Ohio Legislative Service Commission

Bill Analysis

Bethany Boyd

H.B. 229

130th General Assembly
(As Introduced)

Reps. Young, J. Adams, Beck, Becker, Buchy, Hood, Lynch, Roegner, Wachtmann

BILL SUMMARY

- Generally limits the application of the Unlawful Labor Requirements in Public Improvement Contracts Law to state agencies, rather than to public authorities generally as under current law.

- Requires a state agency to ensure that bid specifications issued by the state agency for a proposed public improvement and related contracts do not prohibit a contractor or subcontractor from entering into certain agreements with labor organizations or that requires labor organization membership or dues.

- Prohibits any state funds from being appropriated for constructing a public improvement by or for a political subdivision if the subdivision, in its bid specifications, requires a contractor or subcontractor to enter into, or prohibits a contractor or subcontractor from entering into, an agreement with labor organizations, or that requires membership in a labor organization or the payment of membership dues.

- Prohibits a state agency from discriminating against specified entities for refusing or electing to become a party to any agreement with any labor organization on the public improvement that is under bid or on projects related to that improvement.

- Allows an interested party to bring an enforcement action against a state agency, rather than any public authority as under current law.

CONTENT AND OPERATION

Entities to which bill applies

The bill limits the application of the Unlawful Labor Requirements in Public Improvement Contracts Law[1] to only state agencies, rather than to "public authorities" under current law. That Law prohibits the imposition of certain labor requirements as a condition of performing public works. A "state agency," under the bill, means any officer, board, or commission of the state authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor and includes a state institution of higher education. The bill defines a "state institution of higher education" as any state university or college, community college, state community college, university branch, or technical college. The state universities are: University of Akron, Bowling Green State University, Central State University, University of Cincinnati, Cleveland State University, Kent State University, Miami University, Ohio University, Ohio State University, Shawnee State University, University of Toledo, Wright State University, and Youngstown State University. The bill also includes in the term the Northeast Ohio Medical University and its board of trustees.[2]

Under current law, a "public authority" includes a state agency as described above, any Ohio political subdivision, and any institution supported in whole or in part by public funds, authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor. However, under current law, "public authority" does not mean any municipal corporation exercising the municipal corporation's home rule authority, unless the specific contract for a public improvement includes state funds appropriated for the purposes of that public improvement.[3]

The Ohio Supreme Court held in *Ohio State Bldg. and Constr. Trades Council, et al. v. Cuyahoga County Bd. of Commissioners, et al.*[4] that the Unlawful Labor Requirements in Public Improvement Contracts Law is preempted by the National Labor Relations Act[5]

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[1] R.C. Chapter 4116.

[2] R.C. 4116.01(F); R.C. 3345.011 and 3345.12, not in the bill.

[3] R.C. 4116.01(A).

[4] 98 Ohio St.3d 214, 2002-Ohio-7213 (2002).

[5] 29 United States Code 151, *et seq*.

and is thus unconstitutional; therefore, the law is not currently enforced. (See **COMMENT**.)

Imposition of certain labor requirements in public improvement contracts

The bill limits to state agencies, including state institutions of higher education, the prohibition against including certain labor requirements in bid specifications for a public improvement undertaken by them or on their behalf, and no longer applies the prohibition to any institution supported by public funds. However, the bill also expands this provision by not permitting a state agency to *prohibit* the requirements either. Thus, under the bill, a state agency, when engaged in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements, must ensure that the agency-issued bid specifications for the proposed public improvement do not neither require a contractor or subcontractor to do, nor prohibit a contractor or subcontractor from doing, either of the following:

(1) Entering into agreements with any labor organization (essentially, a union) on the public improvement;

(2) Entering into any agreement that requires the employees of that contractor or subcontractor to become members of or affiliated with a labor organization or to pay dues or fees to a labor organization as a condition of employment or continued employment.

