The Research Bureau

Where Have all the Bidders Gone?: The Impact of "Responsibility" on Public Construction

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EXECUTIVE SUMMARY

During the past few years, there have been several occasions when Worcester officials requested bids on public construction projects and received very few responses with projected costs far in excess of estimates.[1] These instances led The Research Bureau to wonder why this was the case. We analyzed state law regulating public bidding across the Commonwealth and Worcester's ordinances which add additional regulations. We also examined the recent history of bidding on public construction in Worcester and several other Massachusetts cities and towns and interviewed many individuals from both the public and private sectors involved in and knowledgeable about public construction. We found that in some instances, Worcester's ordinances duplicate state law and in others add regulations for companies interested in bidding on public construction projects. The one local requirement that was consistently cited by both companies and public officials as a deterrence to bidding was Worcester's Responsible Employer Ordinance (REO). Specifically, it is the section which requires that all bidders participate in a bona-fide apprenticeship-training program for each trade and occupation from their firm engaged in a particular project, which restricts competition. This requirement has the likely effect of reducing the supply of bidders and increasing the cost of the project.

In order to increase competition and reduce price, The Research Bureau recommends that the Worcester City Council rescind the Responsible Employer Ordinance. If the City Council is unwilling to rescind the REO in the near future, The Research Bureau recommends that City officials perform an experiment. The next time there is a bid opening at which only one or two bids are received, or the lowest bidders are missing a DAT form (Division of Apprenticeship Training, which demonstrates compliance with the apprenticeship requirement), the City should suspend the REO for that one project and repeat the bidding process. Receiving more bids and a lower winning bid price will provide evidence of the impact of the REO.

[1] See, for example, Nick Kotsopoulos, "Sights lowered for city bridge; Walkway cost soars," *Telegram & Gazette*, January 12, 2006 p. B1; Nick Kotsopoulos "Planned sky bridge scrapped; Project is deemed too costly to build," *Telegram & Gazette,* April 28, 2007, p.A1.

INTRODUCTION

How is bidding regulated on public construction projects in a municipality? Do public administrators get as many bids as they would like, and if not, why are potential bidders not bidding? Are some contractors shut out of the bidding process and taxpayers consequently burdened with excessive construction costs? To answer these questions, The Research Bureau undertook a study of the regulations currently imposed by the City of Worcester on the process of bidding for work on public construction projects, above and beyond state law. More specifically, we focused on what is termed "vertical," as distinguished from "horizontal" construction, that is, buildings, as distinguished from roads, bridges, sewers and waterlines (or "public works").[2] While Worcester does not add any regulations of its own to the process of bidding on public works as specified by Chapter 30 of the Massachusetts General Laws (M.G.L.), it does impose various specific regulations on the bidding process on vertical construction projects specified in M.G.L. Chapter 149. The latter was enacted in the early 1980s following the recommendations of the Special Commission Concerning State and County Buildings, or "Ward Commission." The Ward Commission was created by the state legislature to investigate the causes of then-recent scandals in public construction, the most famous being the UMass Boston campus.[3] Chapter 149 has been significantly revised only once in the Construction Reform Act of 2004, which created Chapter 149A. In this report, we focused solely on the bidding process itself (as distinguished from what happens after the general contractor (GC) for a project has been hired and work begins), because the regulations governing that process are in crucial ways the most important aspect of public construction. Monitoring the bidding process is the most effective way for a municipality to prevent corruption, to weed out unqualified or unreliable contractors, and to secure the basic goods of fair competition and economy in public expenditures.

To study this topic, we examined the recent history of bidding on public construction in Worcester and several other Massachusetts cities and towns. We also interviewed general contractors and subcontractors and public administrators from several municipalities, along with state officials, architects, attorneys, economists and public policy professionals. We identified three potential problems with Worcester's process: unnecessary "red tape," the City's Minority/Women Business Enterprise and Worker Utilization Ordinance (Women and Minority Ordinance), and its Responsible Employer Ordinance (REO). Our report discusses these three issues, and concludes with some recommendations for changing the bid process.

[2] M.G.L. Chapter 149 applies to "[e]very contract for construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency."

[3] The Ward Commission was officially charged "[t]o investigate and study as a basis for legislative action the existence and extent of corrupt practices and maladministration concerning contracts…related to the construction of state and county buildings."

BIDDING ON PUBLIC CONSTRUCTION CONTRACTS IN WORCESTER - A BRIEF OVERVIEW

To begin, we offer a brief overview of the ways in which the state of Massachusetts and the City of Worcester regulate the process for bidding on public construction.[4] After the City Council decides to appropriate funds for a new building or the renovation or demolition of an existing one, the first step is to hire an architect or engineer to design the plans. That selection is based on a judgment of professional qualifications, experience with the type of building or work being proposed, and the estimated cost of services. (In choosing an architect, unlike the bidding process for actual construction, the City is not obliged to choose the lowest eligible bidder.) In drawing up plans, the designer follows the City's basic wishes (size, location, function and aesthetics).

