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By Facsimile

The Honorable Gregg Abbott
Attorney General of the State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Re: RQ-0931-GA; Whether TEX. LOCAL GOV'T CODE § 271.121 Prohibits a Governmental Entity from Requiring a Contractor or Other vendor to Sign a Project Labor Agreement.

Dear General Abbot:

This briefing is submitted on behalf of the San Antonio Building and Construction Trades Department in response to Opinion Request No. RQ-0931-GA submitted by the Honorable Todd Hunter, Chair, Committee of the Judiciary and Civil Jurisprudence asking whether TEX. LOCAL GOV'T CODE § 271.121 prohibits a governmental entity from requiring a contractor or other vendor to sign a project labor agreement (hereinafter "PLA"). For the reasons articulated below, TEX. LOCAL GOV'T CODE § 271.121 does not prohibit a governmental entity from requiring a contractor or other vendor to sign a PLA.

TEX. LOCAL GOV'T CODE § 271.121 applies to a governmental entity engaged in procuring goods or services, awarding a contract, or overseeing procurement or construction for a public work or public improvement. TEX. LOCAL GOV'T CODE § 271.121(a)(1)-(3). The term "governmental entity" is defined as a municipality, county, river authority, hospital district, conservation and reclamation district, or a defense base development authority established under Texas law. TEX. LOCAL GOV'T CODE § 271.111(10). Texas Local Government Code § 271.121 expressly prohibits a governmental entity from considering "whether a vendor is a member of or has another relationship with any organization," and requires a governmental entity to, "ensure that its bid specifications and any subsequent contract or other agreement do not deny or diminish the right of a person to work because of the person's membership or other

relationship status with respect to any organization." TEX. LOCAL GOV'T CODE § 271.121(b)(1)-(2).

Representative Hunter requests specifically asks for an

> Opinion confirming that Sec. 271.121, Local Government Code, prevents governmental entities in Texas from requiring a contractor or other vendor to sign a project labor agreement as a condition of being able to submit a bid to a governmental entity engaging in procuring goods or services, awarding a contract or overseeing procurement or construction for a public work or public improvement.

Representative Hunter submitted the request for an opinion on behalf of Jon Fisher, President, Associated Builders and Contractors, Inc. of Texas. This request is not predicated on a specific or actual PLA. Rather, the request seeks an opinion about PLAs in general. Mr. Fisher poses the following definition of a PLA for purposes of his request:

> A pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. A PLA may also be described as a multi-employer, multi-union pre-hire agreement designed to systemize labor relations at a construction site. It requires that all contractors and subcontractors who will work on the project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project; and that wages, hours, and other terms of employment be coordinated or standardized pursuant to the PLA across the many different unions and companies working on the project. The implementation of this PLA on a project underwritten by a governmental entity is accomplished by making agreement to the PLA a bid specification, thereby allowing the contracting authority to ensure that firms at every level—from the general contractor to the lowest level of subcontractor—comply with the terms of the PLA.

Mr. Fisher then goes on to argue that since a PLA is a contract, a contract establishes relationships; a PLA therefore constitutes a relationship the type of which cannot be required under the statute, "even though this type of relationship [PLA] is not specifically spelled out in the statute." This concession by Mr. Fisher is telling because if the legislature had intended to express prohibit local governmental units from requiring a PLA as part of a bid specification, it could have done so in a manner that left no doubt as to the intention of the drafters of TEX. LOCAL GOV'T CODE § 271.121. The only intent of the legislature expressed in TEX. LOCAL GOV'T CODE § 271.121 is that the tenants of Texas' right to work laws.

TEX. LOCAL GOV'T CODE § 271.121 was the product of SB 510, ultimately CSSB 510, of the 77th Legislature. CSSB 510 was enacted to authorize a governmental entity to use competitive bidding, sealed proposals, design-build contracts, construction manager

contracts, or job order contracts to provide the governmental entity the best value. TEX. LOCAL GOV'T CODE § 271.113(a)(1)-(5); see also Office of House Bill Analysis, CSSB 510, Committee Report, Substituted, p. 1, April 10, 2001 (enclosed). The legislation further authorized that governmental entities may consider the he purchase price, the reputation of the vendor and of the vendor's goods or services, the quality of the vendor's goods or services, the extent to which the goods or services meet the governmental entity's needs, the vendor's past relationship with the governmental entity, the impact on the ability of the governmental entity to comply with rules relating to historically underutilized businesses, the total long-term cost to the governmental entity to acquire the vendor's goods or services, and any other relevant factor specifically listed in the request for bids or proposals. TEX. LOCAL GOV'T CODE § 271.113(b)(1)-(8).

