APR 21 1995

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO: 92-3125

PEABODY MUNICIPAL LIGHT PLANT

vs.

ATTORNEY GENERAL[1] & others[2]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT[3]

Plaintiff Peabody Municipal Light Plant ("PMLP") seeks a declaration that neither the competitive bidding nor prevailing wage laws applies to four contracts it let in connection with the alteration, repair, and upgrading of its utility lines. This matter is before the Court on the Motion for Summary Judgment of PMLP and the cross-motions of defendants Attorney General and International Brotherhood of Electrical Workers Local Union No. 104

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[1] The Complaint and Amended Complaint were initially lodged against the Department of Labor and Industries, the governmental body originally charged with enforcing the statutes at issue. However, the Attorney General has since assumed the vanguard and is therefore the proper defendant.

[2] International Brotherhood of Electrical Workers Local Union No. 104, McDonough Electric Construction Corp., Rocha Pole-Line Construction Company, Inc., and William J. Hicks, Inc./ d/b/a Power Line Constructors.

[3] Although the parties agreed to resolve this matter by way of Cross-Motions for Summary Judgment, plaintiff did not file a formal motion, but instead filed a brief seeking judgment on the merits. Because plaintiff's brief does in effect seek summary judgment, and in light of the parties' agreement, the Court treats plaintiff's brief as a Motion for Summary Judgment.

("Local 104").[4]

BACKGROUND

The facts are not in dispute. In July, 1992, PMLP let four contracts for the renovation of its power lines. PMLP did not submit the contracts to competitive bidding, G.L. c. 30, § 39M[5], and it did not pay the workers in accordance with the prevailing wage statute, G.L. c. 149, § 26[6].

The defendant parties submitted formal protests to the

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[4] The Municipal Electric Association of Massachusetts, Inc., amicus curiae, submitted a brief on behalf of PMLP.

[5] General laws c. 30, § 39M provides in relevant part:

> (a) Every contract for the construction, reconstruction, alteration, remodeling or repair of any public work, or for the purchase of any material, as hereinafter defined, by the commonwealth, or a political subdivision thereof, or by any county, city, town, district, or housing authority, and estimated by the awarding authority to cost more than ten thousand dollars . . . shall be awarded to the lowest responsible and eligible bidder on the basis of competitive bids publicly opened . . . .

[6] General laws c. 149, § 26 concerns "the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the commonwealth, or by a county, town or district, or by persons contracting or subcontracting for such works" and provides that:

> The rate per hour of the wages paid to said mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works shall not be less than the rate or rates of wages to be determined by the commissioner as hereinafter provided; provided, that the wages paid to laborers employed on said works shall not be less than those paid to laborers in the municipal service of the town or towns where said works are being constructed . . . .

General laws c. 149, § 27D defines "construction" as used in § 26, to include additions to and alterations of public works.

Department of Labor and Industries ("DLI"), See note 1, supra, citing violations of the above statutes. The DLI held an adjudicatory hearing on September 14, 1992. In its October 2, 1992, decision, the DLI ruled that both the competitive bidding and prevailing wage laws applied to the contracts at issue, and that the contracts were void due to PMLP's failure to comply with the statutes. The DLI also prohibited PMLP from paying for any work that had been performed under the contracts. This suit followed.

DISCUSSION

Stated simply, the issue before the Court is whether PMLP's power line upgrade contracts are subject to the competitive bidding and prevailing wage laws. See G.L. c. 30, § 39M and c. 149, § 26. PMLP thinks not. The defendants disagree. In the alternative, PMLP alleges that even if it is part of the City of Peabody, the upgrading and repair of its electric lines is not a "public work" within the meaning of the competitive bidding and prevailing wage laws.

I. Summary Judgment Standard

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further] that the moving party is entitled to judgment as a matter of law." Pederson v. Time, Inc.,

404 Mass. 14, 16-17 (1989). Where both parties have moved for summary judgment and "in essence there is no real dispute as to the salient facts or if only a question of law is involved," summary judgment shall be granted to the party entitled to judgment as a matter of law. See Dawes, supra at 553.

II. Municipal Identity

The essence of PMLP's first claim is that the statutes generally governing municipal light plants, set forth in G.L. c. 164, are so comprehensive as to evince a legislative intent that c. 164 be the exclusive statutory scheme. PMLP relies primarily on G.L. c. 164, § 56, which provides that the light plant manager shall have "full charge of the operation of the plant, the manufacture and distribution of gas or electricity, the purchase of supplies, the employment of attorneys and of agents and servants, the method, time, price, quantity and quality of the supply, the collection of bills, and the keeping of accounts."

