

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

ASSOCIATED BUILDERS AND	:	
CONTRACTORS, EASTERN	:	
PENNSYLVANIA CHAPTER, INC.,	:	
VELLNIECE CONSTRUCTION, LLC, and	:	CIVIL ACTION NO. 18-cv-03907-EGS
KIM PENNINGTON,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
THE COLONIAL SCHOOL DISTRICT,	:	
Defendant	:	
	:	

SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Associated Builders and Contractors, Eastern Pennsylvania Chapter, Inc. (“ABC-EPA”), Vellniece Construction, LLC (“Vellniece”), and Kim Pennington (“Pennington”) (collectively “Plaintiffs”), by their undersigned counsel, state their complaint for declaratory and injunctive relief against Defendant, the Colonial School District (the “District”), as follows:

INTRODUCTION

1. Vellniece is a general contractor based in Glenside, Pennsylvania which has been successfully performing construction work on public works projects in the Commonwealth of Pennsylvania for over a decade. In fact, Vellniece’s entire business consists of performing works on public works projects.

2. Like the vast majority of construction companies in the Commonwealth of Pennsylvania (and the United States), Vellniece does not have a contractual relationship with a union.

3. Vellniece has approximately eighteen (18) employees, including qualified, skilled craft workers performing construction work in the field.

4. When Vellniece's craft workers perform work on public works projects, they are paid the prevailing wage under the Pennsylvania Prevailing Wage Act, which is generally identical to union wage rates.

5. Vellniece's craft workers have not graduated from a union apprenticeship training program or any other formal apprenticeship training program. Instead, they received their training from years of on-the-job work experience and/or by attending vocational technical schools.

6. Vellniece's craft workers are just as qualified or more qualified than workers employed by union contractors.

7. Likewise, Vellniece is just as qualified or more qualified than contractors with union agreements.

8. Corrupt union bosses, including but not limited to John J. Dougherty ("Dougherty"), Business Manager of the International Brotherhood of Electrical Workers ("IBEW"), Local 98, who was recently indicted on 116 counts in this Court (Docket No. 2:19-CR-00064), hate merit shop (non-union) contractors like Vellniece.

9. Corrupt union bosses such as Dougherty believe that public works projects are the unions' turf and they are desperate to protect it.

10. Working in the shadows, corrupt union bosses have enlisted elected officials, including District President Felix Raimondo, who is employed by an IBEW contractor, to do the unions' bidding.

11. Working hand-in-hand with corrupt union bosses, Raimondo, without first consulting with other members of the District's Board, engaged the Board's solicitor to draft a so-called "Responsible Contractor Policy" ("RCP") that is completely irrational, arbitrary, and

capricious, and that was specifically designed to exclude merit shop contractors like Vellniece from participating in the District's public works projects without any reasonable or logical justification for doing so.

12. Among other things, the RCP requires that contractors performing work for the District participate in a so-called "Class A" apprenticeship training program which is defined under the RCP as an apprenticeship training program approved by the federal or state government.

13. Virtually all union contractors participate in a Class A apprenticeship training program by virtue of their collective bargaining agreements *regardless* of whether they actually employ any workers currently enrolled in a Class A apprenticeship training program and *regardless* of whether any of their craft workers have actually graduated from a Class A apprenticeship program.

14. Many merit shop contractors, including Vellniece, do not participate in a Class A apprenticeship training program; instead, as noted above, their workers receive training from years of on-the-job work experience and/or by attending vocational technical programs.

15. The stated purpose of the RCP, i.e., to ensure that the District contracts with responsible construction contractors who employ qualified craft workers, is completely false and irrational.

16. Because the apprenticeship participation requirement set forth in the RCP hinges on whether a contractor participates in a Class A apprenticeship program – as opposed to whether the actual craft workers employed by a contractor have participated in and/or graduated from a Class A apprenticeship training program – it is not in any way rationally related to the

training, skills, or qualifications of the craft workers performing work on the District's construction projects.

17. For example, if the RCP were effective, on Day 1, Vellniece would not meet the definition of a "responsible" contractor under the RCP and none of Vellniece's eighteen (18) employees would be permitted to work on public works projects for the District as Vellniece employees. In other words, if the RCP were effective, Vellniece would be put out of business and its eighteen (18) employees would become unemployed.

