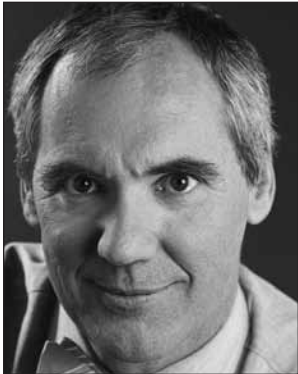


“Is It Public, or Is It Not?” What to Watch for When Public and Private Become Entwined, and Why It Matters

By ROLAND NIKLES



Public-private entanglements on major infrastructure projects are not new. The real change afoot is the extent to which such entanglements are becoming routine on projects large and small. The challenge of properly characterizing a project as “public” or “private” is thus becoming commonplace, if not easy. Courts have focused on (1) the nature of the ownership, (2) the source

of funding, and (3) the use to which a project is placed. This article will examine some of the consequences of mischaracterizing a project as “public” or “private”, provide a checklist of issues to look for, and examine how the courts have approached the problem. The concluding section offers a modest bit of advice.

The Proper Characterization of a Project as “Public” or “Private” Has Broad Implications

When public and private become enmeshed in creative new ways, it is of utmost importance to properly characterize the project as “public” or “private.” The answer to the question “Is it public, or is it not?” has far-reaching consequences. It drastically affects many applicable rules of the game, including: (1) which delivery models may be used, (2) how and when contractors may be selected, (3) contract clauses that are required or permitted, (4) what kinds of claims can be made and when, (5) what remedies may be available or foreclosed, and (6) what penalties might be imposed. The answer to the question may determine the makeup of the workforce and the wages that must be paid. The cost of a project may be substantially affected by the

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* “Top Sheet” is used in construction and other fields to denote a condensed overview of essential information about a bid or project. The Construction Division’s Top Sheet articles are similarly crafted to be succinct examinations of key aspects of a case, law, or other issue.

determination. The consequence of getting it wrong can be severe. In cases of uncertainty, properly allocating the risks of what happens if a project is challenged and the assumptions about the nature of a project prove to be incorrect is a matter of great concern to all participants.

For state projects, the implications of “Is it public, or is it not?” are necessarily local. Individual states have different statutory schemes governing public works, and within states different rules apply to different types of public entities and different types of public projects. A project may be treated as “public” for some purposes but not all. Rules change constantly in the to-and-fro of legislative tussles. Nevertheless, certain themes endure, and here is a checklist for some of the main issues to look for when you see a red flag: “Is it public, or is it not?”

The Checklist

Prevailing Wages. Legislatures in every state have adopted prevailing-wage laws (a/k/a the “Little Davis-Bacon Acts”) that require contractors working on state-funded projects such as roads, schools, and public buildings to pay at or above the average wage for the various trades. These figures are typically calculated on a county-by-county basis. *Prevailing wages*, however, are usually much higher than average wages, with the result that public works construction projects that require prevailing wages are more expensive than an equivalent private project. For example, a February 11, 2009, editorial in West Virginia’s *Charleston Daily Globe* laments: “According to a report by the conservative Public Policy Foundation of West Virginia, the prevailing wage is now 74 percent higher than average wages in 12 occupations. For example, roofers average \$10.22 an hour in this state, according to the report. But the prevailing wage is \$24.68.”¹

Supporters of prevailing-wage laws point out that in addition to higher wages, prevailing-wage laws facilitate apprentice programs, and that a better-paid, better-trained workforce is more efficient and does better quality work.² However, on an individual project basis, no one disputes that the price of the work will be higher where prevailing-wage laws apply.

There is a substantial body of case law grappling with the prevailing wage question and “Is it public, or is it not?” in the different states. The cases focus on (1) the nature of the entity awarding a contract, (2) the source of funding

for a project, and (3) the public or private use to which a project is put. In addition, the wording of the applicable governing prevailing-wage statute is important. For example, in *Mobile, Alabama-Pensacola, Florida Building & Construction Trades Council v. Williams*,³ the court held that a county school board was a “contracting authority” within the meaning of the state prevailing-wage act, which defined the term as including “any state institution supported in whole or in part by state funds, authorized to enter into a contract for public work.” The court declared that the board’s construction of a school was covered by the act, observing that, in construing the act, it was compelled to give effect to the act’s intent. Canvassing the constitutional and statutory regulation of the state school system, the court found that school boards were state institutions supported by state funds.

The Nature of the Entity Awarding the Contract. In *Hardin Memorial Hospital, Inc. v. Land*,⁴ the court—applying the proverbial “is it a duck?” test—held that a remodeling project undertaken by a private corporation operating a county hospital was subject to the prevailing-wage act.⁵ The court found the private corporation was a mere alter ego of a county fiscal court, a public entity. The court observed that (1) the public entity could cancel the lease under which the corporation operated the hospital, (2) the public entity held title to the hospital building and the property on which the hospital was located, (3) the lease required the corporation to obtain the public entity’s consent to any material alterations to the hospital, including the remodeling project, (4) any improvements made to the hospital belonged to the county, and (5) the public entity had both the right to remove any director of the corporation at any time without cause and the right to fill all vacant directors’ positions. Viewing the relationship between the public entity and the corporation as a whole, the court concluded it “walked and talked” like a public entity and thus it was a public entity.⁶