PMLP also relies on G.L. c. 164, §§ 56B-56D, which set forth detailed provisions governing the contracts of municipal light plants. For example, § 56B requires that all municipal light contracts be in writing and accompanied by a bond. Section 56C requires that all such contracts be filed with the city or town, and be open to public inspection.

Section 56D provides that certain contracts may not be awarded unless proposals are advertised in at least one newspaper published in the city or town in which the lighting plant is located, at least one week before the time specified for the opening of the

proposals. Section 56D also grants the municipal light commission the right to reject any or all proposals. The above statutes, PMLP argues, vest in the light plant manager, exclusive control over the award of contracts.

After consideration, the Court concludes that PMLP's claim must fail. General laws c. 164 is not so comprehensive as to demonstrate that the Legislature intended to remove municipal light plants from the ambit of the competitive bidding and prevailing wage statutes.

As PMLP alleges, G.L. c. 164, § 56 does indeed vest in light plant managers a broad array of powers. It is also true that the Supreme Judicial Court has consistently preserved this statutorily conferred autonomy in the face of attempted municipal dominance. See, e.g. Canner v. Groton, 402 Mass. 804 (1988) (once town voted to become a member of the Massachusetts Municipal Wholesale Electric Company, it authorized municipal light plant to enter into contracts with MMWEC on behalf of the town, and town was without power to limit plant's authority after the fact); Municipal Light Commission of Peabody v. City of Peabody, 348 Mass. 266 (1964) (City of Peabody without authority to change light commission's determination as to what should be expended for the efficient operation of the business); Municipal Light Commission of Taunton v. Taunton, 323 Mass. 79 (1948) (because a municipality is without authority to exercise direction or control over one whose duties have been defined by the Legislature, light commission was not subject to city ordinances governing the awarding of contracts and

the fixing of salaries); Adie v. Mayor of Holyoke, 303 Mass. 295 (1939) (members of municipal gas and electric commission are public officers acting under legislative mandate, and Mayor of Holyoke had no authority to remove a member of the commission). The Supreme Judicial Court has never said, however, that municipal light plants operate in a vacuum. The gist of the foregoing cases is that municipalities cannot interfere with or trump legislatively granted powers and duties. Section 56 does not insulate municipal light plants from the laws of the Commonwealth.

Sections 56B and 56C set forth several requirements of municipal lighting plant contracts (they must be in writing, accompanied by a bond, filed with the city or town, and open to public inspection). These few requirements do not evince a legislative intent to "occupy the field" (to borrow the phrase from constitutional law, where it is most commonly used).

PMLP's reliance on § 56D is misplaced. The Court does not view this statute as a clear preclusion of competitive bidding. Moreover, regardless of the requirements contained therein, § 56D, by its terms, applies only to contracts "for the purchase of equipment, supplies or materials[,]" and "contracts for the purchase of generation, transmission or distribution equipment." Based on PMLP's representations, it is apparent that the contracts at issue do not fall into any of the above categories. PMLP has not contended otherwise.

There are good grounds for requiring municipal light plants to comply with the competitive bidding and prevailing wage laws.

Requiring compliance with competitive bidding statutes, such as G.L. c. 30, § 39M, will ensure that the light plants obtain the lowest possible price for the contract among responsible contractors, and that the competition for the contract is both open and honest. See Modern Continental Construction Co. v. Lowell, 391 Mass. 829, 840 (1984); See Andover Consultants, Inc. v. Lawrence, 10 Mass. App. Ct. 156, 160 (1980). Similarly, requiring the light plants to comply with the prevailing wage law furthers the Legislature's goal of ensuring that the employees of private contractors who are engaged in the construction of public works receive a wage on par with that of similarly situated workers. See Commonwealth v. W. Barrington Co., Inc., 5 Mass. App. Ct. 416, 421 (1977).

The Court is unpersuaded by Amicus' argument that the Legislature's recent amendment to the Massachusetts Tort Claims Act, G.L. c. 258, expressly including municipal light plants, is evidence that the Legislature did not intend to include such plants in the competitive bidding and prevailing wage laws. As is often the case, it is likely that the Legislature amended the MTCA in response to judicial interpretations that the act did not insulate municipal light plants. This legislative reaction is not indicative of what the Legislature intended when it promulgated c. 164. The Court is also unswayed by Amicus' claim that the competitive bidding laws are inconsistent with G.L. c. 164. The statutes are easily reconciled.