18. Taking this example further, if the RCP were effective, on Day 2, Vellniece could voluntarily elect to sign a collective bargaining agreement pursuant to Section 8(f) of the National Labor Relations Act and become a union contractor. The act of signing a collective bargaining agreement and becoming a union contractor would, in and of itself, *magically* convert Vellniece from an unqualified contractor into a "responsible" contractor under the RCP. Similarly, the act of signing a collective bargaining agreement and becoming a union contractor would, in and of itself, *magically* and *instantaneously* render Vellniece's eighteen (18) employees trained, skilled, and eligible to perform work on public works projects for the District without any of these employees enrolling in or ever having participated in any formal apprenticeship training program.

19. Conversely, if the RCP were effective, a union contractor who employs craft workers who have all participated in and graduated from a Class A apprenticeship program would be deemed "responsible" under the RCP on Day 1. But if said contractor decided to terminate its collective bargaining agreement, and in turn its participation in a Class A apprenticeship training program, and become a merit shop contractor on Day 2, said contractor would *magically* and *instantaneously* be converted from a "responsible" contractor to an

ineligible contractor even if it continued to employ all of the same craft workers who had graduated from an apprenticeship training program.

20. The RCP is not rationally related to the training and skills of the craft workers performing work on the District's construction project because a contractor can essentially flip a switch and manipulate its status as "responsible" contractor under the RCP.

21. The RCP's apprenticeship participation requirements have nothing to do with selecting qualified and responsible contractors. The RCP arbitrarily and illogically ties "responsible contracting" to union affiliation which is not at all surprising given the that that the RCP is the result of an ill-conceived, backroom scheme hashed by corrupt union bosses and implemented by the District.

22. Furthermore, as explained in greater detail in the affidavit of Dr. Anirban Basu, attached hereto as Exhibit A, the RCP is irrational, arbitrary, and capricious because:

- a. The "Class A Apprenticeship Training Program" requirement is both arbitrary and counterproductive to the goals it ostensibly seeks to achieve;
- b. The requirement would prove harmful to the same sets of stakeholders it seeks to protect, including agencies purchasing construction services, workers, and taxpayers;
- c. The restriction of bidding opportunities to certain firms will contribute to the skills shortage in the construction industry and undermine the objective behind the "Class A" requirement; and
- d. The restriction effected by the "Class A" requirement will degrade the public interest and result in a lower quality of life for the public.

PARTIES

23. ABC-EPA is the Eastern Pennsylvania chapter of ABC, a national trade association representing 22,000 chapter members in the construction industry. Dedicated to promoting the principle that work in the construction industry should be awarded and performed on the basis of merit through fair and open competition regardless of labor affiliation, ABC-EPA represents 500 member companies with approximately 14,000 employees across Eastern Pennsylvania, including many located within the boundaries of the Colonial School District.

24. Vellniece is a Pennsylvania corporation with its principal place of business located at 137 East Glenside Road, Glenside, Pennsylvania 19038. Vellniece is a woman and minority owned general contracting business that exclusively performs publicly funded construction work, approximately ninety (90%) of which is performed in Pennsylvania.

25. Kim Pennington is a citizen and taxpayer of Colonial School District with an address at 967 Plymouth Road, Plymouth Meeting, PA 19462.

26. Defendant Colonial School District is organized under the laws of the Commonwealth of Pennsylvania. The District covers the Borough of Conshohocken, Plymouth Township and Whitmarsh Township in Montgomery County, Pennsylvania.

JURISDICTION AND VENUE

27. This action arises under and pursuant to laws of the Commonwealth of Pennsylvania, the Constitution of the United States and the Fourteenth Amendment thereof, 29 U.S.C. §§ 1001 *et seq.*, 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983, and ERISA.

28. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

29. This Court also has jurisdiction under 28 U.S.C. § 1343(a)(3) to redress any deprivation “under color of any state law, statute, [or] Policy . . . of any right, privilege or immunity secured by the Constitution of the United States.”

30. ABC-EPA has associational standing to bring this action on behalf of its members.

31. Kim Pennington has standing as a taxpayer and a substantial, direct, and immediate interest in the School District’s enactment of the RCP and the adverse effects resulting therefrom.