Source of Project Funding. The nature and source of funding often determines whether prevailing wages will apply. By way of illustration, in *People ex rel. Bernardi v. Illini Community Hospital*,⁷ a private, not-for-profit hospital entered into a contract for construction of a new canopy over its emergency room entrance. The work was covered by the Illinois prevailing-wage act because the act defined “public body” to include any institution supported in whole or in part by public funds. The hospital’s receipt for three years of monies raised pursuant to a county tax specifically authorized to raise funds for local hospitals was sufficient, the court declared, to render the hospital a public body for purposes of the act. The court noted that the clear language of the act encompassed institutions supported “in part” by public funds.⁸

Nature of Use. In addition to the nature of the awarding entity and the source of funds, the applicability of prevailing-wage laws sometimes turns on the public or private nature of the use of a project. For example, in *Opportunity Center of Southeastern Illinois, Inc. v. Bernardi*,⁹ the court

found that the remodeling project of a privately-owned rehabilitation center was subject to the state prevailing-wage act.¹⁰ The act defined a “public work” as any fixed work constructed for “public use.” The court observed that the rehabilitation center received over one-half of its income from contracts with the state, and received additional income from tax monies and state grants, and held that the remodeling project was for a “public use” and thus subject to prevailing wage laws.¹¹

Risk-Transfer Provisions

In general, parties on private projects are free to structure and allocate risk as they see fit, but there are limits to that proposition. For example, public policy in most states prohibits shifting the burden to indemnify for claims arising out of the sole negligence or willful misconduct of an indemnified party.¹² On public projects, however, legislatures often take a more hands-on approach to regulating the risk allocation between parties. A degree of state paternalism is justified for public works contracts because, in general, public contracts are not negotiated but presented by public entities on a take-it-or-leave-it basis.

This paternalism on public projects is expressed in many ways. For example, in California indemnity clauses designed to relieve a public agency from liability for its active negligence are void and unenforceable,¹³ public agencies must assume the risk posed by any undisclosed underground utility lines,¹⁴ local public entities may not require a bidder to assume responsibility for the accuracy of plans or specifications except on design-build projects,¹⁵ public entities may not include provisions in their contracts that would purport to waive a contractor’s damages for delay,¹⁶ local public entities must assume the risk of unforeseen site conditions,¹⁷ and public owners may not shift more than 5 percent of the cost of replacing work damaged or lost due to acts of God to a general contractor.¹⁸ Similar risk-transfer restrictions apply for public works in other states.¹⁹ Therefore, when that “Is it public, or is it not?” red flag goes up, remind yourself to check which risk-shifting provisions may apply, or be taken away, depending on the answer to your question.

Work Force Mandates on State Projects: DBE, WBE, VBE, LBE, etc.

Owners and general contractors on private projects are generally free to contract with whomever they wish. By contrast, the award of public projects by states and local public entities is usually circumscribed by various public policies. Some of these policies are expressed in the form of preferences in awarding contract work to certain classes of citizens in order to achieve social policy goals. Many state and local public works projects are impacted by preferences for employers of local labor, small businesses, historically disadvantaged minority businesses, women-owned businesses, and veteran-owned businesses. Project labor agreements between local public owners and local unions to assure labor tranquility may apply. Other state programs may target the legal status of workers. For example, South

Carolina's Illegal Immigration Reform Act regulates the documentation that contractors must gather on public works projects to assure they are not employing any illegal immigrants.²⁰ Although many of these programs have been challenged on constitutional grounds, they persist and are widely used to achieve local social policy goals. When applicable, such programs require experience, and a great deal of administrative effort to implement, by public entities as well as contractors. So when the "Is it public, or is it not?" red flag goes up, consider the groups and organizations that may benefit if the work is a public project, because that is where a challenge to a public-private hybrid project may come from.²¹

Materials and Equipment Procurement Restrictions

The Buy American Act²² applies when the federal government directly buys products or builds public buildings or works via a procurement covered by the Federal Acquisition Regulation (FAR). The Federal Highway Administration's (FHWA) "Buy American" statute applies similar restrictions principally to highway and transit-related projects.²³ The American Recovery and Reinvestment Act (ARRA) contains significant direct spending programs, tax incentives, loan guarantees, and bond programs that may become entwined in various public-private hybrid projects. The ARRA's "Buy American" rules borrow provisions from the existing Buy American statutes. The application of Buy American rules can be tricky, even without the additional layer of "Is it public, or is it not?"

Many states have similar statutes. For instance, California Government Code section 4303 provides:

The governing body of any political subdivision, municipal corporation, or district, and any public officer or person charged with the letting of contracts for (1) the construction, alteration, or repair of public works, or (2) for the purchasing of materials for public use, shall let such contracts only to persons who agree to use or supply only such unmanufactured materials as have been produced in the United States, and only such manufactured materials as have been manufactured in the United States, substantially all from materials produced in the United States.

Other statutes establish preferences for materials and goods manufactured within the state where a project is located.²⁴

Private owners are free to select and specify brand names and products or materials as they see fit and deem to be in their best interest. Public owners, by contrast, are generally required to state the needs of the government in a manner that encourages maximum competition and eliminates, as much as possible, restrictive specifications. Sole-source specifications, therefore, are generally prohibited for public projects.²⁵ So when that "Is it public, or is it not?" red flag goes up, ask whether public funds are involved and what strings might be attached to such public funds, and specifically, whether there are restrictions on procurement of materials that might apply if the answer is, "It's public!"

