicial review of agency actions.[55]

These reasons, particularly the purported need to curb power and facilitate judicial review, deserve closer scrutiny, especially be-

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52 *Id.* at 85-86. The reasoning may be flawed. Ultimately answering correctly, the Court's analysis illustrates one of the basic problems of the opinion in *Boston Harbor.* The principle applied by the United States Supreme Court is that where a state acts as a typical proprietor would, then it acts as a market participant rather than a regulator. It is not, as seemingly read by the New Jersey Supreme Court, that a state acts as a market participant when it acts like any private entity could:

> Such a prohibition amounts to nothing more than the public equivalent of a corporation's by-law regarding the purchase of construction services. In short, when a state uses project labor agreements on public projects, it is not acting as a regulator of private actors; rather, it is merely defining its role as a proprietor/purchaser of labor in the construction industry.

Id. at 86.

53 *Id.* at 89.

54 *Id.* at 91.

55 Edward L. Rubin, *Law and Legislation in the Adminstrative State,* 89 COLUM. L. REV. 369, 393 (1989) (footnotes omitted).

cause they are related. Both assume that, under certain circumstances, agencies, or the people who run them, will act outside the public interest. In the area of public bidding, the Court has a special invitation into the bidding process. When it reviews a bidding practice, it must apply the principles with sole reference to the public fisc, thereby quashing all potential for favoritism and improvidence.[56]

The Turnpike Authority's bid specification placed the issue squarely: Was the use of a project labor agreement merely a tool available to facilitate efficient construction or an insidious product of a back room deal struck by the building trades and the Florio administration? Certainly, there were facts in *Harms* suggesting political motivations. Harms had a long dispute with the building trades.[57] In addition, the Turnpike Authority made no effort to implement project labor agreements until Harms became an apparent low bidder.[58] Governor Florio, then seeking reelection, signed an Executive Order directing all agencies to use project labor agreements designating a building trades representative whenever feasible. Not surprisingly, shortly after the execution of the order, the building trades endorsed Florio for election.[59]

The majority struck down the deal, providing no substantial policy justifications for its choice. The statutory language and existing case law gave little guidance for such policy-laden issues.[60] The Turnpike picked an unfortunate methodology to adopt its building trades only policy. For example, the Widening Project had been ongoing without such an agreement. The specification

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56 *See supra* note 32 and accompanying text.

57 *Harms*, 644 A.2d at 80.

58 *Id.* at 79. Harms bid the lowest price to perform the contract for the widening of the New Jersey Turnpike between Interchanges 14 and 15E. On the same day, however, the Director of the Turnpike Authority issued an internal memorandum recommending that contracts for the Widening Project be awarded only to contractors who had entered into project labor agreements. *Id.*

59 *See* Warshaw & Weissman, *supra* note 50.

60 As an exercise in statutory interpretation, the problem was indeterminate. As illustrated by the concurring opinion, the text of the competitive bidding statute supports both outcomes. *Harms*, 644 A.2d at 96-97 (Handler, J. concurring). Even the language of the majority was somewhat cryptic. The Court simply stated that the use of a project agreement was not now consistent with the bidding statute. *Id.* at 79.

But to the extent that precedent existed, it favored invalidation of the specification. *See* Witte Electric, Inc. v. State of N.J., 139 N.J. Super. 529 (App. Div. 1976) (union affiliation may not be considered where statute requires contract award to lowest responsible bidder).

was adopted in the eleventh hour after having already bid the job. Harms was a powerful force in the New Jersey construction industry with almost complete dependence on non-craft labor.[61] These factors must have aroused the Court's suspicions of the back room deal and probably succeeded in invalidating the specification.[62] But neither the United States Supreme Court in *Boston Harbor* nor the New Jersey Supreme Court in *Harms* articulated, in a useful sense, the factors to decide when, if ever, a state agency may use a labor requirement.[63]

B. *Organizing Public Construction From The Top Down*

It is vital not to underestimate the stakes in the battle over public construction. Public construction accounts for $116.2 billion dollars per year and it is estimated that all construction accounts for seven to fifteen percent of the nation's economy.[64] Throughout the history of the labor movement, craft unions have fought for their slice of the construction pie. Sometimes the fight takes the form of a craft jurisdictional dispute and sometimes it is the fight to organize a particular employer. Before *Boston Harbor*, however, it was never a fight to organize an entire state from the top down.

