

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 24CV227

WAYNE J. GRIFFIN ELECTRICAL, INC. et. al.¹

vs.

SPRINGFIELD WATER AND SEWER COMMISSION

**DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

The plaintiffs move for a preliminary injunction against the defendant Springfield Water and Sewer Commission (“SWSC”), to prevent it from proceeding with the bidding and awarding of contracts and subcontracts for construction of the West Parish Treatment Plant Project (“Project”) in Westfield subject to a Project Labor Agreement (“PLA”). A non-evidentiary hearing was held on May 14, 2024. For the foregoing reasons, the plaintiffs’ Motion for Preliminary Injunction is **ALLOWED**.

DISCUSSION

“‘[W]hen asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party’s claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction

¹ General Mechanical Contractors, Inc., Associated Builders and Contractors, Massachusetts Chapter, and Merit Construction Alliance.

properly issue.’ (Footnote omitted.) *Packaging Indus. Group, Inc. v. Cheney*, [380 Mass. 609, 617 (1980)]. ‘In an appropriate case, the risk of harm to the public interest also may be considered.’ *Brookline v. Goldstein*, 388 Mass. 443, 447 (1983).” *GTE Products Corp. v. Stewart*, 414 Mass. 721, 722-723 (1993) (alterations and citations in original).

The Project consists of the construction of a 65 million gallon per day filtration water treatment plant on an existing site in Westfield. The Project is designed to address SWSC’s legal noncompliance with standards imposed by the regulatory agencies for clean and safe drinking water for approximately 250,000 western Massachusetts residents. The Project is currently out to bid with bid openings scheduled in the next several weeks.

The estimated Project construction cost is \$256 million dollars with a completion target of August 2028. The SWSC went through a lengthy bid prequalification process in the fall of 2023 after years of planning, designing, and securing the funds to complete the Project. In late November 2023, the SWSC first began discussing the concept of a PLA. A PLA is a pre-bid collective bargaining agreement for a construction project. In *John T. Callahan & Sons, Inc. v. Malden*, 430 Mass. 124, 133 (1999), the SJC authorized public entities to enter PLAs for public construction projects provided that the awarding authority (in this instance, the SWSC) could establish that: (1) the project is of “such size, duration, timing, and complexity that the goals of the [public] bidding statute cannot otherwise be achieved”; and (2) “the record demonstrates that the awarding authority undertook a careful, reasoned process to conclude that the adoption of a PLA furthered the statutory goals.” Challenges to a PLA will be sustained “unless the record supporting the awarding authority’s determination to enter into a PLA establishes that such an agreement was justified by the interests underlying the [public bidding statute].” *Id.* at 132-133. On this record, the SWSC has not met its burden.

On November 30, 2023, representatives of Hazen and Sawyer, an internationally reputable engineering firm and the expert design team hired and relied upon by the SWSC, provided its written opinion that adding a PLA to the Project would increase the cost by roughly \$15.5 million dollars and add over 2 months to the Project schedule. Hazen and Sawyer did not then, nor did it ever, recommend a PLA for this Project. The SWSC was never provided with a countervailing independent expert analysis to rebut, question, or contradict the November 30 opinion. There is nothing in the record evidencing that the SWSC ever discussed the November 30 opinion prior to voting 2-1 on January 11, 2024, to proceed with a PLA. There is nothing in the record to indicate that the SWSC board ever received a copy of the November 30 opinion or were even told about it. Representatives of Hazen and Sawyer were never asked to present their opinions to the SWSC board, notwithstanding the remote option available for participation. The November 30 opinion was buried.

There is a record of extensive lobbying efforts by union representatives advocating for the PLA, countered by an unequivocal opinion of the SWSC's long-time legal counsel, Norman Guz. On December 13, 2023, in an open meeting, Attorney Guz acknowledged the Project's complexity but questioned the legality of a PLA, citing to the *Callahan* language as to whether the Project was so complex² such that competitive bidding "*cannot be otherwise achieved.*" (emphasis in source meeting minutes). Attorney Guz noted that the SWSC "Executive Director, Procurement Officer, and design engineer have not informed the [SWSC] that the project cannot be bid without a PLA." Attorney Guz also noted that the SWSC had just completed two projects totaling \$162 million without PLAs. Legal counsel advised the SWSC that "he could not see how a PLA would be