Arguably, prohibiting PLAs under TEX. LOCAL GOV'T CODE § 271.121 would frustrate the legislature's intent with CSSB 510 to provide governmental entities with flexibility and a wide array of options in selecting contractors and vendors for government works. A governmental entity, exercising its proprietary discretion under TEX. LOCAL GOV'T CODE § 271.113 could determine that a PLA best serves it needs in completing a specific project by ensuring labor peace at a project. Clearly the legislature afforded governmental entities such latitude by including as a catchall factor that a governmental entity could consider "any other relevant factor specifically listed in the request for bids or proposals." TEX. LOCAL GOV'T CODE § 271.113(b)(8).

Here it is worth noting that the proprietary interest of a government purchaser has long been an issue in the debate about PLAs. The United States Supreme Court has held that a governmental unit entering into a PLA acts as a proprietor and not as a regulator; therefore federal labor law does not preempt such conduct. *Bldg. & Constr. Trades Council v. Associated Builders & Contrs.*, 507 U.S. 218, 227 (1993)(*Boston Harbor*). The Court in *Boston Harbor* also held that PLAs are in fact authorized by Sections 8(e) and 8(f), 29 U.S.C. § 158(e)-(f), of the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. § 151, *et seq.* The Court recognized that "Section 8(f) explicitly permits employers in the construction industry -- but no other employers -- to enter into prehire agreements," which the Court defined as "collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees." *Boston Harbor*, 507 U.S. at 230 (citations omitted). The Court went on to acknowledge that Section 8(e) "permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement." *Boston Harbor* at 230.

The Congressional blessing on prehire agreements in Section 8(e) and 8(f) of the NLRA must be harmonized with Section 14(b), 29 U.S.C. § 164(b), which permits states to enact right to work laws that prohibit membership in a labor organization as a condition of employment. In Texas, the right to work laws prohibits denial of employment based on membership or non-membership in a labor organization and a person's right to work may not be denied or abridged because of membership in a labor organization. TEX. LABOR CODE §§ 101.052, 101.301. These laws protect individual, natural persons in their labor

by allowing such persons to use any means they see fit, including forming or joining a labor union, to protect their labor. TEX. LABOR CODE § 101.001.

The Court has held that the scope of a right to work law passed under Section 14(b) does not relate to the hiring process, "but rather to conditions that would come into effect only after an individual is hired." *Oil, Chemical & Atomic Workers v. Mobil Oil Corp., Marine Transp. Dept.*, 426 U.S. 407, 417 (1976). As such, Section 14(b)'s "primary concern is with state regulation of the post-hiring employer-employee-union relationship." *Mobil Oil Corp.*, 426 U.S. at 417. That aspect of the employer-employee-union relationship is not implicated by prehire agreements concerning terms that contractors agree to abide by under a PLA. Section 14(b) and Texas' right to work laws guarantee that an individual worker on a job covered by a PLA would not have to join a union or pay dues or dues equivalent in order to work at the project.

It is in this respect, that Texas law does not require union membership or fee paying to work, that TEX. LOCAL GOV'T CODE § 271.121 is best understood. Texas under its right to work laws can leave it to individual employees to determine if they wish to join a union. A PLA in Texas cannot require otherwise. The legislature's intention on the face of TEX. LOCAL GOV'T CODE § 271.121 was to recapitulate the Texas' right to work laws and ensure no inadvertent infringement of them.

It must also be understood that union hiring halls such as those referenced in Mr. Fisher's correspondence, can legally operate in right to work states such as Texas. The United States Court of Appeals for the Fifth Circuit held that non-discriminatory hiring halls are permitted under Section 14(b) and the Texas' right to work laws in *NLRB v. Houston Chapt., Associated General Contractors, Inc.*, 349 F.2d 449 (5th Cir.1965). In that case, which involved an employer's refusal to bargain about over a hiring hall, a union proposed a hiring hall that would be the exclusive source of an employer's labor, that referrals from the hall would be by factors such as "seniority in the employment by the respective contractors, length of residence in the area, and general work experience in the trade, but without discrimination by reason of membership or non-membership in the union." *Houston Chapt.*, 349 F.2d at 451. The court rejected the employer's argument that a hiring hall was a form of union security that could be regulated by the states through Section 14(b) and held that Section 14(b), and therefore state right to work laws, were only concerned with agreements that amounted compulsory unionism. *Houston Chapt.* at 453. A hiring hall that did not look to membership (or non-membership) in a union as the basis of a referral did not amount to compulsory unionism. *Id.*

The clear impact of this jurisprudence to the issue presented by Representative Hunter is that a PLA requiring use of a hiring hall, even as the exclusive source of employees, does not contravene Texas' right to work law so long as the hiring hall does not discriminate based on union membership. Therefore, even in the hypothetical presented Mr. Fisher, a PLA does not abridge the right to work in Texas because employees working under a PLA cannot be required to join a union or pay does as a condition of employment.