Procurement Restrictions: Competitive Bidding, Best Value

Private owners generally may select their contractors freely. By contrast, public owners are severely restricted in how they may select contractors. Typically, federal,²⁶ as well as state and local entities,²⁷ are required to award public works projects to the lowest responsive, responsible bidder determined through a sealed bidding process. If mandated procedures are not complied with, the consequences can be severe. Contracts may be deemed void. For example, Texas Local Government Code section 252.061 provides: "If the contract is made without compliance with this chapter, it is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by any property tax paying resident of the municipality." Case law has reached similar conclusions.²⁸ Any payments made under a void contract may have to be disgorged.²⁹

Even where sealed, competitive bidding is not required, public entities are constrained by requirements designed to make a selection process open and transparent. Public entities may also be subject to debt limits that may be exceeded by entering into a particular contract.³⁰ The chance of making a mistake in following the prescribed statutory scheme increases as local agencies and individual government officials combine private and public resources for completing projects, and as the private or public nature of a particular project becomes less clear. The moral is that when the "Is it public, or is it not?" red flag is present, consider carefully whether the involvement of the public entity is pursuant to statutory authority, properly exercised, and what the possible consequences might be if the answer is, "No."

Bonding Requirements

One consequence of characterizing a work as "public" is the bonding requirements that apply. The Miller Act was enacted in 1935 to provide a separate fund for payment of unpaid workers and materialmen on federal projects. Statutory performance bonds and payment bonds are also required on most state and local entity public works projects.³¹ Statutory payment bond requirements on the state and local entity level were enacted on the heels of the Miller Act, and they make the award of a state or local entity contract conditional on the contractor's issuing a separate surety guarantee of its performance and payment obligations.³² Public entities are mandated to verify the existence and proper rating of bonds, and, when they fail to do so, the public entity,³³ and even individual government officers,³⁴ may become responsible to pay any claims that would have been covered by a proper payment and materials bond.

Application of the Miller Act or the equivalent state statutes may depend on whether a project involves federal funds, a fact that is not always apparent to claimants and that may not always be apparent to contracting parties. For example, in *United States v. Mattingly Bridge Co.*,³⁵ a supplier to the general contractor on an interstate highway project cautiously pursued actions in federal court (on the theory that a payment bond was a Miller Act bond) and

in state court (on the theory that it was a state statutory payment bond). The continued intertwining of public and private projects through cooperative federal-state and public-private partnerships makes it difficult to properly characterize payment bonds as common law, Miller Act, or state statutory bonds.³⁶ Accordingly, when that “Is it public, or is it not?” red flag goes up, be sure to take a closer look at the type of bonding that might be available or required.

Remedies

The correct characterization of a project as public or private, state or federal, greatly affects the available remedies in the event of a dispute. A wrong decision in classifying a project can result in a loss of claims due to a failure to give proper notice, failure to ascertain the proper bond rights, failure to recognize the applicable statutes of limitation, misapprehension regarding the proper court or venue, or failure to properly present a claim.

Mechanics’ liens are not available on public works.³⁷ Therefore, the more byzantine the project funding becomes, and the more the public and private entities become intertwined, the more difficult it is to establish whether mechanic’s lien rights will or will not apply. Proper characterization is important at the contract formation stage for potential claimants so that available security for payment can be identified. If lien rights do not apply, what will claimants look to for payment if the project runs into financial difficulties?

For public works there are frequently statutory schemes regarding the presentation of claims that apply in addition to what may be spelled out in a contract. In California, for example, Government Code section 910 requires claimants to submit government code claims for any contract claims against a public entity before any suit is commenced. Failure to recognize a project as a public work may result in a loss of claims. For example, in *W.T. Andrew Co. v. Mid-State Surety Corp.*,³⁸ a supplier’s bond claim was disallowed due to a failure to give two notices required by statute, even though the notice given satisfied the notice requirements contained in the bond.

The timing for commencing an action to foreclose on payment bonds or stop notices can be different depending on whether a project is private, public, federal, state, or local. Thus in *A.C. Legnetto Construction, Inc. v. Hartford Fire Insurance Co.*,³⁹ a subcontractor’s payment bond claim was barred because the bond was deemed a statutory bond and the subcontractor failed to commence its suit within the statutory period. By contrast, in *T&R Dragline Service, Inc. v. CNA Insurance Co.*,⁴⁰ the subcontractor mistakenly assumed that bond was a statutory bond, and the claim was barred because, although suit was commenced within the required statutory timeframe, suit was not commenced within the shorter bond period.

Sovereign immunity may come into play. For example, in *Florida Department of Environmental Protection v. Contractpoint Florida Parks, LLC*, the state agency partnered with a private concessionaire to provide camping cabins

and services in state parks pursuant to “Partnership in Parks” program.⁴¹ When the concessionaire sued the state for nonpayment the department asserted a defense of statutory sovereign immunity.⁴² In that case the court found that the state had implicitly waived its sovereign immunity, reasoning that if the state were immune from suit the non-mutuality of remedy would render such contracts illusory.