When the plans and specifications are complete, the architect/engineer makes an estimate and the bidding process begins. State law mandates that the subcontractors bid first in what is known as a "filed sub-bid process."[5] All tradework on the project (electrical, roofing, plumbing, etc.) estimated by the architect to cost over $25,000 ($10,000 prior to Construction Reform Act of 2004) is put out to bid. This requirement is meant to ensure that independent subcontractors get a fair chance at city contracts, and to provide the public with independent verification of how much each major element of the job should cost, beyond the estimates of the architect and GC.

[4] To be precise, not all public construction goes through the bidding process. The Construction Reform Act of 2004 gave awarding authorities the option to employ an alternative delivery method known as "Construction Manager at Risk" on especially large projects. "Construction Manager at Risk" is available only on projects above $5 million; the standard model for all vertical construction in excess of $100,000 (which the Construction Reform Act raised from the original $25,000) remains design-bid-build. In Construction Manager at Risk, before the architect's plans are complete, the municipality solicits applications from general contractors, and then selects one, based not only on the contractor's tentative price, but also on his experience with the type of work the municipality is doing, and the municipality's general confidence in him. The municipality then hires a GC, completes the architect's plans with the general contractor involved, and directly negotiates with him a Guaranteed Maximum Price (GMP). All cost overruns above the GMP must be absorbed by the GC (hence "at Risk," although provision is made for events over which he could not possibly have control, like extreme weather). The main advantage of this alternative delivery method over design-bid-build are that the municipality is able to exercise more discretion over which contractor it works with, instead of being stuck with whoever the lowest bidder is. To anticipate a bit, it should be noted that both the filed sub-bid process and Worcester's Responsible Employer Ordinance still apply in the case of Construction Manager at Risk.

[5] The filed sub-bid process was made law in 1939 and is thus not technically part of Chapter 149. The Ward Commission recommended eliminating it, as did the Final Report of the Construction Reform Task Force, Secretary's Special Initiative to Reform Construction Procurement and Management by Commonwealth Agencies, Executive Office for Administration and Finance, Boston, Massachusetts (1998). The later report was ordered for the purpose of revising Chapter 149; many of its recommendations eventually found their way into the Construction Reform Act of 2004, although eliminating the filed sub-bid process (and therefore giving maximum discretion over selecting subcontractors to the GC) was not one of them. For a critique of filed sub-bids, see Douglas Gransberg's two papers-"The Cost of Inaction: Does Massachusetts Need Public Construction Reform?," "White Paper No. 7," Pioneer Institute for Public Policy Research, Boston, Massachusetts, September 1999, and "Vertical Construction Performance in Massachusetts Lags Far Behind Other States," "Policy Brief," Pioneer Institute for Public Policy Research, Boston, Massachusetts, December 1999.

Once all of the bids from subcontractors have been received, and the deadline has passed, bids are solicited for the general contractor, and the contract is awarded to the lowest eligible bidder.[6]

State Requirements

State law imposes a number of requirements which define eligibility for both GCs and subcontractors alike, the most important being DCAM (Division of Capital Asset Management) certification, proof of which all bidders must submit with their bid. DCAM certification is the means by which the state of Massachusetts deems companies generally fit to do public work.[7] DCAM monitors contractors' references, financial stability, and any past legal difficulties. To be certified, a contractor must receive a passing grade (which the Construction Reform Act of 2004 raised to eighty out of a possible hundred). DCAM also assesses contractors' capacity, how much public work they are capable of undertaking within a given year (measured as a monetary figure). DCAM certification must be updated yearly and is mandatory for all subcontractors on all tradework above $20,000 (the Construction Reform Act made it mandatory for subcontractors), and all general contractors for projects above $100,000 (which the Construction Reform Act raised from $25,000).

State law has several other significant mandates: a pledge to provide appropriate industrial accident insurance to one's employees, not to misclassify one's employees as independent contractors, and to pay them the Prevailing Wage. Prevailing Wage law (or Massachusetts's "little Davis-Bacon," named after the original Federal Davis-Bacon law) mandates certain fixed hourly wage rates for all public construction projects in Massachusetts. These are union rates - the state compiles and mandates them, but they are based on the most recent collective bargaining agreement between a local building trade union and contractors. (Hence they differ not only from trade to trade, but also from locality to locality.) The prohibition against misclassification is related to Prevailing Wage, since one motivation to misclassify employees as "independent contractors" (especially in public construction) is to get around paying them Prevailing Wage.[8] Finally, the Construction Reform Act of 2004 instituted statewide goals of

[6] In the case of subcontractors, it is up to the winning GC which he accepts. Although it is likely this will be the lowest bidder, state law does not mandate it. The GC may have a good working relationship with some sub and thus be willing to accept a higher cost. Also, subcontractors may stipulate in their bids which GCs they refuse to work with.

