



Statement of Associated Builders and Contractors

**Testimony of Peter G. Vigue
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**Before the
Senate Labor Committee**

Equal Opportunity in Federal Construction

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Speaking for the Merit Shop

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Good morning, Mr. Chairman and members of the Committee. My name is Peter Vigue and I am President of Cianbro Corporation, Pittsfield, Maine. Appearing with me here today is my counsel, Maurice Baskin, from Venable, Baetjer, Howard and Civiletti. Cianbro is an employee-owned, open shop contractor providing general contracting and construction management services to clients throughout the Northeast and Mid-Atlantic regions. We were founded in 1949 and provide a variety of construction services in the public and private sector.

I am pleased to be here today on behalf of Associated Builders and Contractors (ABC) -- and its over 19,000 contractors, subcontractors, material suppliers, and related firms from across the country and from all specialties in the construction industry -- to discuss equal opportunity in federal construction. ABC's diverse membership is bound by a shared commitment to the merit shop philosophy -- which is based on the principle of awarding construction contracts to the lowest responsible bidder regardless of labor affiliation, through open and competitive bidding. This practice assures taxpayers and consumers the most value for their construction dollar. Over 80 percent of construction is performed today by open shop contractors, and ABC is proud to be their voice.

The issue of equal opportunity and open and fair competition in federal contracting is a critical one. Government contracts should be based on sound, credible criteria and should be

awarded to the lowest responsible bidder, regardless of labor affiliation. Public owners have a duty to the public to be fiscally responsible and must avoid favoritism, fraud, or corruption in the procurement process. These interests are not served when the government requires Project Labor Agreements (PLAs), which discourage qualified nonunion contractors from bidding. When competition is limited, the cost of the work to the public increases. These costs are ultimately passed on to taxpayers. The only way to protect the public is to let the contracts be openly bid and awarded to the lowest responsible bidder.

PLAs are Discriminatory

Under a Project Labor Agreement, as a condition of awarding the contract the successful bidder must agree that it and all of its subcontractors will become subject to a union agreement, pay union wages and benefits, follow union work rules, and use workers referred through a union hiring hall on the project. PLAs discourage open shop contractors from bidding because working under a PLA disrupts the open shop contractors' entire way of doing business. Since less than 20 percent of the nation's construction industry is unionized, PLAs discriminate against over 80 percent of the construction industry and 4 out of 5 American workers whose hard-earned tax dollars go toward funding these projects.

Nonunion workers are adversely affected by a PLA, even if their nonunion employer is the successful low bidder. Most PLAs limit the number of existing employees the employer may use on the project and require all or most employees to be hired through the union hiring halls.

All of the open shop employees must accept representation by an unwanted labor organization on their terms and conditions of employment. The worker may have to pay a fee to utilize the hiring hall without any guarantee of being referred for employment. And, for the privilege of working on a government-sponsored project, the worker will have to pay dues to a union that he or she did not choose to join.

There are important health care and pension considerations as well. If a worker is lucky enough to be hired, part of their wages will be contributed to union pension and health plans, not to the plans set up by the nonunion employer. And, the nonunion worker will likely have to utilize the health care plan available to the union, regardless of whether or not the worker or a family member is undergoing a course of treatment covered under the employer's plan. Unfortunately, the construction workers and their families get caught in the middle and may lose valuable benefits.

PLAs Increase Costs

PLAs increase the costs of public construction. Recent studies have shown that public sector project labor agreements significantly reduce the number of bidders for government work and significantly increase the costs of construction. An analysis of bids and costs to taxpayers in Roswell Park, New York, conducted both before and after a project agreement was temporarily imposed in 1995, revealed that there were 30 percent fewer bidders to perform the work and that

costs increased by more than 26 percent. Far from eliminating waste, union-only contracts guarantee it, by forcing non-union contractors to adopt inefficient union work practices and use unfamiliar workers.

I have personally witnessed the negative impact of union-only Project Labor Agreements. I have seen first-hand how they discourage non-union contractors from bidding and increase taxpayers' costs on public projects over and above the prevailing wage requirements.