A close reading of TEX. LOCAL GOV'T CODE § 271.121 with an eye towards the entirety of Texas Labor Code Chapter 271, Subchapter H reveals that the prohibitions listed in TEX. LOCAL GOV'T CODE § 271.121(b)(1)-(2) are not triggered by a PLA. The statute states that a governmental entity "may not consider whether is a member or has another relationship with an organization" when it is procuring goods and services, awarding a contract, or overseeing procure or construction of a public work. TEX. LOCAL GOV'T CODE § 271.121(a)(1)-(3); (b)(1). This prohibition, not unlike Texas' right to work law, only means, for purposes of Mr. Fisher's hypothetical, that a governmental entity cannot consider whether a vendor has a relationship, contractual or otherwise, with a union or the United Way. It does not contain any language to suggest that a governmental unit cannot require, in its proprietary discretion, a PLA as a bid specification.

Mr. Fisher's expansive interpretation of the word "relationship" cannot carry the day as a reason to interpret TEX. LOCAL GOV'T CODE § 271.121 as proscribing PLAs. First such a prohibition is broader than the generally language of the statute. This fact is all the more true when one considers that if the legislature wanted to prohibit PLAs, it stands to reason that it would have expressly done so rather than enact a statute entitled "right to work." The relationships created by a PLA are by operation of taking the public work job that usually. They do not come into existence at the time the work is procured.

Further, it must be noted that the term "person" as used in TEX. LOCAL GOV'T CODE § 271.121(b)(2) does not encompass employers, contrary to the implication suggested by Mr. Fisher in support of the request for an opinion. Within Chapter 271, the word "Contractor" is defined "in the context of a contract for the construction, rehabilitation, alteration, or repair of a facility means a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for constructing, rehabilitating, altering, or repairing all or part of the facility at the contracted price." TEX. LOCAL GOV'T CODE § 271.111(2). "Design-build firm" is defined by statute as "a partnership, corporation, or other legal entity or team that includes an engineer or architect and builder qualified to engage in building construction in Texas." TEX. LOCAL GOV'T CODE § 271.111(4). It is a "contractor" who is selected through competitive bidding for work on a governmental entity's project. TEX. LOCAL GOV'T CODE § 271.115(a). It is a contractor who submits sealed proposals for such work. TEX. LOCAL GOV'T CODE § 271.116(a). It is a design-build firm that is selected for work when a governmental unit uses the design-build method for a project. TEX. LOCAL GOV'T CODE § 271.119(b). Job order contracts are awarded to contractors. TEX. LOCAL GOV'T CODE § 271.120(e).

A governmental unit can opt to use the construction manager-agent, which is defined as "a sole proprietorship, partnership, corporation, or other legal entity that provides consultation to the governmental entity regarding construction, rehabilitation, alteration, or repair of the facility," to complete projects. TEX. LOCAL GOV'T CODE § 271.117(b). A governmental unit can also opt to use the construction manager-at-risk, which is defined as "a sole proprietorship, partnership, corporation, or other legal entity that assumes the risk for construction, rehabilitation, alteration, or repair of a facility at the contracted price as a general contractor and provides consultation to the governmental entity regarding construction during and after the design of the facility," to complete

projects. TEX. LOCAL GOV'T CODE § 271.117(b). These methodologies track the procurement procedures authorized in Chapter 271. TEX. LOCAL GOV'T CODE § 271.113(a)(1)-(5). None of the procurement procedures authorized in Chapter 271 are awarded to a person.

This is a critical distinction that must be borne in mind when turning to TEX. LOCAL GOV'T CODE § 271.121. TEX. LOCAL GOV'T CODE § 271.121(b)(2) states that a person's right to work must not be denied or diminished. It does not address the right to work of a contractor or a design-build firm. It certainly does not address the right of a contractor to obtain a government contract. The statute is concerned with a person's right to work. A person is therefore clearly distinct from an employer awarded a project under Chapter 271.

Finally, it is worth revisiting the proprietary role of a governmental entity in as that role is related to federal preemption. In *Boston Harbor*, the Court recognized that PLAs were a function of the government's expression of what it wants a proprietor and that federal labor law only preempted regulation. The interpretation advocated by Mr. Fisher would regulate the proprietary interests of governmental entities subject to Chapter 271 by stating that they cannot, regardless of their preferences, require PLAs. If Mr. Fisher is correct, then TEX. LOCAL GOV'T CODE § 271.121 regulates the use of PLAs, a type of agreement that Congress intended to be left to controlled by the free play of market forces. *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976). The free-play of economic forces at work when a public entity decides to require a PLA as a bid specification are disrupted when a governmental entity is prohibited from making such a requirement. Since a statute should not be interpreted in a manner that conflict with another law, such as the federal government's regulatory scheme for labor relations, the interpretation advocated by Mr. Fisher should be rejected.

For all of the above and foregoing reasons, San Antonio Building and Construction Trades Department urges TEX. LOCAL GOV'T CODE § 271.121 to be interpreted in a manner that allows governmental entities subject to Texas Local Government Code, Chapter 271 to require PLAs in their bid specifications.

Respectfully Submitted,

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