[7] Note that "DCAM certification" is different from prequalification, which is a process by which local awarding authorities determine a contractor's *particular* fitness for the project they are building. The Construction Reform Act of 2004 made prequalification mandatory on all projects above $10 million and optional on projects above $100,000.

[8] In order for an employee of a contractor to be a genuine "independent contractor," he must satisfy three criteria: (1) the individual must be free from all control and direction in connection with the performance of the required services (2) the individual must not perform those services on premises owned or controlled by the employer, and (3) the individual is customarily engaged in an independently established occupation, profession or business. On the problem of misclassification in the Massachusetts construction industry more generally (public and private), see "The Social and Economic Costs of Employer Misclassification in Construction," Francoise Carre and Randal Wilson, Construction Policy Research Center, Labor and Worklife Program, Harvard Law School and Harvard School of Public Health, December 17, 2004. The main cost of misclassification is loss of payroll tax revenue to the state from unemployment insurance and worker's compensation funds.

7.4% minority and 4% women participation in both manpower hours and business ownership in public construction.

Worcester's Requirements

On top of these fairly extensive state regulations, Worcester has added two additional regulations: its Women and Minority Ordinance and the Responsible Employer Ordinance. The former is an increase from State law: "[a]ll contractors and subcontractors if subcontracting any portion of the work are obligated to make a good faith effort to engage 10% minority and 5% women owned businesses. Further, each contractor shall make a good faith effort to maintain a workforce that is 10% minority and 5% women." The REO pertains to all bids filed by general contractors in excess of $100,000 and all subcontractors in excess of $25,000. It contains six provisions, two of which place additional requirements on prospective contractors; the other four either have been ruled unconstitutional or are reiterations of state law. The added requirements are that all employers must "furnish at [their] expense, hospitalization and medical benefits for all individuals employed on the project or coverage which is comparable to the hospitalization and medical benefits provided by the health and welfare plans in the applicable craft recognized by M.G.L. Chapter 149, Section 26, in establishing minimum wage rates," and "must maintain and participate in" a bona fide apprenticeship training program "for each apprenticeable trade or occupation represented in its workforce." The REO stipulates that the burden of proving compliance with these strictures is on the contractor, general or sub, prior to bidding and weekly in the form of certified payrolls.

These, then, are the main requirements placed on prospective bidders by Worcester and Massachusetts:

State:

- DCAM certification (both GCs and subs)
- Prevailing Wage
- Accident insurance/Worker's compensation
- No misclassification of employees as "independent contractors"
- Women and minority participation

City:

- Minority and Women Ordinance (requiring greater participation than the state for both manpower hours and ownership)
- Apprenticeship Program (REO)
- Health Insurance (REO)

ANNOYANCES, ENCUMBRANCES, AND DETERRENTS TO BIDDING

As mentioned earlier, in our discussions with contractors, three factors were identified as potential constraints to doing business with Worcester: "red tape" or excessive bureaucracy, Worcester's Women and Minority Ordinance, and the Responsible Employer Ordinance. Regarding the first, nothing in our research suggested that Worcester's process is excessively bureaucratic by comparison with procedures elsewhere in the Commonwealth, and certainly not to the point to raise serious questions about its overall fairness or cost. However, before moving on, two points should be noted about "red tape." First, the entire bidding process is governed by protocols instituted by state law. Some of these protocols have indeed come under fire as being excessively bureaucratic; a common complaint has been that Chapter 149 overcorrected for the mistakes which led to the scandals in public construction in the 1970s.[9] But our focus in this report is primarily on Worcester, and although these state laws are sometimes administered by city officials, nothing in our research suggested that Worcester's public officials are unusually bureaucratic or demanding in executing the state laws. Whether or not the Construction Reform Act of 2004 adequately addressed the charges of "overcorrection" and whether or not state law is in need of more reform, are questions for a different report.