To facilitate the discusion of top down organization, we start with a hypothetical example. Imagine that the City of Slobovia seeks bids for repaving a stretch of road in the downtown area. The road is the main artery in and out of the business district and is typically backed up on any business day. During the past winter, the road deteriorated to such an extent that the city received numerous complaints regarding damage to cars and, in one case, a

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61 Harms employed workers organized by the United Steelworkers, a union with no craft designations.

62 When the Court evaluates whether an action rises to the level of rulemaking, it considers four factors. These factors are: "(1) The segment of the public to be affected; (2) the generality of application; (3) the prospectiveness of the result; and (4) the novelty of the legal standard announced." *Harms*, 644 A.2d at 81 (citing Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 331-32 (1984)).

63 The *Harms* court considered the importance of "unfettered competition" in public bidding and effectively avoided a strict factor analysis. *Id.* at 95. Instead, the court decided to restrict its review of the agency's decision to whether it violated the State's policy of fostering competition. *Id.*

64 Harms, 644 A.2d at 83 (citing David B. Brenner, *The Effect of ERISA Preemption on Prevailing Wages and Collective Bargaining in the Construction Industry*, 1993 DET. C.L. REV. 1123 (1993)).

pedestrian broke her ankle when she stepped into a pot hole. As the municipal engineer prepares bid specifications, the mayor and council direct that work must be finished in time for the Slobovia Day parade. If it is not, the city stands to lose tens of thousands of dollars in revenue for its merchants.

Prior to the bid, the local building trades council contacts the mayor, who is actively seeking an endorsement from organized labor, and informs him that the local building trades intend to picket the job should it be awarded to a non-building trade union contractor. Furthermore, the building trades are faced with substantial unemployment and are considering endorsement of the mayor's opponent at the upcoming election. The mayor quickly meets with the municipal engineer, the general counsel, and two members of the town council. The general counsel, after reading the *Boston Harbor* decision, suggests that, in order to ensure timely completion of the job, the bid specifications require that all contractors and subcontractors execute a project labor agreement with the appropriate local building trades council. Furthermore, the suggestion is extended by resolution to all public construction in the city. Shortly thereafter, the building trades endorse the mayor for reelection.

1. Top Down Organizing Before *Boston Harbor*

The Supreme Court in the *Boston Harbor* decision did not facially revisit the economic balance between employers and labor. After all, the Court merely considered whether the state regulates labor when it purchases construction services in the open market. But the facts of the case suggest that labor relations had changed after the Court rendered its decision. To develop this argument and the concept of top down organizing, two cases deserve discussion—both of which plainly dealt with the construction industry proviso of section 8(e).

i. *Connell Construction v. Plumbers & Steamfitters*

The Supreme Court examined the anti-competitive effects of a subcontracting agreement in *Connell Construction v. Plumbers and Steamfitters.*[65] Connell Construction Co. ("Connell"), a general contractor, awarded subcontracts through competitive bidding

[65] 421 U.S. 616 (1975).

without regard to union affiliation.[66] Local 100 of the Plumbers and Steamfitters Union ("Local 100") sought a subcontracting agreement with Connell whereby Connell agreed to subcontract mechanical work to firms that had a current contract with Local 100.[67] At the time, Local 100 represented workers in the mechanical trades and had a multiemployer agreement with about 75 mechanical subcontractors in the Dallas area.[68] Local 100 had no interest in representing Connell's employees or to bargain collectively on their behalf.[69] Local 100 stationed a single picket when Connell refused to sign the proposed agreement; Connell then executed the subcontracting agreement under protest.[70]

The Court held that the agreement was not exempt from the federal antitrust laws, because it tended to restrain competition in a way that did not follow naturally from elimination of competition over wages and working conditions.[71] The Court conceded that federal labor policy contemplated market restraints resulting from the legitimate union objective of eliminating competitive advantages gained from lower wages and substandard working conditions of non-union shops.[72] But the subcontracting agreement in *Connell* tended to eliminate subcontractors from the Dallas market, even if their competitive advantage arose from more efficient operating methods rather than from substandard wages and working conditions.[73]

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66 *Id.* at 619.