Some states, such as Arkansas, recognize a doctrine of acquired immunity for a contractor that performs its work according to the terms of the contract with a governmental agency, and under the governmental agency’s direct supervision.⁴³ The theory is that the contractor was merely operating as the agent of a disclosed principal, the public entity, so that the principal’s immunity also applies to the agents. Consistent with classic principal/agency law, however, acquired immunity does not insulate the contractor from its independent liability for negligence or intentional torts.⁴⁴ Thus, when it comes time to submit claims or file suit, revisit the question “Is it public, or is it not?” to ensure that proper notice is given, proper procedures are followed, and suit is commenced timely and in the correct court and jurisdiction.

Is It Public or Is It Not? How Can You Tell?

As a practical matter, when the ownership, funding, and use of a construction project become entwined between public and private, a project may fall within the scope of some laws that apply to “public works” projects, but not others. Consistent with the discussion on the applicability of prevailing-wage laws, above, courts tend to look at three factors: the nature of a project’s ownership, the source of funds or financing, and the use to which the project will be put. As a general rule, whenever (a) a public entity directly or indirectly owns or will own part or all of a construction project, (b) a public entity disburses funds for, assumes debt on behalf of or any financial risk for, or guarantees a construction project, or (c) a construction project is being built for a public use, these are red flags that the project may be subject to some or all of the laws that typically govern public works projects. Unfortunately, deciding which laws apply requires a statute-by-statute, ordinance-by-ordinance review of all the statutes that may potentially apply to public works within a jurisdiction.

Project Ownership Is a Red Flag

Direct or indirect ownership of the project by a public entity may subject the project to some statutes that apply to “public works” projects. A classic area of concern lies in so-called lease-leaseback arrangements. In *Department of General Services v. Harmans Associates Limited Partnership*, the State of Maryland entered into a “creative financing” arrangement with a developer under which the state leased land to the developer for \$1 per year in exchange for the developer’s promise to build on the land and subsequently enter into a sublease-to-own agreement with the state.⁴⁵ Even though the state did not enter into a direct contract with the construction contractor, the court concluded, after reviewing the facts and carefully examining the statutory language, that

the project was “public” for the purposes of the competitive bidding statutes, certain dispute resolution statutes, and statutes requiring contractor-friendly differing-site clauses.⁴⁶

Project ownership can be a vexing issue. For example, under Pennsylvania law, projects owned or contracted for by a charter school are covered by the prevailing-wage statute. In *500 James Hance Court and Knauer and Gorman Construction Co. v. Pennsylvania Prevailing Wage Appeals Board*,⁴⁷ a developer and charter school attempted to get around this restriction by dividing the project into “shell” and “fill-in” portions and entering into separate contracts for each. The court found that the “shell” portion to be built by the developer’s contractor was exempt from the prevailing-wage statutes, while the project’s “fill-in” work to be completed by the charter school’s separate contractor (including site work, framing work, windows, HVAC, and electric work) was governed by the prevailing-wage statutes.⁴⁸

Public Grants or Financing: A Red Flag

Public financing of a project frequently triggers “public works” statutes such as prevailing-wage statutes. For example, in California the prevailing-wage statutes apply to any “public works,” which is defined to include any project that receives financing by a public agency.⁴⁹ However, California’s Labor Code definition of “public works” is restricted to application of the prevailing-wage statutes and should not be used to define “public works” for other purposes.⁵⁰ Other statutory schemes, such as California’s lien laws, have their own governing definitions.⁵¹ In Connecticut, laws requiring outreach to minority and small businesses broadly define “public works contract” to include not only construction work actually paid for by the state, but also any construction work involving “grants, loans, insurance, or guarantees” provided by the state.⁵² However, like the definition of “public works” that governs application of California’s prevailing-wage laws, Connecticut’s definition of “public works” for outreach programs is limited in scope.⁵³

Public financing alone may not be sufficient to characterize a project as “public.” *City of Long Beach v. Department of Industrial Relations*⁵⁴ illustrates the principle that the “public” character of a project may turn on the statutory language that governs the particular issue in dispute. The case involved the development of an animal shelter on privately-owned land. The city gave a cash grant to a private foundation for preconstruction activities and design services on the project. The state’s department of industrial relations contended that the grant of city funds meant that California’s prevailing-wage statutes should apply to the entire project. However, after a close examination of the statutory language defining “public works” and the statutory language mandating prevailing wages, the California Supreme Court ruled that the prevailing-wage statutes applied only when public funds were paid for “construction” activities, not preconstruction activities.

The meaning of “public financing” itself becomes uncertain when public and private entities adopt novel or creative financing schemes to fund construction work.

In *Pennsylvania State Building and Construction Trades Council, AFL-CIO v. Prevailing Wage Appeals Board*,⁵⁵ the Harrisburg Redevelopment Agency (HRA) offered “tax increment financing” to an insurance company, PNI, as an inducement to build its new headquarters building in the city of Harrisburg. HRA issued \$10,500,000 in “tax increment” bonds to be repaid from the increased tax revenue attributable to construction of the new headquarters buildings (the “tax increment”). The insurance company purchased the bonds, and the bond proceeds were held in trust by HRA for payment of a portion of the construction costs of the headquarters project. The scheme required that tax authorities pay the tax increment to HRA to pay off the bonds. Essentially, HRA and the taxing authority allowed the insurance company to fund construction costs through tax rebates on the improved property. As one of the witnesses before the trial court confirmed, the money that paid for the new headquarters essentially moved in a “loop” from the insurance company, to the public entities, and back again to the insurance company.