Second, Worcester's REO is a major source of "red tape." The REO adds a layer of bureaucracy not only by imposing additional requirements, but also by making local authorities responsible for enforcing state law. Three of the REO's six provisions, Prevailing Wage, no misclassification of employees as "independent contractors," and maintaining appropriate industrial accident insurance, are, as previously noted, part of preexisting state law. The point of including them in the REO is to provide extra enforcement by both local and state authorities. Still, since complying with these requirements simply involves submitting a certified copy of a payroll (which the contractor would of course be issuing anyway) to two authorities rather than one, it is unlikely that this extra paperwork plays a large role in deterring contractors.

The Women and Minority Ordinance was found to be slightly more of an encumbrance to the bidding process, but not much more. For one thing, maintaining 5% women and 10% minority business participation (and also 5% women and 10% minority manpower hours) is a *goal*, not a requirement. All that is required is "a good faith effort" on the part of the contractor. Also, the City's percentages are far less aggressive than those, for example, of Cambridge (25% minority and 10% women manpower hours) and even the Worcester Redevelopment Authority, whose goal is 20% minority business participation.[10] More to the point, no contractor we interviewed

[9] For examples of criticisms of Chapter 149 along these lines, see Douglas Gransberg, op. cit., and Massachusetts Taxpayer Foundation, "A Taxpayer's Look at a Sacred Cow: Public Sector Design in Massachusetts Two Decades After the Ward Commission," November 1995. Although all of these were written before the Construction Reform Act of 2004, not all of their criticisms were addressed by it.

[10] "Every contractor shall commit to a minimum goal that twenty percent of its workforce shall include individuals who are low-income or female or minority or Worcester County residents…or any combination thereof, and shall further commit to a goal of utilizing bona-fide minority firms qualified by the State Office of Minority and Women

considered Worcester's Women and Minority Ordinance more than a minor inconvenience. Like "red tape," the Women and Minority Ordinance, whatever its merits, is not particularly costly.

The REO is a different story, however, since it bars perfectly qualified, well-respected contractors, both general and sub, from the bidding process. The open-shop (non-union) contractors we interviewed were virtually unanimous in citing this as the main reason they were not bidding on Worcester contracts.

It is not the REO's residency requirement, which states that 50% of the total employee-worker hours in each trade, at every tier, be performed by bona fide residents of the City of Worcester, which discourages bidding. This provision was struck down in 2004 as a violation of the United States Constitution's Privileges and Immunities Clause.[11] Nor should the health insurance requirement discourage bidding. According to Worcester's City Solicitor, the wording of this provision means that the employer simply must make health insurance *available*-it does not specify the character or quality of the benefits.[12] Furthermore, the cost of providing health insurance may be deducted from the Prevailing Wage the employer is required to pay that individual. However, in the course of our interviews with local contractors, we found considerable confusion as to what precisely the health insurance requirement means. Public officials should be aware of this problem, as several prominent and experienced local contractors mistakenly believed that Worcester officials interpreted the ordinance in a much more aggressive way than they actually do.

The one requirement of the REO that has an unambiguously anti-competitive effect is the apprenticeship training. To regularly maintain or participate in a state-certified apprenticeship-training program for all trades is too difficult for every contractor. By imposing this requirement on all prospective bidders, the REO reduces the number of bidders.

Nineteen other cities in Massachusetts have REOs, the first of which was adopted by Cambridge in 1995.[13] These ordinances were likely initiated by the unions. (For evidence of this, see www.faircontracting.org which provides do-it-yourself templates for REO's.) According to one

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Business Assistance (SOMWBA) or a local certifying agency for at least twenty percent of the total value of contracts and subcontracts made by the contractor on account of this contract." Worcester Redevelopment Authority "Responsible Employer and Inclusionary Participation Policy."

[11] *UCANE v. Worcester*, U.S. District Court (D. Mass) Civ.Action 02-11877NG

[12] An attempt for a state or municipality to mandate benefits would likely be a violation of the Federal ERISA Law (Employee Retirement Income Security Act). In the United States, it is legal for states and municipalities to mandate certain *wages* (hence Prevailing Wage) but not benefits.

[13] Amherst, Boston, Brockton, Cambridge, Everett, Fall River, Lawrence, Malden, New Bedford, Quincy, Revere, Salem, Springfield, Waltham, Weymouth, Woburn, and Worcester. Also, the Plymouth County Correctional Facility Corporation and the Plymouth County Sheriff's Department have REO's. REO's have been considered but not adopted in Dedham, Holyoke and Somerville. The Worcester Redevelopment Authority also has an REO for its projects (technically called the Responsible Employer Inclusionary Policy, or REIP). (Source: Massachusetts Executive Office of Labor and Workforce Development). REO's have been occasionally proposed in private work as well on an ad hoc basis, when the building trade unions are able to persuade an owner into adopting one before hiring any contractors. This is the case, for example, with part of Worcester's CitySquare project.

union spokesman, "the movement for responsible employer ordinances is part of organized labor's tradition of attempting to set standards for all workers rather than simply representing the interests of union members. Like the campaigns for minimum-wage hikes and the living wage, the responsible employer ordinances simply ask that all contractors, union or non-union, play by the rules and treat their employees fairly."[14] According to one open-shop spokesman, however, the REO is "merely a tool to help the unions regain lost market share in public construction."[15] While there are some minor variations among them,[16] generally speaking, they stipulate the same requirements as Worcester's. Although only twenty out of 351 municipalities in the Commonwealth have REO's on the books, eight out of the state's ten most populous cities,[17] which undertake the biggest and greatest volume of projects, have them.