67 *Id.*

68 *Id.* These contracts contained a "most favored nation" clause which obligated the union to extend the most favorable terms it offered to other employers to the members of the Association. *Id.*

69 *Connell*, 421 U.S. at 620. The agreement provided as follows:

> Whereas, . . . the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the [ ] contractor . . . [, moreover, if] the contractor should contract or subcontract any of the [ ] work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work *only to firms* that are parties to [a] [ ] current collective bargaining agreement with Local Union 100.

Id. at 620 (emphasis added).

70 *Id.* at 620. Connell sought an injunction against Local 100's actions, averring a violation of the state's anti-trust laws. *Id.*

71 *Id.* at 625.

72 *Id.* at 622. Abrogating competition is acceptable so long as the union's organization and wage fixing affects competition between employers and such actions do not violate antitrust laws. *Id.*

73 *Connell*, 421 U.S. at 623. "Curtailment of competition based on efficiency is

The court was also troubled by Local 100's power to control access to the market. Reasoning that Local 100 could refuse to sign collective bargaining agreements with subcontractors, the union could control the marketplace for reasons unrelated to legitimate organizational goals.[74]

Whether or not the Court articulated its legitimate concerns over top down organizing, the *Connell* decision severely limited labor's ability to exclude non union contractors from the local market.[75] Regardless of whether the entity was public or private, a union could not secure a subcontracting agreement from an employer that the union did not wish to organize and it could not extend that agreement to non-specific job sites.[76]

Referring to our example, any agreement entered pursuant to the city's bid specification is problematic under a *Connell* regime. The building trades cannot have a collective relationship with the city. And the city's requirement results in the organization of the entire road repair project, although the building trades have not even attempted to contact a contractor. Likewise, the resolution extending the requirement fails for all the same reasons and because it is not job-site limited. Although each project agreement executed pursuant to the requirements may pass muster, the unarticulated back room deal resonates the concerns expressed in *Connell.*

ii. *Woelke & Romero Framing, Inc. v. NLRB: Organizational Pressure Moves Closer to the Top*

In *Woelke & Romero Framing, Inc. v. NLRB,*[77] the Court again

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neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect." *Id.*

74 *Id.* at 624-25. Specifically, the Court reasoned that "if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work, it could refuse to sign collective-bargaining agreements with marginal firms." *Id.*

75 *See generally Connell,* 421 U.S. at 632-36 (concluding that federal policy favors employee organization and employer competition when done in accordance with Congress' regulations and usual labor policy).

76 *Id.* at 631-32. These problems are necessary to prevent construction unions from possessing an organizational arsenal that could place economic pressure on subcontractors. Requiring work to be done on specific job sites by voluntary contractors promotes the most fair and efficient labor policy. *Id.* at 630-32.

77 456 U.S. 645 (1982).

addressed the extent to which top down organizational pressure is permissible under section 8(e) of the NLRA. There, two labor unions, in separate labor disputes, sought union signatory subcontracting clauses.[78] The United Brotherhood of Carpenters and Joiners of America picketed a Woelke & Romero Framing construction site in support of its demand for a subcontracting clause.[79] Likewise, the collective bargaining agreement between the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. and Local 701 of the International Union of Operating Engineers, AFL-CIO contained a union signatory subcontracting clause and a clause permitting the Engineers to strike to enforce awards obtained through the grievance and arbitration process on matters covered by the agreement.[80]

The court began its analysis by distinguishing *Connell.* In *Connell,* the Court did not address the extent of protection under section 8(e) where a subcontracting clause is sought or obtained in a valid collective bargaining relationship.[81] With that distinction in place, the Court next considered whether the construction industry proviso should be limited to construction sites where both union and nonunion workers are employed.[82] Relying on an extended discussion of the legislative history of section 8(e), the Court concluded that Congress intended no such limitation on the construction industry proviso and thereby relegated job site friction to a subordinate justification for the clause.[83]

But with surprising candor, the Court recognized and ap-

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78 *Id.* at 647.

79 *Id.* at 649.

80 *Id.* at 650.

81 *Id.* at 653. The language of the *Woelke* court's analysis of *Connell* foreshadowed the court's subsequent limitation on the decision: "In *Connell,* the Court was confronted with a novel and apparently foolproof organizational tactic: "stranger" picketing aimed at pressuring employers with whom the union had no collective-bargaining relationship, and whose employees it had no interest in representing, into signing union signatory subcontracting agreements." *Woelke,* 456 U.S. at 653 n.8.

82 456 U.S. at 654-60.