The scheme came at an unexpected cost to PNI. The local unions contended that, as a result of the “tax increment bonds,” the project was a “public work” for the purposes of Pennsylvania’s prevailing-wage laws. The Pennsylvania Supreme Court agreed:

Based upon the statutory scheme and the foregoing testimony, in our view, the monies paid to the tax authorities as tax increments, which, in turn, are used to pay off the bonds that are used to pay the cost of construction are public funds for purposes of the Wage Act. . . . [A]s noted by the Commonwealth Court, for a time these monies do rest in the public coffers. Significantly, the statutory financing at issue here is not a tax abatement, where the taxing authority agrees to forego receiving property taxes on a certain property for a certain time.

Pennsylvania State Building thus offers a cautionary moral: Developers who enter into creative financing relationships with public entities do so at their own peril.

A Project’s End Use May Determine Its Character

A project’s end use may determine its character in some jurisdictions. For example, in *Comstock & Davis, Inc. v. City of Eden Prairie*, an engineer was allowed to pursue a mechanic’s lien recorded against property owned by a public agency because the public entity that owned the land planned to sell it to a private entity for private commercial use.⁵⁶

*L. Suzio Concrete Co. v. New Haven Tobacco, Inc.*⁵⁷ is an example in which a supplier erroneously assumed a project was public because it failed to appreciate the significance of the project’s end use. In that case, the Town of East Haven sold property to a private entity for construction of a factory. However, to discourage the purchaser from reselling the property after it took title, and to encourage the purchaser to build the factory and warehouse that the purchaser promised it would build, the town included a number of restrictions on the sale, including one that required the

purchaser to pay for and build a foundation for its facilities on the land before title would be transferred. The purchaser engaged a contractor that built the foundation but defaulted on payments to its supplier. When the supplier attempted to put a lien on the property, it learned that title was still held by a public entity. Assuming the project to be a “public work,” the supplier refrained from recording a lien on the theory that it could pursue a payment bond remedy. The supplier then learned too late that the public entity never required the developer to post a payment bond, as Connecticut law requires for all public works projects. The supplier sued the officials who failed to require a payment bond for the damages it suffered as a result of the contractor’s default. The court sided with the officials, reasoning that despite the clause requiring that the purchaser build a foundation before title would be transferred, the sales agreement was, at its core, a land sales agreement, not a construction contract. Furthermore, the ultimate use of the project was private, not public. The claimant paid dearly for its erroneous assumption about “Is it public, or is it not?”

Similarly, in *Rhode Island Building & Construction Trades Council v. Rhode Island Port Authority and Economic Development Corporation*,⁵⁸ a project built on public land by a private developer was found to be exempt from Rhode Island’s prevailing-wage statutes because the ultimate use of the project was private, not public. The project involved the construction of an office building complex on land owned by an economic development corporation. The project was funded with \$25 million in taxable bonds issued by the economic development corporation. The project would be leased to a private entity for an annual rent of \$1 plus the interest and principal due on the bond. The applicable statute provided that prevailing wages would be paid on any “public work” funded through a bond issued by an economic development corporation. Was this project, which was built on public land and funded through a public obligation, a “public” project? The Rhode Island Supreme Court answered “no.” The court reasoned that it should be “guided by the nature of the use to which the ultimate project is to be put rather than the source of the funding.”

In *James J. O’Rourke, Inc. v. Industrial National Bank of R.I.*,⁵⁹ a group of claimants made a similar painful mistake about “Is it public, or is it not?” A port authority facilitated the financing for construction of a meatpacking plant by issuing \$2.1 million in bonds. To make the issuance of bonds possible, the meat-processing company donated the land to the port authority, and the port authority leased the land back to the company for rental payments that equaled the principal and interest on the bond. Under the terms of the lease, the facility owner could repurchase the land for \$1 after the bond was redeemed. The company executed a contract with a general contractor for construction of the plant, but the contract was immediately assigned to the port authority. When the general contractor defaulted on payments to subcontractors during construction of the facility, the subcontractors sued the port authority for damages on the grounds that the port authority failed to

demand a payment bond from the general contractor. Even though the port authority owned the land, had issued the bonds, and held the general contract for construction, the Rhode Island Supreme Court ruled that the project was not a public project, finding the facts that the project use was private and its funding was essentially private to be dispositive. The court acknowledged that its decision left the subcontractors without a remedy, but it nevertheless ruled that “this litigation can afford the plaintiffs no relief.”

As the cases discussed above illustrate, owners, developers, contractors, and sureties must closely examine the potential application of “public-works” statutes whenever a public entity is involved in a project, even if the involvement is tangential.