The Impact of "Responsibility"

Here we examine the specific reasons for the impact of the apprenticeship requirement in excluding non-union contractors. As already noted, the Worcester ordinance requires that "the bidder and all subcontractors under the bidder maintain and participate in a bona fide apprenticeship training program." "Bona fide" is defined by the state office of DAT (Division of Apprenticeship Training), which determines the appropriate character and amount of classroom instruction and on-the-job training, as well as the appropriate journeyman-to-apprentice ratio for each trade. The primary reason for the state's possessing this responsibility is the Prevailing Wage law, which allows a contractor to pay apprentices less than journeymen (although there are specifications dictating exactly how much less). By maintaining a "bona fide" designation for apprenticeship training programs, the state can ensure that real training is going on, and not just an attempt to get around the Prevailing Wage law.

Open-shop contractors do train apprentices, even sometimes in state-certified apprenticeship training programs. Indeed, if they do public work in Massachusetts, they have an interest in doing so, since they don't have to pay apprentices the full Prevailing Wage. But for reasons of cost and administrative capacity, it is always much easier for a unionized contractor to "maintain and participate" in an apprentice training program, since he does so for a given trade simply by being a signatory to that trade's local union. Factored into the collectively-bargained wage rates which any signatory is required to pay his employees are amounts which go into funds which finance the apprenticeship-training programs run by the trade unions. The trade union bears all of

[14] Mark Erlich, "'Responsible Employer' Ordinances Help Level the Playing Field," *Boston Globe,* July 8, 1998. The REO movement has not been confined to Massachusetts, but has also found purchase in New York, New Jersey, California and Illinois, among others states. The union website www.faircontracting.org contains a useful (though incomplete) compendium of information on REO's nationwide.

[15] Electronic correspondence with Ron Cogliano, President and CEO of Merit Construction Alliance, January 18, 2008.

[16] For example, in Weymouth, the threshold is $200,000 and contractors are also required to provide pensions to their employees. For variety in ordinances, see www.faircontracting.org.

[17] With the exception of Amherst, only cities, not towns, in Massachusetts have REO'S. Critics attribute this to the fact that special-interest groups (in this case, the buildings trade unions) have a much more difficult time influencing governments in towns than in cities, possibly owing to the greater stakes involved in winning elective office (requiring larger campaign contributions and get-out-the-vote drives) in cities.

the administrative burden involved in training. Indeed, technically speaking, a unionized contractor need not have any apprentices working on his project. The open-shop contractor by contrast, has to actively recruit apprentices, pay for their classroom instruction (or somehow convince them to pay for it), and supervise their training himself. If he happens to operate a relatively small firm, he faces the additional difficulties of staying in compliance with the state's strict requirements regarding apprentice to journeyman ratios and, in the case of small GC's, maintaining state-certified apprenticeship training programs for all trades at all times. A contractor would be out of compliance if, for example, he had only a laborer's program but also employed his own carpenters, [18] or even if one of his journeymen or apprentices quit, thus creating an imbalance in the state-mandated journeyman-to-apprentice ratio.

Limiting supply, in this case the number of bidders, generally increases costs. But the additional cost of projects noted in Appendix A, goes beyond basic economics. By state law, prospective bidders for both GC and subcontractor have the right to check with the awarding authority about who has "pulled the papers" (solicited plans and specifications) for a project and thereby size up the competition (or lack thereof) before making their bid. A contractor can wait until the last minute to make his bid, check to see how many planholders (those who have solicited plans and specifications) there are, and if there is a shortage of bidders, put it in an artificially high bid, confident he can get his asking price. Indeed, just in order to make it worthwhile for larger contractors to undertake smaller-sized jobs, they may *have* to raise the price compared with what a smaller contractor would charge. More than one local official with whom we discussed the situation mentioned the economic effect of this problem, but officials are powerless to prevent it. The City's only recourse is to start the bidding process over again for that project, at considerable cost (delayed opening of project, possibly larger architect fees), and with no guarantee that a second round will generate lower bids.