83 A relevant Conference Report stated as follows:

> The committee of conference does not intend that this proviso [ ] be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would [contradict prior law] (citation omitted). To the extent that such agreements are legal today under section 8(b)(4) of the

proved of the organizational benefits of its decision.[84] Notwithstanding the concerns of the *Connell* Court, top down organizing had reached the general contractor level and had, apparently, unlimited geographic scope.[85]

But even *Woelke* limited the construction industry proviso to those situations where the union sought a Section 8(f) agreement in a collective bargaining relationship.[86] The back room deal struck in our hypothetical still fails. The building trades obviously do not seek to organize the City of Slobovia and no collective bargaining relationship exists. By striking a deal with the city politicos, however, the building trades organized the job without exerting any economic pressure on a private contractor.

But after *Boston Harbor*, it is not clear at all that the deal runs afoul of the NLRA. Obviously, the building trades did not seek to organize the MWRA and did not have a collective bargaining relationship with it. And there is no indication that Kaiser, the engineering firm recommending the project agreement, had any union employees.[87] Thus, *Boston Harbor* implies that a subcontracting

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National Labor Relations Act, as amended, the proviso would present such legality from being affected by section 8(e).

Id. at 655-56 (quoting H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39 (1959), 1 Leg. Hist. 943).

84 Specifically, the Court stated that

> [a]s we have already explained, we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship—and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction job site justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives.

Id. at 663.

In sum, the *Connell* decision holds that the anticompetitive effects of top-down organizing along lines unrelated to wages and conditions of employment made the objectives illegitimate. *Connell*, 421 U.S. at 616. The *Wolke* court, however, brushes over this concern by stating that in most labor markets, only one union represents a particular craft. *Woelke*, 456 U.S. at 664.

85 The Court, in *Woelke*, resurrected most of the organizational power apparently dissipated by the *Connell* decision. By merely establishing a collective bargaining relationship, subcontracting clauses automatically became valid, despite the anticompetetive concerns raised in the *Connell* decision. *Woelke*, 456 U.S. at 654.

Furthermore, the NLRB has held that a Section 8(f) pre-hire agreement is a collective bargaining agreement for section 8(e) purposes. *See* Donald Schriver, Inc. v. NLRB, 635 F.2d 859, 874 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

86 456 U.S. at 664.

87 *See Boston Harbor*, 113 S.Ct. at 1199.

agreement is legal even when no collective bargaining relationship exists.[88] If that is correct, then labor may do what it could not do in *Connell*: organize all the jobs of a stranger employer although it has no desire to represent that contractor's employees. Furthermore, the organizational advantage moves to the owner level.

2. The Equal Protection and Due Process Cases

The mere fact that the actions of the City of Slobovia are subject to constitutional limitations does not change the result of our hypothetical. For the most part, the courts have found that union only requirements, as part of project agreements, do not violate Equal Protection or Due Process principles.[89] Applying minimum rationality, the judiciary operates under the presupposition that the state acts for the public benefit.[90] Courts have accepted that the contracting agency knows best whether a union only requirement is beneficial.[91] As a result, constitutional challenges have failed.[92] The Supreme Court's conclusion that project agreements

88 *See id.* (explaining that Congress intended to accommodate, not hinder, industry agreements). It is unclear how much this analysis holds. The project agreement was not executed between the MWRA and the building trades but between Kaiser and the trades. The Court, either purposefully or not, extended the use of subcontracting clauses to construction managers who use no union employees. But where the unions strike a deal directly with the public body to include a project agreement requirement, another level of complexity is added. *Id.*

Unions can still argue that no project agreement exists between the public body and the union. But the public body grants the exclusive representation in return for the union's support and for the promise that the union will execute the project agreement with the lowest bidder. *Id.*

89 *See, e.g.*, Hoke Co. v. Tennessee Valley Auth., 854 F.2d 820, 828 (6th Cir. 1988); Image Carrier Corp. v. Beame, 567 F. 2d 1197 (2d Cir. 1977).

90 *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980) (implying that states always acts for its people's best interests when legislation affects economic or social policy).

91 *See Harms*, 644 A.2d at 107 (Handler, J., concurring) (concluding that it is not the obligation of the judiciary to authorize contractual agreements and that the legislature's place is best confined to oversight of these agreements).