² Regarding complexity, *Callahan* involved a situation where even a slight delay in the Project could leave thousands of schoolchildren without a school to report to at the start of the school year. By contrast, a slight delay in the SWSC Project will not leave Springfield residents without safe and clean drinking water, as the current treatment plant will continue to operate until the Project is complete.

upheld for the [Project] if challenged.”³ In response to Attorney Guz’s concern, it is disturbing to the court that a representative of the Pioneer Valley Building Trades Council told the SWSC that the Holyoke Soldiers Home project was bid with a PLA and there were “no protests.” The record before me reflects that the Legislature specially authorized, indeed mandated, a PLA for the Soldiers Home bidding and construction — a fact not mentioned to, or investigated by, the SWSC. Legal counsel for the Pioneer Valley Building Trades Council later doubled down on that half-truth. Keeping in mind that the SWSC bears the burden of demonstrating a careful and reasoned process, it is significant that the SWSC did not (1) give anything remotely close to equal time or consideration to PLA opponents and/or (2) investigate or even question the claims being advanced by parties that were in effect PLA lobbyists.

Notwithstanding clear prior legal guidance from counsel that a PLA would be subject to a successful court challenge, and with no support from the SWSC Executive Director, Procurement Officer, or design engineer, the SWSC voted to proceed with a PLA on January 11, 2024. The Project’s engineering team did not alter or change their opinion. There is no evidence they were further consulted. Attorney Guz changed his opinion by this date with no persuasive reasoning. All but one of the considerations recited by Attorney Guz were known and present at the prior December 2023 meeting.⁴ Discovery in this case will bear out what occurred in the interim but for

³ SWSC now states several times only that Attorney Guz was initially “skeptical,” a fanciful flourish. There does not appear to be room for doubt in his December 2023 advice to the SWSC. His unexplained about-face is extremely problematic in this Court’s consideration of the merits of the SWSC’s current position.

⁴ In his affidavit, Attorney Guz states that between the December and January meetings, the SWSC received a notice from the Massachusetts Department of Environmental Protection (“DEP”) setting a Project deadline of September 30, 2028, and imposing fines for every day of non-completion past that date. However, the record does not adequately address if or how this target deadline substantially differed from the existing projected deadline nor why the notice radically changed Attorney Guz’s *Callahan* calculus. Though *Callahan* acknowledged concerns about delay significantly increasing costs as a factor, the *Callahan* court evaluated this factor primarily in the context of potential “work stoppages” that could cause such delay. There are no such valid concerns here, as discussed *infra*. Further, SWSC has not shown that an open bidding process will threaten the timing of the Project. Indeed, SWSC’s decision to impose a PLA resulted in the SWSC pushing back bid deadlines, thereby undermining the stated motivation of avoiding delay.

the present purposes, the court concludes SWSC has not met its burden to show its decision to impose a PLA was made after a careful, reasoned process.⁵

“The purpose of competitive bidding statutes is transparent: ‘to ensure that the awarding authority obtain the lowest price among responsible contractors’ and ‘to establish an open and honest procedure for competition for public contracts.’” *Callahan*, 430 Mass. at 128, quoting *Modern Continental Constr. Co. v. Lowell*, 391 Mass. 829, 840 (1984). There is also a very strong policy in favor of “equal footing” between bidders — that is, “bidders have the opportunity to bid in the same way.” *Department of Labor & Indus. v. Boston Water & Sewer Comm’n*, 18 Mass. App. Ct. 621, 626 (1984).

The court is convinced, based upon the Affidavits of Joseph Birtz, Wayne J. Griffin, Mark Tomassini, and Jason Kauppi, that the subject PLA is anticompetitive and violates the letter and spirit of G. L. c. 149.⁶ Notwithstanding the lip service the PLA pays to being open to all bidders, it most assuredly is not. The evidence before the court is that the PLA poses such a significant disadvantage to open shops as to render a competitive bid impossible. Certainly, in theory, Griffin and others can bid on the Project, but it is bidding blindly, and utterly defies common sense and logic to think that it is a real chance on “equal footing.” No reasonable, otherwise highly qualified

⁵ Director of Legal Affairs and Chief Procurement Officer Theo Theocles avers in his Affidavit that he met with the individual Commissioners separately between December 13, 2023, and January 11, 2024 “to brief them and explain the advantages and potential disadvantages to include the PLA in this project”. He does not provide the Court with the benefit of this analysis, nor does he aver that he recommended the PLA. Reading the meeting minutes carefully the court cannot find where these advantages or disadvantages were ever publicly discussed. In any event, his affidavit is consistent with Attorney Guz’s representation to the board on December 13 that as Chief Procurement Officer Mr. Theocles had informed the SWSC that the Project could be bid without a PLA.