As under current law, this provision also applies to any subsequent contract or other agreement for the public improvement to which the state agency and a contractor or subcontractor are direct parties.[6]

Prohibited actions by state agencies

Similar to current law, the bill prohibits a state agency (rather than a public authority as under current law) from doing any of the following with respect to public improvements undertaken by or on behalf of the state agency:

(1) Awarding a contract for a public improvement if the contract or subsequent contract or other agreement to which the state agency and a contractor or subcontractor are direct parties is required to or prohibited from containing the elements described in (1) and (2) under "**Imposition of certain labor requirements in public improvement contracts**," above;

[6] R.C. 4116.02.

(2) Discriminating against any bidder, contractor, or subcontractor for refusing or electing to become a party to any agreement with any labor organization on the public improvement that currently is under bid or on projects related to that improvement;

(3) Violating the state agency's duty to ensure that bid specifications issued by the state agency for the proposed public improvement, and any subsequent contract or other agreement for the public improvement to which the state agency and a contractor or subcontractor are direct parties, do not require or prohibit the elements described in (1) and (2) under "**Imposition of certain labor requirements in public improvement contracts**," above.[7]

Use of state funds for certain local projects

The bill prohibits any state funds from being appropriated for the purpose of constructing a public improvement by or on behalf of a political subdivision, if the political subdivision, in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements undertaken by or on behalf of the political subdivision, requires in the bid specifications a contractor or subcontractor to enter into, or prohibits in the bid specifications a contractor or subcontractor from entering into, an agreement described under "**Imposition of certain labor requirements in public improvement contracts**," above. The bill defines a "political subdivision" as a county, township, municipal corporation, or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.[8]

Public improvements to which the bill applies

The bill generally applies only to the construction of a public improvement undertaken by a state agency or political subdivision as opposed to current law, which applies to construction of a public improvement undertaken by *a public authority* and construction in the private sector that is funded pursuant to certain statutory programs involving the issuance of bonds or state loans or grants. Similar to current law, under the bill, a "public improvement" means all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and other structures or works constructed by a state agency or political subdivision or by any person who, pursuant to a contract with a state agency or a political subdivision, constructs any structure or work for a state agency or a political subdivision. However, the bill eliminates the current law

[7] R.C. 4116.03.

[8] R.C. 4116.01(E) and 4116.04.

stipulation that, when a state agency or political subdivision rents or leases a newly constructed structure within six months after completion of its construction, all work performed on that structure to suit it for occupancy by a state agency or a political subdivision, it is considered a "public improvement."

"Construction," under the bill, is limited to (1) any new construction of any public improvement performed by other than full-time employees who have completed their probationary periods in the classified service of a state agency or a political subdivision and (2) any reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of any public improvement performed by other than full-time employees who have completed their probationary period in the classified civil service of a state agency or political subdivision.[9] "Construction" no longer includes construction on any project, facility, or project facility financed through economic development loans or loan guarantees from the Director of Development Services[10] or on any community urban redevelopment corporation projects for redevelopment of urban areas,[11] any "project" involving a community improvement corporation for which industrial development bonds have been issued,[12] any energy resource development facility,[13] or any air quality project.[14]

Enforcement

Continuing law permits an interested party to bring an action to enforce the Unlawful Labor Requirements in Public Improvement Contracts Law; however, the bill permits those actions to be brought against state agencies only, apparently even under the statute[15] denying state funds to a political subdivision that violates the bill. An "interested party," under continuing law and with respect to a particular public improvement, includes all of the following:

(1) Any person who submits a bid for the purpose of securing the award of a contract for the public improvement;

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[9] R.C. 4116.01(B) and (C).

[10] R.C. 122.39, 122.80, and 166.02, not in the bill.

[11] R.C. 1728.07, not in the bill.

[12] R.C. 165.01, not in the bill.

[13] R.C. 1551.01, not in the bill.

[14] R.C. 3706.01, not in the bill.

[15] R.C. 4116.04.

(2) Any person acting as a subcontractor of a person mentioned in (1), above;

(3) Any association having as members any of the persons mentioned in (1) or (2), above;

(4) Any employee of a person mentioned in (1), (2), or (3), above;

(5) Any Ohio resident.

The bill no longer limits residency to someone who is a resident of the jurisdiction of the public authority for which products or services are being procured for, or work is being performed on, a public improvement.