92 This, however, is by no means an historically unanimous position. Some courts and judges have ruled that union only requirements reward favoritism, constitute an abuse of discretion, or violate low bid statutes. *See, e.g.*, Holden v. City of Alton, 53 N.E. 556 (Ill. 1899) (rejection of bid on city printing contract due to its nonunion status held inconsistent with statute requiring award of contract to the lowest bidder); Navarro Corp. v. Pittsburgh Sch. Dist., 25 A.2d 808, 810 (Pa. 1942) (union contractor's damage claim, predicated upon hiring nonunion contractor to work at same site, was rejected on basis that the award to the nonunion contractor was legally mandated due to its status as the lowest responsible bidder); Lewis v. Detroit Bd. of Educ., 102 N.W.

promote efficiency further solidifies these results.

IV. Checking the Back Room Deal

We have argued that the use of project labor agreements on public jobs is not consistent with the policies underlying public bid-

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756, 757 (Mich. 1905) (board of education lacked the authority to require post-bid that low bidder agree to employ union-only labor because of its monopolistic effect); Adams v. Brenan, 52 N.E. 314, 316 (Ill. 1898) (board of education's agreement with unions that all school repairs would be done with union labor could not be implemented by bid specification because the board lacked the power to restrict competitions and thereby increase the cost of public work); Fiske v. People, 58 N.E. 985 (Ill. 1900) (Chicago ordinance requiring bidders to employ union labor held unconstitutional); Upchurch v. Adelsberger, 332 S.W.2d 242, 243 (Ark. 1960) (city ordinance requiring that all printed materials purchased by the city bear a label of a particular labor union was challenged by company having a labor agreement with a different union; the ordinance was invalid because its anti-competitive effect conflicted with the competitive bidding statutes and because it was unconstitutionally discriminatory); Daniel B. Van Campen Corp. v. Building and Const. Trades Council, 195 A.2d 134, 137 (Pa. Super. 1963) (city has a "positive duty" to let contracts to the lowest bidder and not to distinguish between union and nonunion contractors); M. Cristo, Inc. v. State Office of Gen. Serv., 424 A.D.2d 481, 349 N.Y.S.2d 191, 194 (1973) (threat of union picketing did not support decision to rebid).

The court's analysis in Miller v. Des Moines, 122 N.W. 226 (Iowa 1909), illuminates the distrust of union only requirements resonant in these decisions. The court invalidated a competitive bidding requirement which limited bidders to supply printing materials to those organized by the Allied Trades Council. 122 N.W. at 227. Although the city maintained that union shops performed better quality work, the court imposed its own discretion on the city and required it to let the job to the lowest bidder:

> In denying him that opportunity a double wrong is perpetrated, first, upon the individual who is entitled to be considered upon his personal merits uninfluenced by these extrinsic considerations; and, secondly, upon the state at large, whose expenses are multiplied, and whose integrity is jeopardized by a system of favoritism, the demoralizing effect of which is patent to every thoughtful student of public affairs.

Id. at 231.

In its rhetoric, the *Miller* court was concerned by the potential unfairness to the unaffiliated bidders. *Id.* at 230. Although the city argued that the union printers did better work, the court dismissed the contention and substituted its own judgment. *Id.* at 230-31. Nowhere in the opinion did the court support its assertion that the nonunion shops performed on par with union printers. But the court assumed the fact nonetheless and even went so far as to state that a bidder is wronged if union affiliation is considered in the bidding criteria. *Id.* at 231.

The court articulated greater concern over the impact on the public fisc. *Miller*, 122 N.W. at 232. It is not clear whether this concern arose from the mere stifling of competition or whether it was the deeper concern over corrupt government. If its concern over the demoralizing effect of favoritism was sincere, the quality of work may not have mattered. Even if union shops provided better material, it is doubtful that the court wished to make this dispositive. *Id.*

ding. Those policies, which seek to maximize benefits to the public, exhibit a strong distrust of the public body (or a strong trust that it will not act in the public interest) in the letting of public contracts. We have also presented a critique of the Supreme Court's decision in *Boston Harbor.* Central to our criticism is the Court's attempt to analogize the MWRA to a private proprietor. The Court's holding, which seems to benefit the public by allowing the public agency to facilitate efficient construction, may actually raise costs: costs associated with the expenditure of resources to gain competitive advantage through the use of project agreements.