⁶ The SWSC challenges the plaintiffs’ standing to bring this action. However, *Callahan* held that a party challenging a PLA need only show that it has the potential to obtain the award. On the face of the Griffin affidavit, Griffin is an eligible bidder for the Project. Griffin has submitted a sworn affidavit that it desires to bid the Project, but it cannot and will not due to the PLA. This is not a self-inflicted harm, as the intervening party argues. Rather, the PLA imposes an unnecessary obstacle to open bidding, which was implemented at the insistence of the Trade Council and after the SWSC’s failure to conduct a careful and reasoned evaluation of the actual merits of a PLA for this Project. As contractors who have demonstrated the potential to obtain the contract, the plaintiffs have standing to challenge the bid process.

contractor or subcontractor would entertain such a colossal risk. For all intents and purposes, the PLA excludes open shops from bidding, as it essentially requires bidders to execute an agreement to use union laborers on the Project.

Attorney Guz was, at least initially, correctly focused on whether competitive bidding could not otherwise be achieved. That question has never been answered, and frankly was not even fairly considered. The SWSC has not met its burden to fit this Project into the *Callahan* exception. The plaintiffs have demonstrated, and basic common-sense dictates, that the public achieves the fairest, most competitive, and responsible potential contractors via a public bidding process.

The SWSC principally asserts that the PLA is necessary to ensure “labor harmony” for such a complex and expensive high stakes job. The issue with this excuse is that every single public works and public bidding job (indeed, privately bid projects as well) depend on labor harmony. If this was a permissible reason absent particularized evidence to justify the concern, then the exception would swallow the *Callahan* rule in almost every instance. More importantly to the court, however, is that there is a complete absence of evidence anywhere in the discussion at any of the SWSC board meetings about expensive high stakes projects being derailed by labor unrest.

The *Callahan* case, adopting the reasoning utilized in *New York State Chapter, Inc. v. New York State Thruway Auth’y*, 88 N.Y.2d 56, 65 (1996), requires a “detailed focus” and some “cited labor history” to support a finding that a PLA is consistent with the public bidding goals. No detailed focus on labor history was present here, let alone discussed, during the SWSC’s proceedings. The concept of labor unrest appears to have been a fear injected into the discussion by the Trade Council, untethered to any real-life events. Notably, the SWSC has no experience with labor unrest for non-PLA jobs. Indeed, the SWSC has never bid a project with a PLA notwithstanding having been in existence for decades. The two most recent SWSC projects – one

of which stretched out for years – were completed without a PLA and absent labor unrest (i.e., with labor harmony).

In addition, the SWSC's focus on minority and WBE participation, training, and other factors, while appropriate in other contexts, are not relevant considerations under *Callahan*. All these concerns or goals can be easily addressed in bid documents without a PLA. There is very little if any documentation in this record that the SWSC was focused on the public bidding law's statutory goals as required by *Callahan*.

The court is unpersuaded that an injunction would disrupt the delicate logistical and financial schedule for completion of this Project. The SWSC was warned unequivocally by its own legal counsel in December 2023 that requiring bidders to sign onto a PLA could lead to a successful legal challenge. The balance of the harms and the equities sharply favors the moving parties, who absent the injunction will be effectively precluded from providing the SWSC, and by extension, the public, with a bid. The record is clear that the inclusion of PLAs in bid documents results in a significant drop in responsive bids. The consequence of delay, if any even comes to bear, is the result of SWSC's actions, which were of course forewarned.

Finally, the public interest is manifest. The public benefits from an open, fair, competitive, and robust bidding process. The PLA requirement unnecessarily curtails that without legal justification.

ORDER

For the foregoing reasons, the plaintiffs' motion for preliminary injunction is **ALLOWED**. It is further **ORDERED** that the Springfield Water and Sewer Commission and any person or entity acting on its behalf is ordered and enjoined from opening, and/or proceeding with, the bidding and awarding of contracts and subcontracts for the West Parish Treatment Plant Project subject to a Project Labor Agreement requirement.

A handwritten signature in black ink, appearing to read "Michael K. Callan", written over a horizontal line.

MICHAEL K CALLAN
Justice of the Superior Court

DATE: 5/16/24