32. Declaratory relief is authorized by 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57.

33. Injunctive relief is authorized by Federal Rule of Civil Procedure 65.

34. Venue is proper in this district under 28 U.S.C. § 1391(b).

35. An actual controversy exists between the parties concerning the validity and constitutionality of the RCP. A declaration that the RCP is invalid and an injunction against its enforcement would resolve this controversy.

36. A preliminary injunction to enjoin Colonial School District from enforcing the RCP will protect the rights of ABC-EPA’s members, Vellniece, and Pennington during this proceeding, and a permanent injunction will protect their rights after this proceeding concludes.

FACTUAL ALLEGATIONS

37. On August 15, 2018, the District adopted an RCP that requires contractors to certify their participation in a “Class A Apprenticeship Program” as a condition for bidding or performing work on public construction or maintenance work contracts that are valued at or above five hundred thousand dollars (\$500,000.00).

38. The RCP sets specific standards that an apprenticeship program must have in order to qualify as a so-called “Class A” program, namely that (a) the program be registered with and approved by the United States Department of Labor or a state apprenticeship agency; and (b) the program have graduated apprentices to journey person status for at least two of the past seven years, with an exception possible for programs registered within the past ten (10) years.

39. A contractor that does not certify participation in a so-called “Class A Apprenticeship Program” or does not otherwise meet the standards for participation in such a program is automatically disqualified from performing work that is subject to the RCP.

40. The District’s Board stated that the purpose of the RCP is to “ensure that all work on public construction and maintenance contracts is performed by responsible, qualified firms” That stated purpose is 100% false, irrational, arbitrary, and capricious.

41. The RCP’s apprentice participation requirement is not in any way rationally related to selecting responsible or qualified contractors to perform the District’s public works projects.

42. That is a result, in part, from the fact that the apprenticeship participation requirement set forth in the RCP hinges on whether a contractor participates in a Class A apprenticeship program – as opposed to whether the actual craft workers employed by a contractor have participated in and/or graduated from a Class A apprenticeship training program – and thus it is not in any way rationally related to the training, skills, or qualifications of the craft workers performing work on the District’s construction projects.

43. As illustrated by the example discussed above, a contractor, such as Vellniece, who has successfully performed public works projects in the commonwealth for decades will suddenly not meet the definition of a “responsible” contractor under the RCP on the first date

that the RCP takes effect. But on the second date that the RCO is in effect, Vellniece could voluntarily elect to sign a collective bargaining agreement pursuant to Section 8(f) of the National Labor Relations Act and become a union contractor, which, in turn, would *magically* convert Vellniece from a “unqualified” contractor into a “responsible” contractor under the RCP. Similarly, the act of signing a collective bargaining agreement and becoming a union contractor would, in an of itself, *magically* and *instantaneously* render Vellniece’s eighteen (18) employees trained, skilled, and eligible to perform work on public works projects for the District without any of these employees enrolling in or ever having participated in any formal apprenticeship training program.

44. Conversely, if the RCP were effective, a union contractor who employs craft workers who have all participated in and graduated from a Class A apprenticeship program would be deemed “responsible” under the RCP on Day 1. But if said contractor decided to terminate its collective bargaining agreement, and in turn its participation in a Class A apprenticeship training program, and become a merit shop contractor on Day 2, said contractor would *magically* and *instantaneously* be converted from a “responsible” contractor to an ineligible contractor even if it continued to employ all of the same craft workers who had graduated from an apprenticeship training program.

45. Furthermore, as explained in greater detail in the affidavit of Dr. Anirban Basu, attached hereto as Exhibit A, the RCP is arbitrary, irrational, and capricious because:

- a. The “Class A Apprenticeship Training Program” requirement is both arbitrary and counterproductive to the goals it ostensibly seeks to achieve;

- b. The requirement would prove harmful to the same sets of stakeholders it seeks to protect, including agencies purchasing construction services, workers, and taxpayers;
- c. The restriction of bidding opportunities to certain firms will contribute to the skills shortage in the construction industry and undermine the objective behind the “Class A” requirement; and
- d. The restriction effected by the “Class A” requirement will degrade the public interest and result in a lower quality of life for the public.

46. The above effects of the RCP underscore the arbitrariness and irrationality underlying the “Class A” requirement.

47. Many of ABC-EPA’s members, including Vellniece, perform high quality construction services on publicly funded projects in Pennsylvania and have developed their workforces through sources other than government registered apprenticeship training programs.