[18] For example, because a New Hampshire caulking company working on a job in Weymouth carried an apprenticeship program for laborers, but not waterproofing and caulking, the project was delayed and the firm was fined $15,000. Mark Fontecchio "Contractor on school work fined $15,000; Company doesn't meet apprenticeship proviso of town ordinance," *Patriot Ledger,*, April 9, 2004),

ARGUMENTS FOR AND AGAINST THE REO

In public statements in defense of REOs, building trade union representatives have made a number of arguments. First, the unions claim that by tightening the standards for public construction, an REO ensures that only the best contractors are hired. They either deny that REO's inflate costs or maintain that the benefit is worth the cost. An REO, they maintain, reduces the likelihood that the City of Worcester will be stuck with a low bid submitted by an unscrupulous contractor. (This is the primary justification for making local authorities responsible for enforcing state law.) They would emphasize that overly weak laws do just as much to restrict competition as overly aggressive ones, because they deter good contractors from putting in bids against "fly by night" contractors with artificially low bids. The union argument seems to equate "open shop" with "unscrupulous."

As for its apprenticeship-training requirement, the unions believe that a contractor who takes on the responsibility of ensuring a skilled labor supply for the future deserves special consideration for public contracts. The unions hold that there must be certain, publicly recognized standards for apprenticeship training, so that its content may be easily verifiable. Union spokesmen may regard it as unfair that, although unions account for only 20% of the construction labor force in Massachusetts, they are responsible for the majority of state-certified apprentice training programs.[19] Hence, the unions argue that only those contractors who are actively working to ensure a future supply of trained laborers should be classed as "responsible."

In response to these arguments, it should be noted that all open-shop contractors we interviewed share the concerns about keeping unscrupulous contractors out of public construction. However, they believe that the regulations imposed by Worcester as well as the Commonwealth actually restrict the opportunity for well-qualified contractors to participate in public construction.

First, opponents of the REO object to the labeling of reputable contractors as "irresponsible" simply because they do not "maintain or participate in" a state-certified apprenticeship training program at all times for all trades. Second, they also view its wording as an obvious handout to the unions, because it allows unionized contractors to "participate" in a state-certified apprenticeship training program simply by being signatory to the unions. Third, they point to an inherent contradiction between the REO and the City's Women and Minority Ordinance regarding construction, inasmuch as virtually all female- and minority-owned construction firms in the area are open shop. Hence the REO tends to work against broadening the participation of female- and minority-owned firms in public construction. Fourth, open-shop contractors stress the distinction between "participation in a bona fide apprenticeship-training program" and "training." To become a journeyman in any of the various recognized trades, licensed or

[19] It is estimated that, among state-certified programs, 81% of apprentices are in union-run programs. On the whole, there may be fewer state-certified union programs than open-shop programs, but that is because the union programs are much larger.

unlicensed,[20] one need not ever have been in a state-certified apprenticeship-training program. To become licensed, the individual completes a program in his trade, gains experience through employment and then takes a state-administered test. Most trades, however, are unlicensed, and tradespeople get their experience simply from working in their trade. Union labor argues that the advantage of hiring someone who has been through a certified apprenticeship training program is that you know the content and amount of training. Open-shop labor argues that there is no definitive evidence that union workers are better trained.

Nor does the future of skilled labor in Massachusetts rest on the amount of participation in apprenticeship training programs, because most of it does not come from apprenticeship training programs officially labeled "bona fide." What else could account for the fact that although the unions operate 80% of all training programs, they account for only 20% of the work force? In short, the REO has little to no effect on the future of skilled labor in Massachusetts, but excludes non-union firms from bidding on City contracts. Finally, opponents argue the REO is illegal, as it frustrates the intent of the state's competitive bidding statute.[21]

[20] Examples of licensed trades (for which one must take a state-administered test) are electrical work, plumbing, asbestos removal, pipe fitting and gasfitting. Unlicensed trades are carpentry, laboring, bricklaying, painting, plastering and roofing.

[21] For the specifics on the legal weakness of the REO, see Appendix B.

CONCLUSIONS AND RECOMMENDATIONS

A couple of other factors related to state law likely affect the bidding process, at least as much as, if not more than the REO. First, Massachusetts law already makes it extremely inconvenient for open-shop contractors to bid on public work. According to James J. Meyers, Christopher L. Noble and Penny P. Cobey, authors on construction law, "Massachusetts has the dubious distinction of having the most regulated public construction contracting processes in the country. Massachusetts statutes override the normal rules of law governing private contracting in the area of public bidding and in many important aspects of the performance of public contract, as well as the fiscal aspects of contracts with state instrumentalities and municipalities."[22] State law also makes it difficult for the same contractor to be able to do both public and private work, since Prevailing Wage law forces such a contractor to pay his employees two different rates, one the market price (in his private work) and the other the union price (in his public work). Finally, many contractors find the public bidding process in general too frustrating to deal with, because the filed sub-bid process prevents maximum discretion over whom they work with, and it is inconvenient to do all the work of preparing a bid without any guarantee of getting it. The REO, with its apprenticeship-training requirement, just makes it even more difficult to bid on public work.