Through analysis of our City of Slobovia hypothetical, we argued that the *Boston Harbor* decision has doctrinally settled two important questions. First, the Court appears to have validated top down organizing all the way to the owner level, whether or not the owner employs craft labor. Furthermore, the rhetoric, if not the reasoning, of the opinion settles the rationality of project agreements, even if the project agreement is the product of the back room deal and even if its use promotes inefficiency. Finally, we point out that equal protection and due process are ineffective tools to evaluate a union only requirement in the guise of a project agreement. Thus, doctrinally, there are few tools available to visit the back room.

In this section, we discuss the traditional justifications for project agreements and the way in which they relate to the public job. Based upon the doctrines already discussed, we make suggestions for checking the back room deal. First, we suggest criteria for evaluating whether a project agreement addresses legitimate construction concerns. Because these suggestions tend to collapse into a purpose analysis, we argue for the application of a more stringent standard of proof to protect the policy favoring competitive bidding. Finally, where the public body demonstrates that concerns exist, we require the court to weigh the cost savings against the harm arising from granting exclusive representation.

The traditional justification offered by proponents of project labor agreements is labor certainty. An owner uses a project labor agreement to assure that there will be no work stoppage during the life of a particular job. A second justification is that project labor agreements are useful for job site harmony where many subcontractors and trades are forced to work in close proximity. Third, a project agreement often provides for grievance procedures and

dispute resolution to settle jurisdictional disputes. All the justifications are related in that they seemingly promote efficiency, thus lowering costs.[93]

Perhaps counterintuitively, project agreements in the private sector are often the product of employer economic power.[94] But the major motivator for a contractor to enter a project agreement is to fix and reduce costs associated with craft labor. Often the agreement contains union concessions with respect to manning requirements, eliminating work rules and increasing management prerogatives.[95] In the private sector, therefore, project agreements are often used to improve the efficiency of craft contractors.[96]

The strongest case for the use of a project agreement arises where a local agreement between construction employers and the building trades is scheduled to end during the pendency of a job. Typically, construction contractors negotiate with the building trades through group representation. For instance, a contractors' association may negotiate agreements on behalf of its membership with either individual unions or a local building trades council. Theoretically, a work stoppage could occur while a new agreement is negotiated. By securing a project labor agreement, the private contractor assures that termination of the local agreement will not lead to a work stoppage.

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93 *See* HERBERT R. NORTHRUP, OPEN SHOP CONSTRUCTION REVISITED: MAJOR INDUSTRIAL RESEARCH WWII STUDIES 330-333 (1984) (discussing the contributions of project agreements).

94 *Id.* "There is no question, however, that open shop competition has been a decided spur in recent years for project agreement consummation." *Id.* at 330. *See also* MCNEILL STOKES, LABOR LAW IN CONTRACTORS' LANGUAGE 196 (1980), attributing the use of project agreements to open shop competition and stating that

> [p]roject agreements proliferated in the late 1960s and the 1970s, stimulated by this rapid increase in competitive open-shop construction, the dismay of owners over their inflated union construction labor costs, and the recognition by unions, in varying degrees and in varying areas, of the undesirability of pricing themselves out of work by high wage costs and restrictive work practices. This accelerating proliferation of project agreements has been a source of concern, especially to building trades leadership and to some elements of contractor management.

Id.

95 MCNEILL STOKES, *supra* note 94, at 197.

96 *See id. But see* NORTHRUP, *supra* note 93, at 332-36. Professor Northrup, however, warns that many of the advantages of project agreements may not reach important aspects of craft inefficiency. For instance, craft lines remain intact and some unions have undertaken job actions despite the promise not to do so. *Id.*

The implication is obvious for assessing the use of a project agreement on a public job. There seems to be no reason to interpret low bid statutes as allowing a project agreement where the expiration of an existing agreement is unproblematic. A court assessing a project agreement requirement should ascertain what collective bargaining agreements are scheduled to expire during the pendency of the particular project. This information should be readily available to the public agency. Certainly, no public body should be permitted to raise this justification without being able to support it factually.

With respect to job site harmony, this consideration has been minimized as a consideration in the construction industry proviso to section 8(e). The Supreme Court in *Woelke* ruled that a union signatory provision barring a contractor from dealing with nonunion sub-contractors is legal regardless of whether union and nonunion workers will work side by side at a particular job site.[97] And to the extent that the craft unions cannot work side by side with non-union workers, it would seem to be very questionable policy to appease discontent by granting exclusive representation.[98] Furthermore, there are instances of job site disharmony even where crafts have given concessions in return for a subcontracting clause.[99] Thus, there is little force behind the justification—even in the private sector.