48. A contractor that develops its workforce through non-apprenticeship training alternatives is by no means automatically less qualified than one that develops its workforce exclusively through a government-registered training program.

49. This is evident from the fact that Vellniece, among many other similarly situated ABC-EPA members, will be precluded from performing public works projects that are subject to the RCP, despite that it has successfully performed public work in Pennsylvania on a great number of construction projects.

50. By mandating participation in an apprenticeship training program, the RCP does not further its stated goal of ensuring that work is performed by responsible, qualified firms.

51. Rather, it ensures that non-union or merit-shop contractors will be precluded from being awarded public works projects in favor of union contractors.

52. That is because the criteria of a “Class A” program matches that of the apprenticeship programs that are sponsored by the labor organizations that are affiliated with the Pennsylvania Building and Construction Trades Council.

53. On the other side of the coin, the vast majority, if not all, contractors that will ultimately be disqualified from performing public works projects because of the Class A Requirement are non-union or “merit shop” contractors that draw their workforces from either non-registered craft training programs or non-apprenticeship training alternatives.

54. It is clear that the RCP is not grounded in any rational justification, but was crafted to benefit politically powerful and corrupt labor organizations and their contractor signatories.

55. The anti-competitive effect of the RCP greatly impairs not only the interests of merit-shop contractors like Vellniece, but also the public and its ability to derive the best quality and value in the performance of public works projects that are financed with its tax dollars.

**THE CLASS A REQUIREMENT VIOLATES
PENNSYLVANIA PUBLIC BIDDING LAW**

56. The Public School Code of 1949, 24 P.S. § 7-751(a.2) provides that “[a]ll construction, reconstruction, repairs, maintenance or work of any nature . . . upon any school building or upon any school property . . . made by any school district . . . shall be . . . entered into by such school district with the lowest responsible bidder”

57. The Pennsylvania Supreme Court has articulated the following factors that a public entity is to consider in determining whether a bidder is responsible: financial

responsibility, integrity, efficiency, industry experience, promptness, and ability to successfully complete the project. *Kratz v. City of Allentown*, 155 A. 116, 117 (Pa. 1931).

58. As a general matter, competitive bidding rules exist in Pennsylvania “for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of [public] contracts[.]” *Yohe v. City of Lower Burrell*, 208 A.2d 847, 850 (Pa. 1965).

59. Moreover, the “courts will not condone a situation that reveals a clear potential [for public bidding] to become a means of favoritism[.]” *Hanisco v. Township of Warminster*, 41 A.3d 116, 123 (Pa. Commw. Ct. 2012).

60. A prequalification requirement is permissible only to the extent that such a requirement is necessary and reasonable to determine in advance who is a qualified bidder. *See Corcoran v. City of Philadelphia*, 70 A.2d 621, 623 (Pa. 1950).

61. However, given the overarching purpose of the competitive bidding rules, a prequalification requirement must be fair to all prospective bidders. *See Flaherty v. Allegheny Contracting Industries, Inc.*, 293 A.2d 639, 642-43 (Pa. Commw. Ct. 1972) (citing *Harris v. City of Philadelphia*, 149 A. 722 (Pa. 1930)).

62. In that regard, the Pennsylvania Supreme Court has recognized that a government agency may not enforce a prequalification requirement by which “one person may be conclusively authorized to bid on a pending contract, while another, equally as responsible and perhaps more so, is wholly excluded from even submitting a bid.” *Harris v. City of Philadelphia*, 149 A.2d 722, 724 (Pa. 1930), *overruled on other grounds by Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323 (Pa. 1986). *See also Corcoran* 70 A.2d at 623

(noting that prequalification requirement will be considered invalid where it is conducive to favoritism).

63. By unqualifiedly mandating the maintenance of a specific type of apprentice training program as a condition of bidding, Colonial School District, through its adoption of the RCP, is attempting to exclude responsible contractors, such as Vellniece, from submitting bids on projects valued at or above \$500,000.

64. Colonial School District's imposition of a mandate as to a specific type of apprentice training program as a condition of bidding is neither reasonable nor necessary in determining who is a responsible bidder.

65. Moreover, Colonial School District's imposition of a mandate as to a specific type of apprentice training program as a condition of bidding has the potential to transform public bidding in the District to become a means of favoritism inasmuch as the RCP excludes responsible contractors, such as Vellniece, from submitting bids on projects valued at or above \$500,000.