One of our goals for this project was to collect data on the recent bidding histories of fourteen municipalities in Massachusetts, both with and without REO's on projects above $100,000. Unfortunately, we were unable to gather enough information for several reasons. First, with a few exceptions, public officials were generally unresponsive to our requests. Second, since most of the larger cities in Massachusetts have REO's, we were able to obtain much more data on projects from these cities than from those without REO's. We managed to get very good data on Leominster, for example, (which does not have an REO), but it only did four projects above $100,000 over the last four years, whereas Boston did thirty-seven such projects in the past year alone. Finally, it is difficult to isolate the effect of the REO on cost when the projects are of a different size and scope, and completed in different time periods.

Given these difficulties, we cannot predict by how much the cost of public construction would be reduced if there were no REO. Nonetheless, in the interests of both greater fairness and greater economy in public construction, we recommend that Worcester rescind its REO. It is a long-held principle of economics that restricting the supply of a product (in this case bidders) tends to increase price. And indeed, the available evidence (in Appendix A) indicates that the City often receives only one or two bids (and generally from the same few contractors) per project, and the bid price is often higher than had been estimated by the City's architect or engineer. Moreover, since we found no evidence that the REO has actually increased the amount of apprenticeship training being done in Worcester, it seems unlikely that rescinding it would decrease the supply of skilled construction labor. Finally, we ask, what does the REO really do for "responsibility" in public bidding that M.G.L. Chapters 149 and 149A do not?

[22] *Construction Law 1997* (quoted in Gransberg, September 1999, op.cit.)

If the City Council is unwilling to rescind the REO in the near future, The Research Bureau recommends that City officials perform an experiment. The next time there is a bid opening at which only one or two bids are received, or the lowest bidders are missing a DAT form (Division of Apprenticeship Training, which demonstrates compliance with the apprenticeship-training requirement), the City should suspend the REO for that one project and repeat the bidding process. Receiving more bids and a lower winning bid price will provide evidence of the impact of the REO.[23]

Above all, in considering the so-called Responsible Employer Ordinance, public officials need to recall the primary sense of "responsibility" as it applies to public activities and expenditures. It is the very meaning of republican or representative government that the task of elected and appointed officials is to be responsible, that is, answerable, to the public at large – not to some one particular constituency. Every Worcester taxpayer suffers from the burden of artificially inflated construction costs, just as every resident of the City suffers from the cost of construction and maintenance needs that go unmet – most obviously, the serious backlog of streets and sidewalks needing repair – because of a shortage of funds to address them. In addition, the principle of equal justice would appear to dictate that City government should not arbitrarily discriminate in favor of one class of people (such as unionized construction workers) over others (those who work for nonunion firms) in issuing public contracts. A truly "responsible" ordinance is one that puts the needs of the public, and the rights of all citizens to equal treatment, first.

[23] In other words, we predict that the effect will mirror what happened in Fall River in 2006, when, after soliciting bids for contracts to build three schools under a PLA (Project Labor Agreement) and being frustrated with the results, the city rebid the same three contracts without the PLA and saved $8.5 million. For a discussion of this case, see David Tuerck and Paul Bachman, *Project Labor Agreements and Financing School Construction in Massachusetts,* Beacon Hill Institute, Boston, Massachusetts, December 2006, pp. 19-25.

APPENDIX A: RECENT BIDS ON PUBLIC CONSTRUCTION PROJECTS IN WORCESTER

Project	Project year	Number of Bidders	Price Difference[24]	Other
(1) Kettle Brook Pump Station Renovations (General Contractor)	10/2007	2 (9 on Planholders' list)	$140,182	Low bidder missing DAT form
(2) Boiler Replacement-Worcester Memorial Auditorium (GC)	11/2007	2 (9 on Planholders' list)	$31,200	Low bidder missing DAT form
(3) Technical Services Data Center (Electrical sub-bids)	6/2007	3	$33,800	Low bidder missing DAT form
(4) Franklin Street Fire Station (Acoustical Ceilings sub-bids)	8/2007	4	$6,900	Lowest and second lowest bidders missing DAT form
(5) Worcester Skybridge (Misc. metal sub-bids)	3/2007	3	$39,000	Low bidder missing DAT form
(6) Worcester Skybridge (Plumbing)	3/2007	4	$6,600	Low bidder missing DAT form
(7) Union Station Tenant Fit-up #1 (GC)	9/2007	1 (5 on Planholders' list)	$447,378 above original estimate	Bid rejected
(8) GHMGC Club House Stair and Ramp (GC)	10/2007	1 (8 on Planholders' list)	$202,271 above original estimate	Bid rejected
(9) Union Station Tenant Fit-up #2 (GC)	9/2007	1	$135,000 above original estimate	
(10) McKeon Road Fire Station	12/2004	2 (9 on Planholders' list)	$68,569 above original estimate	