Statutorily Established Public-Private Partnerships

In addition to the foregoing factors, the character of a project may be defined by reference to enabling laws that expressly authorize public-private partnerships. Examples of statutes authorizing such partnerships include California’s statutes relating to the State Court Facilities Construction Fund,⁶⁰ the “High Speed Rail” voter-approved initiative,⁶¹ and private toll-road franchises.⁶² Other states are passing similar statutes, some of which attempt to provide some guidance regarding whether statutes that ordinarily govern public works contracting apply to the project developed under their purview, and some of which do not. For example, the statutes authorizing the California Judicial Council to pursue alternative project-delivery methods for projects developed under the aegis of the Court Facilities Construction Fund specifically exempt the projects from the Public Contract Code.⁶³ Even this express guidance is incomplete, however. While the statute expressly excludes projects from the Public Contract Code, it is silent concerning application of other state statutes, such as California Civil Code section 3247, which requires an “original contractor” on a project “awarded” by a “public entity” to post a payment bond. Express statutory exemptions notwithstanding, the prudent developer, public owner, contractor, and potential claimant on any project must closely examine all public works statutes within the jurisdiction for possible application of any of the traditional public works restrictions and rules when dealing with any construction project involving public funds, public owners, or public use.

Conclusion

Public construction is pervasively regulated. Prevailing wages, government code claims, bonding requirements, false claims, public sector financing, sealed bidding, negotiated bidding for “best value,” human rights commissions, affirmative action goals, and “Buy American” and other restrictions on procurement of materials are but a few of the considerations. Nevertheless, through it all contractors and developers must “turn square corners” when dealing with the government. Public entities cannot exceed their statutory authority in entering into or amending a contract; when they attempt to do so, the contract may be void. It is

indeed a lot for all parties involved to keep track of.

When public entities deviate from the established rules in order to take advantage of opportunities for greater efficiencies, to bring private sector financing to public projects, or due to preferences for private sector solutions, the answer to the question “Is it public, or is it not?” can become obscured. It is important for all parties, therefore, to recognize the red flags: (1) public ownership is involved, (2) public money is involved, or (3) the project is fundamentally for public use. When one or more red flag is present, careful analysis is essential. Ask yourself, what are the consequences if the project is really public, or really private? Which rules apply, and which do not? What is the payment security if there are no lien rights? Does the public entity have statutory authority to do what it’s doing? What are the consequences if the answer is no? Who bears the risk? 

Endnotes

1. The editorial can be found at <http://www.dailymail.com/Opinion/Editorials/200902100475?page=1&build=cach>.

2. See prevailing-wage studies compiled by the Sheet Metal and Air Conditioning National Association (SMACNA) discussing the benefits of prevailing-wage laws at <http://www.smacna.org/legislative/index.cfm?fuseaction=studies>.

3. 331 So. 2d 647 (Ala. 1976).

4. 645 S.W.2d 711 (Ky. App. 1983).

5. KY. REV. STAT. ANN. § 337.010(3)(d).

6. For other cases focusing on the nature of the awarding entity, see *Western Mich. Univ. Bd. of Control v. State*, 455 Mich. 531 (1997); *Bridgestone/Firestone v. Hartnett*, 175 A.D.2d 495 (N.Y. 1991) (private contract for replacement of roofing material pursuant to 10-year warranty subject to prevailing wage because state’s general contract required the warranty); *Stephens & Rankin, Inc. v. Hartnett*, 160 A.D.2d 1201 (N.Y. 1990) (Niagara Falls Bridge Commission, established under federal law, was a “commission appointed pursuant to law” within meaning of state prevailing-wage act); *Newark Laborers’ Pension – Welfare Funds v. Commercial Union Ins. Co.* 126 N.J. Super. 1, 312 A.2d 649 (1973) (state housing authority was an “instrumentality exercising public and governmental functions”); *Male v. Pompton Lakes Borough Municipal Utilities Authority*, 105 N.J. Super. 348, 252 A.2d 224 (1969) (municipal utilities authority had broad independent power to acquire property, issue bonds, and set rates for its services).

7. 163 Ill. App. 3d 987 (4th Dist. 1987).

8. For other cases focusing on the nature of funding, see *Lycoming County Nursing Home Ass’n v. Dep’t of Labor & Indus.*, 627 A.2d 238 (Pa. Commw. 1993) (nursing home construction by private, nonprofit corporation); *State ex rel. Webster v. Camdenon*, 779 S.W.2d 312 (Mo. App. 1989) (lease-leaseback for police station and fire house). Compare *Nw. Ohio Bldg. & Constr. Trades Council v. Ottawa Cnty. Improvement Corp.*, 122 Ohio St. 3d 283 (2009); *Mosaica Educ., Inc. v. Pennsylvania Prevailing Wage Appeals Board*, 925 A.2d 176 (Pa. Commw. 2007) (charter school renovation project that did not involve public funds); *Carson-Tahoe Hosp. v. Building & Constr. Trades Council of Northern Nevada*, 128 P.3d 1065 (Nev. 2006) (private hospital construction financed in part through city revenue bonds); *Coats v. State*, 170 Or. App. 32 (2000) (contractor’s quarry work ten miles away from public project not subject to prevailing wages); *Found. for Fair Contracting, Ltd. v. Dep’t of Labor*, 316 N.J. Super. 437 (App. Div. 1998) (construction of state-funded, low to moderate income housing); *Elliott v. Morgan*, 214 Wis. 2d 253 (Wis. Ct. App. 1997) (sidewalks, decorative lighting, and landscaping along river not subject to prevailing wage-rate statute, even though city provided grant money); *McIntosh v. Aubry*,

14 Cal. App. 4th 1576 (1993) (privately run residential shelter care facility for minors on land leased from county); *Nat’l R.R. Passenger Corp. v. Hartnett*, 169 A.D.2d 127, 572 N.Y.S.2d 386 (1991) (construction of new Amtrak line was not public works project); *Alaska State Federation of Labor v. Dep’t of Labor*, 713 P.2d 1208 (Alaska 1986) (new community hall owned and operated by Indian tribes not covered by state prevailing-wage act, even though state grant funded 25 percent of the project costs for construction).