Additionally, Commonwealth v. Oliver, 342 Mass. 82 (1961) has

significance beyond that ascribed to it by the parties. In Oliver, members of Taunton's municipal lighting plant were indicted for, among other things, "the awarding of a contract 'for the alteration, remodeling and repair of a public building in the amount of $18,324 . . . without competitive bids in accordance with the procedure set forth in . . . c. 149[7], § 44A to 44L, inclusive.'" 342 Mass. at 86. The Commonwealth sought to impose on the commission members the fine set forth in G.L. c. 149, § 180, which then provided: "Whoever violates a provision of this chapter for which no specific penalty is provided shall be punished by a fine of not more than one hundred dollars."[8]

The Court ruled that the defendant commission members could not be held criminally liable for violating § 44A to 44L. In addition to expressing doubt that the Legislature intended that the competitive bidding statute be subject to § 180, the Court found that the requirements of § 44A to 44L were not sufficiently clear to inform the person referred to precisely what was required of him, and that "constitutional principles bar a penal construction of such provisions." Significantly, the Court never said that the

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[7] General laws c. 149, §§44A et. seq. sets forth competitive bidding requirements that operate parallel to those required in c. 30, § 39M. Section 44A et. seq. requires competitive bidding on "building" construction projects, while § 39M applies to public construction projects which are not "buildings." See J. D'Amico, Inc. v. Worcester, 19 Mass. App. Ct., 112, 113-114 (1984) ("The distinction between public building projects and public works which are not buildings must be recognized to reconcile G.L. c. 30, § 39M, and G.L. c. 149, §§ 44A-44I . . . .")

[8] This statute remains intact today, although the fine is now $500.00.

municipal light plant contract was not subject to competitive bidding, which, if true, would have obviated the need for further discussion. The negative pregnant of Oliver is instructive. The Supreme Judicial Court would not need to reach the constitutional question if statutory grounds indicated that the competitive bid laws did not apply.

PMLP also alleges that it is not subject to the requirements of either G.L. c. 30, § 39M, or G.L. c. 149, § 26, because a municipal light plant is not one of the entities expressly enumerated in those statutes. The Court disagrees.

While a strict mechanical analysis of each of the entities enumerated in the statutes could conceivably yield PMLP's desired result, such an approach is overly simplistic. Although this issue has not been squarely addressed, appellate courts have characterized light plants as part of municipalities. See, e.g., Canner v. Groton, 402 Mass. 804, 806 (1988) ("The town operates a municipal electric system through its light department.") The fact that light plants enjoy a certain degree of autonomy does not change this result.

III. Public Works

PMLP's next claim is that contracts for the renovation of power lines are not "public works" as that phrase is used in the competitive bidding and prevailing wage statutes. The Court disagrees.

It is established in the Commonwealth that sewer construction projects, and even street sweeping are public works. See J.

D'Amico, Inc. v. Worcester, 19 Mass. App. Ct. 112 (1984); J.J. & V. Constr. Corp. v. Commissioner of Pub. Works of Fall River, 5 Mass. App. Ct. 391 (1977); Commonwealth v. Gill, 5 Mass. App. Ct. 337 (1977); Commonwealth v. W. Barrington Co., Inc., 5 Mass. App. Ct. 416 (1977). The Court has little difficulty in concluding that power line renovations are also public works. Andover Consultants, Inc., supra, does not require a different conclusion. There is a significant difference between the preparation of tax assessor maps, which does not involve any physical construction (or alteration, etc.), and the renovation of power lines.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that plaintiff Peabody Municipal Light Plant's Motion for Summary Judgment be **DENIED**, and that the Cross-Motions for Summary Judgment of defendant Attorney General, and defendant International Brotherhood of Electrical Workers Local Union No. 104, be **ALLOWED**.

It is further **ORDERED** and **DECLARED** that plaintiff Peabody Municipal Light Plant is subject to the competitive bidding act, G.L. c. 30, § 39M, and the prevailing wage law, G.L. c. 149, § 26.

Joseph A. Grasso, Jr.
Justice of the Superior Court

Dated: April 14, 1995