[24] Note that these figures only account for price differences at the time of bidding. The final cost of the projects may be higher, as a result of unforeseen difficulties with labor, weather, materials, and/or the engineer or architect's original plans.

Elevator (GC)				
(11) Police Department MEP Upgrades (Plumbing sub-bids)	11/2006	3 (10 on Planholders' list)	$37,356 above original estimate	
(12) Fanning Building Steam Boiler Replacement (GC)	5/2005	3 (6 on Planholders' list)	$10,062 above original estimate	
(13) Central Administration Building Chiller Replacement (Electrical sub-bids)	4/2006	0 (4 on Planholders' list)		
(14) Union Station Fit out #1 and #3 (GC)	1/2008	4	$148,662	Two Lowest Bidders missing DAT form; two week extension granted to produce it
(15) Worcester Skybridge	5/2005	2	$2.4 million above original estimate	

APPENDIX B: LEGAL ARGUMENTS

The strongest legal challenge to Worcester's REO consists in applying to it the same reasoning the Massachusetts Supreme Judicial Court used in *John T. Callahan & Sons, Inc. vs. City of Malden*, 430 Mass. 124 SJC-07959 (1999) regarding the use of Project Labor Agreements (PLA's) in public construction. PLA's are collective bargaining agreements between owners and local building trade unions which set out the terms of employment for entire projects-both their scope and duration. Any contractor who wins the contract must abide by the terms set out by the unions and owners. Like REO's, PLA's limit bidders by preventing the open-shop contractors from bidding.[25] The specific grounds on which PLA's were being challenged in *Malden* was their violation of Massachusetts' public bidding law, the stated intent of which is to promote competition in public construction contracts. The ruling stated that, when a municipality passes an ordinance that can be reasonably said to hinder competition, the municipality bears the burden of proof to show that this frustration of the intention of state law is justified. [26] In this particular case, the court found that the city of Malden could support this burden, because the PLA in question promised to bring order to a massive, complex project and thus help the project meet its strict deadline. However, the court made clear that projects of a smaller magnitude and which are not required to maintain such a uniquely strict schedule would not justify limiting competition as Malden did with its PLA. [27]

Would an REO be struck down if Malden's reasoning were applied to it? Given that REO's have an anti-competitive effect, the question then becomes, can the city justify limiting competition as it does? Neither of the two arguments with which Malden justified its PLA could be used to support an REO. First, REO's apply to all projects above $100,000, even ones which require only one or two trades, and may be finished in a matter of months, so the city could not credibly argue that it needs to restrict competition in order to bring order and "labor harmony" to a complex project. Nor could the city argue that REO's smooth out the construction process itself, or guard against delays, because *REO's only address the bidding process*-they have nothing to say about what happens after the contractor has been hired. In sum, it seems that the court would either have to revise the *Callahan* framework by which anti-competitive statutes are evaluated, explain why it did not apply to REO's, or strike down the REO.[28]

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[25] For a more detailed look at PLA's, see The Research Bureau's report on "Project Labor Agreements on Public Construction Projects: The Case for and Against" http://www.wrrb.org/reports/01-4pla.pdf

[26] To be even more precise, the judge relied here on previous Massachusetts case law regarding residency requirements (like the original stipulation #1 in Worcester's REO). In the case of residency requirements, the city also bears the burden of proving why active discrimination against non-residents is justified (pervasive unemployment in that sector of the local economy, for example). In other words, there exists a great deal of legal background supporting the claim that, at the very least, a city bears the burden of proof to demonstrate what vital need is met by restricting competition in public construction.

[27] The PLA in question covered a $100 million project to demolish three schools and build five new ones. "[I]n most circumstances, the building of a single school will not, in and of itself, justify the use of the PLA." *Malden*

[28] No substantive legal challenge has been brought against REO's, probably because the costs of litigation are prohibitively high. Unlike a challenge to PLA's, where a contractor stands to benefit a great deal from winning a case (a $100 million contract), no contractor wants to risk time and money over a roofing job in Everett.

Mission Statement:
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