66. Thus, the RCP violates Pennsylvania law with respect to competitive bidding and is invalid.

THE CLASS A REQUIREMENT IS UNCONSTITUTIONAL

67. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution "secure[s] every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution." *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923).

68. A government regulation that intentionally treats one group of individuals differently from others similarly situated with no rational basis violates the Equal Protection

Clause. *Bizzarro v. Miranda*, 394 F.3d 82, 88 (2d Cir. 2005) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

69. The “Class A” requirement intentionally treats one group of individuals differently from others similarly situated with no rational basis.

70. This much is evident from the experience of merit shop contractors like Vellniece who on Day 1 of the RCP’s enactment are “unqualified” and “not responsible” but on Day 2 of the RCP’s enactment are “qualified” and “responsible” if they sign a collective bargaining agreement. The irrationality of such a requirement is made even more palpable when taking into consideration that Vellniece and many other ABC-EPA members have successfully performed public works projects in Pennsylvania for decades and have done so better and safer than so-called “responsible” and “qualified” union contractors.

71. The stated rationale for the RCP is merely a pretext for protecting the economic interests of union contractors at the expense of merit-shop contractors.

72. As discussed above, the “Class A” requirement does not bear any rational connection whatsoever to its purported objective.

73. The RCP also violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

74. A legislative act will not withstand a substantive due process challenge where there exists no legitimate state interest that the legislature could rationally conclude was served by the statute. *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000).

75. There is no rational basis for the RCP’s adoption for reasons discussed above.

76. Moreover, Plaintiffs have a liberty interest in their right to earn a living, to contract freely, and to enter into collective bargaining agreements (or not) as they see fit without government intervention of the type imposed by the RCP.

THE RCP IS PREEMPTED BY ERISA

77. A program established or maintained for the purpose of providing “apprenticeship or other training” is an “employee welfare benefit” program governed by ERISA. 29 U.S.C. § 1002(1).

78. ERISA “supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 U.S.C. § 1144(a).

79. A state law or local regulation that mandates standards and criteria that an apprenticeship program must possess cannot withstand ERISA’s “clearly expansive” preemptive reach.

80. When adopting the RCP, the District acted in its capacity as a regulator.

81. The RCP clearly mandates standards that ERISA-governed apprenticeship programs will be required to adopt as part of their own in order to be considered a so-called “Class A Apprenticeship Program.” These include the standards of federal and/or state registered programs that are incorporated into the “Class A Apprenticeship Program” by the RCP and such other mandated standards, including the requirement that the program graduate apprentices to “journey person status” in two of the previous seven years.

82. As such, the RCP is preempted by ERISA.

IMMEDIATE INJUNCTIVE RELIEF IS NECESSARY

83. An injunction must issue to prevent immediate and irreparable harm to Vellniece and the many ABC-EPA members who will be disqualified from bidding on public works project subject to the RCP.

84. Without an injunction, Vellniece, and many ABC-EPA members will be unlawfully excluded from participating in the bidding process on public works projects that are subject to the RCP.

85. This will have dramatic consequences for the Plaintiffs that for which monetary relief is not adequate, including but not limited to a possible a shutdown of operations or being forced to eliminate portions of their workforce.

**COUNT I
(Violation of the Fourteenth Amendment – Equal Protection)**

86. Plaintiffs re-allege and incorporate by reference the allegations set forth above.

87. A government regulation that intentionally treats one group of individuals differently from others similarly situated with no rational basis violates the Equal Protection Clause.

88. The RCP was crafted with the objective of promoting the pecuniary interests of labor organizations and their contractor signatories.

89. The vast majority, if not all, of the contractors that will be excluded by the RCP from performing public works projects are contractors that are not affiliated with a labor organization.

90. The RCP violates the Equal Protection Clause by intentionally seeking to exclude contractors that are not affiliated with labor organizations from performing public works projects that are subject to the RCP.

91. The RCP is not supported by any rational basis. A contractor that participates in a so-called “Class A Apprenticeship Program” is by no means presumptively more qualified than a contractor that has developed its workforce through an alternative program or method of training. The Council has cited no empirical – or even anecdotal – evidence to suggest otherwise.