9. 204 Ill. App. 3d 945 (5th Dist. 1990).

10. ILL. COMP. STAT. ch. 48 §§ 39s-1, *et seq.* (1987).

11. See *Long Island Lighting Co. v. Indus. Comm’r*, 40 A.D.2d 1003, 338 N.Y.S.2d 751 (1972) (erection of streetlight standards had a public objective); compare *City of Long Beach v. Dep’t of Indus. Relations*, 34 Cal. 4th 942 (2004) (private animal shelter); *Elliott v. Morgan*, 214 Wis. 2d 253 (Ct. App. 1997); *Cattaraugus Cmty. Action, Inc. v. Hartnett*, 166 A.D.2d 891 (N.Y. 1990) (home for adolescent mothers undertaken by a private nonprofit corporation); *Columbia-Pacific Bldg. & Constr. Trades Council v. Oregon Comm. on Pub. Broad.*, 102 Or. App. 212 (1990); *State ex rel. Webster v. Camdenon*, 779 S.W.2d 312 (Mo. App. 1989) (sale-leaseback for construction of a combination fire station and police station); *Hunter v. Bozeman*, 216 Mont. 251 (1985) (lease-leaseback of land for constructing a building); *Daniels v. Ft. Smith*, 268 Ark. 157 (1980) (construction of industrial park on city-leased land); *Int’l Bhd. of Elec. Workers v. Bd. of Harbor Comm’rs*, 68 Cal. App. 3d 556 (1977) (oil and gas lease for production of oil from tidelands held in trust by city).

12. See, e.g., CAL. CIV. CODE § 2782.

13. CAL. CIV. CODE § 2782(b).

14. CAL. GOV’T CODE § 4215.

15. CAL. PUB. CONT. CODE § 1104.

16. CAL. PUB. CONT. CODE § 7102.

17. CAL. PUB. CONT. CODE § 7104.

18. CAL. PUB. CONT. CODE § 7105.

19. For a summary of anti-indemnity statutes, for example, see INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC., CONSTRUCTION RISK MANAGEMENT, VOL. II at X.E.4 (May 1998).

20. 2008 Act No. 280, added Chapter 14 to Title 8 of the South Carolina Code of Laws; see also, e.g., CAL. PUB. CONT. CODE § 6101.

21. E.g., *Ne. Florida Contractors v. Jacksonville*, 508 U.S. 656 (1993) (contractor’s group challenged city ordinance that 10 percent of the budget for city contracts be set aside each year for minority business enterprises); *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wash. 2d 121 (1982) (union challenge to award of sewer contract for failing to comply with statutory requirement to hire specified percentage of state residents).

22. 41 U.S.C. §§ 10a to 10d. Section 10(b) of the act pertains to construction contracts and reads: “Every contract for the construction, alteration, or repair of any public building, or public work in the United States heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States. . . .”

23. 23 U.S.C. § 313; see also 23 C.F.R. § 635.410. Essentially, the FHWA “Buy American” statute requires that all steel and/or iron materials that are permanently incorporated into a covered project must be manufactured and fabricated in the United States. Here is the first loophole, however: If a state’s transportation department determines that a bridge structure (even a bridge structure that is to remain in place for years and possibly then moved for a secondary, continued use at another location) is “temporary” rather than permanent in nature, then the Buy American protection does not apply. Then there is a second loophole: Buy American protection does not apply to bridge structures funded totally from state revenue,

even if application of federal funding to another state highway project freed state funds to be applied to build a bridge through loophole number two. The FHWA Buy American statute also does not apply if: (1) the state accepts alternate bids from both foreign and domestic steel mills or fabricators, and the foreign company's bid is lower than the domestic company's bid by more than 25 percent, or (2) the use of foreign steel and iron does not exceed 0.1 percent of the total contract value, or \$2,500, whichever is greater. See 23 C.F.R. § 635.410(b)(1)(4).

24. See, e.g., CAL. GOV'T CODE § 4331: "Price, fitness and quality being equal, any body, officer, or other person charged with the purchase, or permitted or authorized to purchase supplies for the use of the State, or of any of its institutions or offices, or for the use of any county or city shall always prefer supplies grown, manufactured, or produced in the State, and shall next prefer supplies partially manufactured, grown, or produced in the State."

25. E.g., CAL. PUB. CONT. CODE § 3400.

26. See FAR 36.103(a) ("The contracting officer shall use sealed bid procedures for a construction contract if the conditions in 6.401(a) apply. . . ."). FAR 6.401(a)(1) provides: "Contracting officers shall solicit sealed bids if – (1) Time permits the solicitation, submission, and evaluation of sealed bids; (2) The award will be made on the basis of price and other price-related factors; (3) It is not necessary to conduct discussions with the responding offerors about their bids; and (4) There is a reasonable expectation of receiving more than one sealed bid."