In recent court decisions on the subject of public-sector PLAs, the supreme courts of New York and New Jersey have struck down union-only requirements for government construction under competitive bidding laws. Most recently, on April 17, 1997, a New York court declared a Project Labor Agreement incorporated in the bid specifications for the Orange County Court Facilities Project unlawful and unenforceable. Orange County failed to establish "that its determination to use the PLA was actuated by the goals of the competitive bidding statutes, or that it assessed the specific needs associated with the project with a 'detailed focus on the public fisc.'" The same principles exist under the federal Competition in Contracting Act.

Proponents claim that PLAs are necessary because only union contractors are equipped to perform and man such work, yet among the nation's largest contractors, many are open-shop. There is no demonstrated difference in the skill level of union and non-union workers and

marketshare alone suggests open shops are far more productive. Additionally, recent OSHA statistics show that open shop contractors have better safety records with fewer fatalities than their union counterparts.

It has also been claimed that PLAs will ensure local employment, yet this has been found to be inaccurate because the union's use of craftsmen to perform unskilled and semiskilled work requires them to import "travelers." Open shops have a greater ability to hire and train locally for their projects. One of the major competitive advantages open shop companies have over unions is their ability to deploy manpower more efficiently. Union deployment essentially requires that skilled craftsmen perform nearly all the work involved in an expansive definition of a job -- even though much of the work is semiskilled or even unskilled.

PLAs are also promoted as a means to ensure labor peace. Yet, open shop employees do not strike. By threatening labor unrest, unions create the very problem which they then contend can be addressed through a PLA. The government cannot and should not allow itself to be coerced by such threatened labor unrest. And, if unions attempt to disrupt their work, it is a matter for the appropriate police and labor relations agencies to address, not a reason for agreeing to blackmail. Moreover, no specific federal projects have been identified where labor "disharmony" has delayed or interfered with construction or could not be addressed by other lawful means. Union-only contracts are completely unnecessary to achieve the alleged goal of "labor peace" on government projects.

President Clinton's draft Executive Order requiring agencies to consider using PLAs is an unnecessary, wasteful, and discriminatory policy for a special interest. Use of PLAs grants a monopoly to unions and unionized contractors at the expense of all taxpayers, and in violation of the legislative intent of Congress. Since PLAs generally require that an open shop contractor cannot use his own employees but must use workers from the union hiring hall, and that all workers pay union dues, these agreements are a way for unions to increase their influence, membership and incomes. PLAs are a political initiative unions seek to offset the economic advantages of open shop companies. If the unions can bid competitively without a Project Labor Agreement, why is one necessary?

Conclusion

ABC strongly opposes union-only Project Labor Agreements that award public construction contracts only to contractors who agree to recognize the construction trade unions as the representative of their employees on that job. ABC firmly believes that this violates an employee's individual freedom to choose or reject labor affiliation and restricts free competition. Ultimately, this drives up the cost of public works construction and ignores the efficiency and productivity of the merit shop. It should be unlawful for any agency to require a contractor or subcontractor to adopt a labor agreement as a condition of performing work on a construction project.

President Clinton's proposed Executive Order requiring all agencies to consider using Project Labor Agreements is bad policy and bad law. Encouraging PLAs is a discriminatory effort to serve a special interest at the expense of all taxpayers. On behalf of ABC, I urge Congress to act now to prevent implementation of this Executive Order and any similar attempts in the future by clarifying that union-only project agreements are discriminatory and violate the principles of open competition. Congress should help ensure there is equal opportunity for all Americans to compete for work on government construction projects.



**PRESIDENT CLINTON'S EXECUTIVE ORDER
ON
UNION-ONLY PROJECT AGREEMENTS:
*BAD POLICY AND BAD LAW***

The Administration has announced a new Executive Order which "facilitates" the use of project labor agreements (PLAs). The Executive Order requires all federal agencies to determine on a project-by-project basis whether a project labor agreement will "advance the government's procurement interest."

The Executive Order establishes an unprecedented, dangerous and wasteful new policy which discriminates against 80% of the construction industry, which is non-union. Contrary to its intent, the Executive Order will increase the costs of government construction by discouraging competitive bidding by non-union contractors. The Executive Order will also slow down the pace of much needed construction by requiring each agency to establish new regulations and make project labor agreement determinations on a project-by-project basis, before any new construction can be performed. The Executive Order will increase the budget deficit, hurt the interests of taxpayers and benefit no one except labor unions.