92. The Plaintiffs have no adequate remedy at law.

93. Plaintiffs respectfully request that pursuant to 42 U.S.C. § 1983, the Court declare the RCP unconstitutional and enjoin its enforcement.

COUNT II
(Violation of the Fourteenth Amendment – Due Process)

94. Plaintiffs re-allege and incorporate by reference the allegations set forth above.

95. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects the right to earn an honest living in the occupation of one’s choice, subject only to regulations that are rationally related to a legitimate governmental interest.

96. There is no legitimate governmental interest in excluding from performing public works projects those contractors, such as Plaintiffs and other ABC-EPA’ members, from bidding on public works project because they do not have a government registered apprentice program.

97. The RCP deprives Plaintiffs of their right to earn an honest living in the occupation of their choice by imposing restrictions on the bidding and performance of publicly funded work.

98. The Plaintiffs have no adequate remedy at law.

99. Plaintiffs respectfully request that pursuant to 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983, the Court declare that the RCP unconstitutional and enjoin its enforcement.

COUNT III

(Declaratory Relief Pursuant to the Federal Declaratory Judgment Act – Violation of The Public School Code of 1949, 24 P.S. § 7-751, and Public Bidding)

100. Plaintiffs re-allege and incorporate by reference the allegations set forth above.

101. Colonial School District is subject to the Pennsylvania Public School Code of 1949 and its mandate that all construction contracts valued at or above \$18,500.00 be entered into with the lowest responsible bidder.

102. The Pennsylvania Supreme Court has articulated the following factors that a public entity is to consider in determining whether a bidder is responsible: financial responsibility, integrity, efficiency, industry experience, promptness, and ability to successfully complete the project. *Kratz v. City of Allentown*, 155 A. 116, 117 (Pa. 1931).

103. A prequalification requirement is permissible, if authorized by statute or local regulation, only to the extent that such a requirement is necessary and reasonable to determine in advance who is a qualified bidder. *See Corcoran v. City of Philadelphia*, 70 A.2d 621, 623 (Pa. 1950).

104. By unqualifiedly mandating the maintenance of a specific type of apprentice training program as a condition of bidding, Colonial School District, through its adoption of the RCP, is attempting to exclude responsible contractors, such as Vellniece, from submitting bids on projects valued at or above \$500,000.

105. Colonial School District's imposition of a mandate as to a specific type of apprentice training program as a condition of bidding is neither reasonable nor necessary in determining who is a responsible bidder.

106. Moreover, the District's imposition of a mandate as to a specific type of apprentice training program as a condition of bidding has the potential to transform public

bidding in the District to become a means of favoritism inasmuch as the RCP excludes responsible contractors, such as Vellniece, from submitting bids on projects valued at or above \$500,000.

107. Thus, the RCP violates Pennsylvania law with respect to competitive bidding and is invalid.

108. The Plaintiffs have no adequate remedy at law.

109. Plaintiffs respectfully request that pursuant to 28 U.S.C. §§ 2201 and 2202, the Court declare that the RCP violates Pennsylvania public bidding law and enjoin its enforcement.

COUNT IV
(Declaratory Relief – ERISA Preemption)

110. Plaintiffs re-allege and incorporate by reference the allegations set forth above.

111. Apprenticeship and training programs are employee welfare benefit plans covered by ERISA. Under 29 U.S.C. § 1002(1) the terms “employee welfare benefit plan” and “welfare plan” are defined to include:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services

112. Pursuant to 29 U.S.C. § 1144(a), the ERISA statute “shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan”

113. The Class A Apprenticeship Program Requirement relates to an employee welfare benefit plan within the meaning of 29 U.S.C. § 1002(1).

114. Accordingly, the Class A Apprenticeship Program Requirement is preempted by ERISA pursuant to 29 U.S.C. § 1144(a).

115. When adopting the RCP, the District acted in its capacity as a regulator. In that regard, the RCP effectively regulates contractors performing public works project for the District by deeming them qualified and responsible or unqualified and irresponsible based, in certain circumstances, solely upon their union affiliation.