27. See 2000 Model Procurement Code for State and Local Governments § 5-202(2)(h) ("Competitive sealed bidding . . . shall be used to procure construction in design-bid-build procurements"); see also 2007 Model Code for Public Infrastructure Procurement, AMERICAN BAR ASSOCIATION, available at <http://meetings.abanet.org/webupload/commupload/PC500500/relatedresources/5IntroductionToModelCodeforPublicInfrastructureProcurement.pdf>.

28. See, e.g., J&J Contractors/O.T. Davis Constr., A.J.V. v. Idaho Transp. Bd., 118 Idaho 535 (1990) (contract in violation of competitive bidding laws is void, and contractor may not recover in quantum meruit); Miller v. McKinnon, 20 Cal. 2d 83 (1942) (ordinarily,

compliance with the terms of a statute requiring the letting of certain contracts by a public agency such as a municipal corporation or county by competitive bidding and the advertising for bids is mandatory with respect to those contracts coming within the terms of the statute; a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power).

29. See *J&J Contractors; Miller*, *supra* n.28. Compare OR. REV. STAT. § 279C.470 (contract that fails to comply is to be ratified and contractor paid unless fraud or criminal conduct is involved).

30. See, e.g., *J. Kent Corp. v. Town of Dillon*, 648 P.2d 669 (Colo. Ct. App. 1982).

31. See generally Patrick J. O'Connor, *Statutory Bonds or Common-Law Bonds: The Public-Private Dilemma*, 29 TORT & INS. L.J. 77 (1993); 48 A.L.R. 4th 1170 (cases regarding what constitutes a public work for purposes of payment bond statutes).

32. See O'Connor, *supra* note 31.

33. See, e.g., *Western Waterproofing Co. v. Springfield Housing Authority*, 669 F. Supp. 901 (C.D. Ill. 1987); *N.V. Heathorn v. County of San Mateo*, 126 Cal. App. 4th 1526 (2005); *Platt Elec. Supply, Inc. v. JC Nw., Inc.*, 159 Or. App. 328 (1999); *Palm Beach Cnty. v. Trinity Indus., Inc.*, 661 So. 2d 942 (Fla. Dist. Ct. App. 1995); *Green Elec. Sys., Inc. v. Metro. Airports Comm'n*, 486 N.W.2d 695 (Minn. Ct. App. 1992); *Redbird Engineering Sales, Inc. v. Bi-State Dev. Agency*, 806 S.W.2d 695 (Mo. Ct. App. 1991); *Charlie Brown Constr. Co. v. City of Boulder City*, 106 Nev. 497 (1990); *Joseph A. Fortin Constr., Inc. v. Massachusetts Hous. Fin. Agency*, 392 Mass. 440 (1984).

34. See, e.g., OR. REV. STAT. § 279C.625 (imposing individual liability upon public officials who fail to obtain statutorily required bonds).

35. 344 F. Supp. 459 (W.D. Ky. 1972).

36. See O'Connor, *supra* note 31.

37. See 53 AM. JUR. 2d, *Mechanics' Liens* §§ 31-37 (2006); CAL. CIV. CODE § 3109; *Meyerhofer v. Bd. of Educ.*, 89 Cal. 110 (1891).

38. 221 Mich. App. 438 (1997).

39. 92 N.Y.2d 275 (1998).

40. 796 F.2d 133 (5th Cir. 1986).

41. 986 So. 2d 1260 (Fl. 2008).

42. *Id.*

43. *Lopez v. James Constr. Grp.*, 432 F.3d 829, 833 (8th Cir. 2005).

44. *Id.*

45. 98 Md. App. 535, 633 A. 2d 939 (1993).

46. *Id.*

47. 2009 Pa. Commw. LEXIS 1594 (2009).

48. For another charter school case using creative ownership mechanisms see *Mosaica Educ., Inc.*, *supra* note 6. A New York court has ruled that charter schools are categorically not subject to New York's prevailing-wage statutes because charter schools are not identified in the statute as a public entity whose projects are covered by the prevailing wage statutes. In the Matter of New York Charter School Ass'n v. Comm'r of Labor, 2009 N.Y. App. Div. LEXIS 2452 (2009).

49. CAL. LAB. CODE § 1720.

50. *Id.* ("As used in this chapter. . .").

51. CAL. CIV. CODE §§ 3100, *et seq.*

52. CONN. GEN. STAT. § 46a-68b.

53. *Id.* ("As used in this section and sections 4a-60, 4a-60a, 4a-60g, 4a-62, 46a-56 and 46a-68c to 46a-68k, inclusive: 'public works contract' means. . .").

54. 34 Cal. 4th 942 (2004).

55. 570 Pa. 96 (2002).

56. 557 N.W.2d 213 (Minn. Ct. App. 1997).

57. 28 Conn. App. 622 (1992).

58. 700 A.2d 613 (1997).

59. 478 A.2d 195 (1984).

60. CAL. GOV'T CODE §§ 70371–70379.

61. CAL. STS. & HIGH. CODE §§ 2704–2704.21; CAL. PUB. UTIL. CODE §§ 185000–185038.

62. CAL. STS. & HIGH. CODE § 143.

63. CAL. GOV'T CODE § 70374(b).