Similar to current law, the bill permits an interested party to file a complaint against a state agency alleging a violation of the bill, within two years after the date on which the contract is signed for the public improvement, in the court of common pleas of the county in which the public improvement is performed. Under continuing law, the performance of the contract forms the basis of the allegation of a violation. Continuing law requires the court in which the complaint is filed to hear and decide the case and, upon a finding that a violation has occurred, must void the contract and make any orders that will prevent further violations. If the court finds a violation has occurred, the court may award reasonable attorney's fees, court costs, and any other fees incurred in the course of the civil action to the prevailing plaintiff. Under continuing law, the Rules of Civil Procedure govern these actions, and any determination of a court is subject to appellate review.[16]

Intent and severability

The bill states that nothing in the Unlawful Labor Requirements in Public Improvements Contracts Law must be construed as regulating the conduct of a private entity. The bill further states that the Law applies only to the state or a state agency that is acting in a proprietary capacity as a market participant.

Additionally, the bill states that the intent of the Law is to achieve all of the following:

- To ensure that all construction contracts undertaken by or on behalf of the state are let for bid without unnecessary restrictions that arbitrarily may reduce the potential pool of bidders, thereby increasing procurement and construction costs for Ohio taxpayers.

[16] R.C. 4116.01(D) and 4116.05.

- To ensure that a contract for construction undertaken by or on behalf of a state agency is awarded to the lowest responsive and responsible bidder or based upon any other applicable competitive bidding standard.

- To prevent political kickbacks, favoritism, discrimination, cronyism, or collusion between government officials and any individual, employee, or organization.

- To prevent discrimination by a state agency based upon a contractor's or subcontractor's relationship with a labor organization or lack thereof.

- To expand job opportunities for small and disadvantaged businesses.

The bill also expressly states, consistent with the Ohio statutory rules of construction, that the items of law contained in the bill, and their applications, are severable. If any item of law contained in the bill, or if any application of any item of law contained in the bill, is held invalid, the invalidity does not affect other items of law contained in the bill and their applications that can be given effect without the invalid item of law or application.[17]

COMMENT

In 2002, the Ohio Supreme Court held that specified provisions of the federal National Labor Relations Act (NLRA) preempted Ohio's Unlawful Labor Requirements in Public Improvement Contracts Law. The NLRA generally applies to the private sector, and a state may be limited in regulating labor relations between private employers and unions. Sections 8(e) and (f) of the NLRA specifically allow the construction industry to enter into agreements and take other actions that other private employers cannot. The Court held that the Revised Code provisions essentially prohibit public authorities from entering into or enforcing project labor agreements on public construction projects, and that those sections of the NLRA allow such agreements. The Court stated that if the state, as a market participant, wants to prohibit the use of project labor agreements, the state may do so as the purchaser of the product or services. However, by prohibiting other entities, such as political subdivisions, from using project labor agreements, the prohibition amounts to a regulation, and the Court held that the state cannot pass laws to regulate the construction industry in contravention of the NLRA.[18]

[17] R.C. 4116.06 and Section 3.

[18] *Ohio State Bldg. and Constr. Trades Council,* supra, at ¶65, 69, and 94.

In a separate case, the federal Sixth Circuit Court of Appeals (whose geographic jurisdictional area includes Ohio) recently concluded that a Michigan law was not preempted by the NLRA because the law was not regulatory in nature and was essentially just a blanket action by the state as a market participant. The Michigan law generally prohibits a governmental unit that awards any construction contract from doing either of the following in any bid specifications, project agreements, or other controlling documents:

- Requiring a bidder or contractor to enter into or prohibiting a bidder or contractor from entering into an agreement with a union for that project;

- Discriminating against a bidder or contractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with a union in regard to that project or a related construction project.[19]

Only a court could decide whether any part of this bill is preempted by the NLRA.

HISTORY

ACTION	DATE
Introduced	07-02-13

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[19] *Mich. Bldg. & Constr. Trades Council & Genessee v. Snyder*, 729 F.3d 572 (6th Cir. 2013); M.C.L.A. 408.875.