116. The Plaintiffs have no adequate remedy at law.

117. Plaintiffs respectfully request that pursuant to 28 U.S.C. §§ 2201 and 2202, the Court declare that the RCP is preempted by ERISA, rendering the RCP unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, ABC-EPA, Vellniece, and Kim Pennington pray that the Court:

- a) Declare that the “Class A Apprenticeship Program” requirement set forth in the Responsible Contractors Policy is unconstitutional as it violates the Fourteenth Amendment to the U.S. Constitution;
- b) Declare that the “Class A Apprenticeship Program” requirement set forth in the Responsible Contractors Policy violates the Pennsylvania Public School Code and Pennsylvania Public Bidding Law;
- c) Declare that the “Class A Apprenticeship Program” requirement set forth in the Responsible Contractor Policy is preempted by ERISA;
- d) Temporarily restrain and enjoin the District from enforcing the “Class A Apprenticeship Program” requirement set forth in the Responsible Contractor Policy; and

- e) Preliminarily and permanently enjoin the District from enforcing the “Class A Apprenticeship Program” requirement set forth in the Responsible Contractor Policy;
- f) Award Plaintiffs the costs of this suit;
- g) Award Plaintiffs reasonable attorney fees; and
- h) Award Plaintiffs any other relief that this Court deems just and proper

Respectfully submitted,

**COHEN, SEGLIAS, PALLAS,
GREENHALL & FURMAN, P.C.**



Dated: February 15, 2019

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EXHIBIT A

In the United States District Court for the Eastern District of Pennsylvania

Associated Builders and Contractors, Eastern Pennsylvania Chapter, Inc., Vellniece Construction, LLC, and Jeanette Tennant, Plaintiffs

v.

Plymouth Township, Defendant

&

Similarly situated cases against the Township of West Norriton, the County of Northampton, and Colonial School District

Affidavit of Anirban Basu, Expert for Plaintiff

December 10, 2018

I am prepared to testify to the following. The requirement found in similar ordinances from Plymouth Township, the Town of West Norriton, the County of Northampton, and Colonial School district that contractors be able to certify their participation in a Class A Apprenticeship Program for a certain number of years in order to be eligible for construction contracts of a certain size is both arbitrary and counterproductive to the goals it ostensibly seeks to achieve.

From the perspective of a) delivering higher quality construction training; b) creating a larger, more talented construction workforce; and c) providing taxpayers with value for their money, there is neither evidence nor logic to support such a dramatic prohibition on competitive bidding. The requirement is mere pretext, designed to benefit a politically favored element of the region's construction industry at the expense of another.

If implementation is permitted, the prohibition would prove harmful to the same sets of stakeholders it seeks to protect, including agencies purchasing construction services, workers, and taxpayers. There is strong reason to believe that the restriction on contractor participation in public projects would result in fewer trained construction workers. Given the ongoing shortage of skilled workers, this makes no sense from a public policy perspective. It also treats similarly situated people dissimilarly, and is therefore anathema to fairness.

I. Delivering High Quality Construction

While all stakeholders would agree with the proposition that high quality construction is both desirable and necessary, no evidence is put forth by those promulgating the Responsible Contractor Ordinance indicating that participation in a Class A Apprenticeship Program for a certain time period generates superior construction outcomes than other sources of training, at least for projects

valued at the specified thresholds. Indeed, there is no evidence regarding why the requirement is for participation in three of the past five years. This represents another source of arbitrariness.

As plaintiffs have indicated, apprenticeships represent an important source of human capital formation. Perhaps this is why many organizations offer them. As an example, as indicated by the U.S. Department of Labor's Occupational Outlook Handbook's description of training for electricians, several groups, "including unions and contractor associations, sponsor apprenticeship programs . . .

This is made apparent by the U.S. Department of Labor (DoL). As an example, in its Occupational Outlook Handbook, the DoL indicates that "most electricians learn through an apprenticeship, but some start out by attending a technical school . . . Several groups, including unions and contractor associations, sponsor apprenticeship programs . . . Some electrical contractors have their own training programs, which are not recognized apprenticeship programs but include both classroom and on-the-job training."¹

Nowhere does it state that one form of apprenticeship program is superior another. The presence of multiple modalities by which to create a trained construction workforce is not only consistent with amassing large quantities of human capital, but each method of training, including various types of apprenticeship programs, are induced into competing against one another on an ongoing basis, potentially elevating the quality of instruction in the process.