What about jurisdictional disputes?[100] Jurisdictional disputes among the craft unions can impose substantial costs. As the terms suggest, they arise where two or more craft unions, or non-union and union workers, lay claim to the same work assignments. The costs are generally associated with the relatively slow processes available to resolve jurisdictional disputes under the NLRA. Dis-

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97 *Woelke*, 456 U.S. at 663.

98 *Cf. Harms*, 644 A.2d at 79. Incredibly, the Turnpike Authority relied upon George Harms Construction Co., Inc.'s history with Local 825 of the International Union of Operating Engineers to justify its building trades only policy. *Id.* at 80. This history included violent picketing occurring at other Harms job sites in New Jersey. Harms employs steelworkers, a union not organized along craft lines. Thus, the Turnpike Authority was concerned with potential job disruption by the building trades picketing Harms rather than disharmony among Harms' workers on the job site. *Id.*

99 *See* NORTHRUP, *supra* note 93, at 331.

100 Again, this problem is peculiar to craft labor. Merit shop firms are not faced with jurisdictional disputes. It is counterintuitive to justify eliminating these firms on the grounds that a project agreement is needed in order to protect the public from a problem they do not present.

pute resolution provisions in a project agreement can guard against these increased costs.[101]

We are skeptical that jurisdictional disputes will occur on typical projects. Many bridges, highways, buildings, dams, and sewer systems have been built using craft unions. Work assignments have been resolved by time. It seems unlikely that a jurisdictional dispute should arise on these typical construction jobs.

The atypical construction project may present new ground to the craft unions. The Alaska pipeline is an example. The labor supply was thin and it was a project of unprecedented scope. Craft lines may not have been as defined as on a typical bridge job. Where these concerns are present, the public owner seeking to organize a public job should identify the work assignments which it believes present a potential jurisdictional dispute.

Furthermore, there is every reason to require a higher evidentiary standard on these issues. Given the policy choice made by the legislature for unfettered competition, little is lost and much is gained in requiring the public body to show by clear and convincing evidence that the elimination of open shop contractors is warranted by legitimate construction concerns. This would include evidence of the potential expiration of the agreement and potential jurisdictional disputes as well as the costs associated with delay. At the very least, the playing field should be even—the court should give no deference to the conclusory justifications of the public body.

But even granting legitimate construction concerns, labor certainty has a price. In a private transaction, it is a valid assumption that the contractor acts rationally to promote efficiency. As we saw earlier, the same assumption applied to the public body does not lead to the same result. Thus, even where the public body demonstrates legitimate construction concerns, the court must decide whether the costs associated with use of the agreement is less than the costs of completing the job without an agreement. Only then are the purported goals of project agreements and competitive bidding realized: savings for the public.

It is axiomatic that reducing the pool of eligible bidders will increase costs. But the problem is exacerbated where the reduction eliminates firms which gain competitive advantage through more

101 *See* NORTHRUP, *supra* note 93, at 330-31.

efficient work methods. Studies show that union labor increases costs over open shop contractors by twenty to sixty percent.[102] Because merit shops eliminate the inefficiencies associated with craft designations and union work rules, they are often able to force union concessions on jobs where both bid.[103] And the avoidance of the appearance of favoritism in the bidding process has value of its own. Courts have invalidated an award and incurred the costs of rebid where the bidding process may give the appearance of favoritism.[104]

Our argument implies that, as is common where competing interests exist, the court need only balance the scale and decide whether use of the agreement is cost effective. But the analysis is not so simple. For instance, this approach asks the court to speculate what the bids would look like if there were no project agreement requirement. Similarly, the public owner's delay damages are speculative because both the length of delay and the probability of its occurance are variable. Even this superficial inquiry suggests that a cost-benefit analysis may be more complex than is practical in the limited context of a bid dispute.

These problems are reflected in the cases. Typically, the public body argues with a parade of horribles designed to tip the balance in its favor. For instance, in the *Harms* case, the Turnpike Authority argued that a delay could cost millions of dollars in federal funding. Just to make sure, it also argued that the portion of the project known as the Southern Mixing Bowl was extremely dangerous and that job delay could risk lives.[105] On the other hand,

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102 NORTHRUP, *supra* note 93, at 24.

103 *Id.* Professor Northrup has taken an aggressive posture against union labor in his continuing studies on open shop construction. According to his works, open shops are able to operate more efficiently by eliminating job classifications, eliminating work restraint rules such as double-time pay; eliminating reporting pay and mandatory eight hour work days; increasing management prerogatives; eliminating shift premiums; and eliminating manning requirements. Professor Northrup also makes the case that open shop contractors save costs through better training and recruitment methods. *See* HERBERT R. NORTHRUP ET AL., DOUBLEBREASTED OPERATIONS AND PRE-HIRE AGREEMENTS IN CONSTRUCTION: THE FACTS AND THE LAW, A SUPPLEMENT TO OPEN SHOP CONSTRUCTION REVISITED 1 (1987).

104 *See* Section II, *supra.*

105 *See Harms*, 644 A.2d at 95. *See also* Certification of Donald L. Watson, Exec. Dir. of N.J. Turnpike Auth. dated Sept. 20, 1993 in George Harms Constr. Co., Inc. v. N.J. Turnpike Auth., Super. Ct. of N.J., App. Div., at 6-9; and Supplemental Brief of Respondent New Jersey Turnpike Auth. dated Oct. 3, 1993 in George Harms Constr. Co., Inc. v. N.J. Turnpike Auth., Supreme Ct. of N.J., Docket No. 37,561, at 15 [on file

the contractors lay claim to the anti-competitive effects of exclusive representation, an argument we have attempted to expand on here. Because the analysis seems to be a moving target, the courts are inclined to defer to the public body.

There are, however, finger holds into the inquiry. For example, cost increases associated with the elimination of merit shop contractors may be ameliorated if the public body requires work rule concessions from the building trades. Although this does not eliminate all anti-competitive effects, it addresses a fundamental problem with project agreements. Furthermore, the public body can present data respecting its expected delay damages and the probability that delay will occur. Without some presentation on these issues, deference to the public body seriously endangers competitve bidding.

V. Conclusion

Although we offer this criteria as a starting point for the inquiry rather than a dispositive test, it is useful to attempt to apply the criteria. Considering the Boston Harbor clean up, there is much to indicate the lack of a back room deal. The project, scheduled to last approximately ten years, was a unique undertaking. Certainly, the existing local collective bargaining agreements would expire prior to the end of the job and the MWRA was under a court order to complete the clean up. Furthermore, the job was unique with respect to craft lines and the MWRA justifiably feared jurisdictional disputes. And although the MWRA approved the specification, it was suggested by Kaiser Engineering, a private construction manager.

On the other hand, Executive Order 99 did not even relate to any specific project. It was a patently political victory for labor and was trumpeted as such. But for the New Jersey Supreme Court's reading of the bidding requirement, the building trades would have organized public construction in the entire state of New Jersey.

Even the Turnpike Authority's proposed use of the agreement relied upon thin construction considerations. Harms was willing to

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with the *Seton Hall Legislative Journal*]; Hoke Co. v. TVA, 854 F.2d at 820, 828 (6th Cir. 1988) (TVA argued that contracting with non-union coal company could result in disruption of its power supply operations encompassing some seven million people).

execute the agreement, but the Turnpike Authority insisted on building trades. There was no indication of potential jurisdictional dispute because of atypical work. And the Turnpike Authority made no serious effort to quantify the costs of proceeding without an agreement.

The analysis should also consider concessions that a typical proprietor might secure in a project agreement. These include concessions on manning requirements, show up pay, shift premiums, and mandatory work weeks. By securing these concessions, the public owner acts like a typical proprietor seeking to maximize returns.[106] And if the Courts or legislatures are serious about protecting the public fisc, these institutions must develop and expand these criteria to accommodate real efficiency rather than pay lip service to some apparitional purpose.

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106 This suggestion is, of course, the other shoe dropping. Where the *Boston Harbor* decision seems like a victory for labor, a danger lurks for unions also. All of the items covered in the text relate to conditions of employment and are typically subject to collective bargaining. The holding in *Boston Harbor* undermines a preemption challenge to such a requirement. One might predict that as open shop contractors make greater inroads into public construction, union contractors might seek these concessions through back room deals so as to allow them to better compete for the public dollar.