II. Creating a Larger, Better Trained Construction Workforce

The state of affairs is similar for carpenters. According to the Department of Labor, "Carpenters typically learn on the job and through apprenticeships and learn the proper use of hand and power tools on the job." Here is the point. On-the-job training is critical to the formation of productive and safe construction workers. By denying a significant fraction of contractors the opportunity to even bid on substantial public construction projects, these ordinances effectively deny workers at those firms the ability to participate in on-the-job training.

While some workers at a limited number of firms would enjoy plentiful opportunities to refine their skills, another group would be left behind, potentially losing the opportunity for gainful careers. This would merely serve to exacerbate the skills shortages presently plaguing the Philadelphia area and national construction industries. It would also translate into a smaller middle class, which would contribute to already large income and wealth inequalities regionally and nationally. That is hardly equal treatment. Nor is it sound public policy rooted in rationality.

Note that there is no evidence provided regarding the superiority of Class A apprenticeship programs. Indeed, if participation in these programs effectively becomes a requirement to work on significant public projects, there would be no reason for those who manage these programs to ensure their quality since firms and their workers would be required to engage this programs as a

¹ <https://www.bls.gov/ooh/construction-and-extraction/electricians.htm#tab-4>

prerequisite to bidding on public work even if these programs did a poor job imparting skills to the emerging construction workforce.

Other industry training programs could atrophy given the need to participate in Class A apprenticeship programs in order to compete. This would reduce overall apprenticeship program capacity, which would further restrict the supply of qualified construction workers.

III. Taxpayer Considerations

With fewer firms able to bid on contracts and with fewer workers trained and available to work productively on public projects, the average public project would become more expensive to deliver. The construction industry would be associated with greater market concentration, less competitiveness, and higher average bids. This would be true for public construction projects both above and below the dollar threshold values since the aggregate number of competitive firms would have been suppressed.

This is not good for taxpayers. It would also result in fewer public construction projects delivered since each individual project would account for a larger share of public capital budgets. This translates into a less competitive economy and lower quality of life (e.g., worse roads, less modern schools).

This is not to suggest that certain restrictions are invalid. As an example, these ordinances call for requirements and criteria concerning competency, experience, adequacy of resources including equipment, financial and personnel, and satisfactory records regarding past performance, safety, law compliance and business integrity. It would be impossible for a firm to establish a satisfactory record of safety without sound, trained workers. In other words, the requirement for participation in a Class A apprenticeship program is largely redundant from the perspective of ensuring that only reliable, qualified bidders can supply construction work. Its only value is pretextual—to drive activity to union construction firms at the expense of merit shops.

Conclusion

There is no valid reason for the requirement that bidders on substantial public construction projects be able to certify their participation in a Class A Apprenticeship Program for a certain number of years. As a practical matter, there are many other ways to produce highly qualified construction workers, including through on-the-job training.

To demonstrate how arbitrary the bidding requirement is based on an utter lack of evidence, consider a reversal of the fact pattern underlying this dispute. Let us say that a different township indicates that bidders on sizeable public construction projects must participate in apprenticeship, safety enhancement, or other programs sponsored by Associated Builders and Contractors (ABC) because its 20,000+ members are deemed to be leaders in construction quality. Ostensibly, this would inure to the benefit of construction service quality, which would benefit users of infrastructure, taxpayers, etc. However, absent any evidence that ABC training or safety programs

are superior, the requirement would be arbitrary and pre-textual, and the defendant in this case would likely emerge as a plaintiff in another.

As a final indication of just how remarkably arbitrary is the requirement to participate in Class A apprenticeship programs to be considered a responsible, qualified bidder, one of the relevant ordinances states that, “The Council of Plymouth Township recognizes that there is a need to ensure that all work on public construction and maintenance contracts is performed by responsible, qualified firms that maintain the capacity, expertise, personnel and other qualifications and resources necessary to successfully perform public contracts in a timely, reliable and cost-effective manner.” Similar language appears in each of the four ordinances.

Perhaps the best evidence that a firm is able to perform well on public projects is its demonstrated history of success. However, many firms with a strong history of performing safely and reliably on public construction projects would be excluded under these ordinances which makes no sense at all, the essence of arbitrariness.

Under penalty of perjury, I hereby swear that the forgoing is true and correct to the best of my knowledge, information, and belief.

A handwritten signature in black ink, appearing to read 'AS', is written over a horizontal line.

Anirban Basu