The Executive Order is also inconsistent with federal law, as expressed in the Competition in Contracting Act, 41 U.S.C. §253, and the Federal Acquisition Regulations. Court decisions in a number of states have found that union-only project agreements violate the fundamental principles of open competition for government work. The same principles have been codified by Congress and cannot be cavalierly set aside by the President.

This memorandum summarizes the key provisions of the Executive Order and explains why it is both misguided and unlawful and a wasteful abuse of Presidential power on behalf of special interests.

1. Summary of the Executive Order

The Preamble to the Executive Order states that its purpose is to “meet rigorous performance standards, minimize costs and eliminate waste and burdensome requirements.” The Order states that project labor agreements have been used on projects that “involve a large volume of work, extend over a substantial period of time, include a substantial number of contractors, subcontractors trades and craft workers, incur substantial costs or entail similar circumstances.” According to the Order, the purpose of such agreements is to “guarantee efficient work; establish fair and consistent labor standards and work rules; supply a skilled work force and “assure stable labor-management relations” over the life of a project.

The Preamble makes no reference to the Congressional mandate of open competition on government projects, the well recognized benefits of encouraging responsible bidding, and the costs to taxpayers of favoritism and corruption of the bidding process. The Preamble takes note of certain state executive orders relating to project agreements, but fails to address the numerous court decisions which have held such public sector restrictions to be unlawful.

Perhaps most significantly, the Preamble makes no findings as to any particular deficiency in the long established system of government construction -- no economic studies demonstrating any need for union-only requirements, no demonstrated cost savings over open shop construction, and no present disruption or inability of the government to accomplish its construction needs.

Notwithstanding these omissions, the Executive Order orders all federal agencies to “determine on a project-by-project basis” whether a project labor agreement “will advance the government’s procurement interest” and whether laws applicable to the specific construction project preclude the use of project labor agreements. Once an agency determines that a PLA is appropriate, the Executive Order authorizes the agency either to enter into the PLA itself or to require contractors to sign agreement with labor unions as a condition of performing work (regardless of the wishes of the contractors’ employees).

The Executive Order does not require the use of PLAs but, once decided upon, they must be included in all project bid specifications and made available to all contractors and subcontractors. The Executive Order requires the agreements to be “accessible” to all employees, regardless of union membership. However, the Order contains no method by which employees working on a project can choose not to be represented by a labor organization with which their employer has been forced to sign an agreement.

Each department and agency head is required to issue new regulations within 45 days of the Executive Order to implement its terms.

2. The Executive Order Violates Federal Competitive Bidding Laws

In recent decisions on the subject of public-sector PLAs, the highest courts of New York and New Jersey have struck down union-only requirements for government construction under competitive bidding laws. *See General Building Contractors of New York, Inc. v. Dormitory Authority of State of New York*, 88 N.Y. 2d 56 (1996) and *Tormee Construction, Inc. v. Mercer County*, 669 A. 2d 1369 (1995). In these cases, both state high courts found that PLAs promote favoritism inconsistent with the principles of open bidding, except in the most extraordinary circumstances. *See also New York State Chapter, Inc., Associated General Contractors of America v. New York Thruway Authority*, 88 N.Y.2d 56 (1996) (permitting a PLA only upon a showing that substantially all prior work on a very large project had been previously performed on a union basis and that unique features of both the project and the agreement provided assurance of actual cost savings).¹

At the federal level, the Competition in Contracting Act, 41 U.S.C. §253, et seq., establishes a firm Congressional commitment to open competition in federal procurement. The statute provides:

An executive agency in conducting a procurement for property or services (A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title ... and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984.

In addition, the applicable section of the Federal Acquisition Regulation (FAR) similarly requires contractors to be selected "on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract." See 48 C.F.R. §44.244-5.

Under these provisions, it is unlawful for federal agencies to require contractors to sign union contracts as a condition of bidding upon government work. Such requirements interfere with "full and open competition" for the reasons discussed above. Therefore, it is unlawful for the Executive Order to require agencies to impose such requirements.

Just last year the Court of Appeals for the D.C. Circuit struck down an Executive Order of the President which departed from the expressed intent of Congress. *U.S. Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996). The same result should occur with regard to the present Executive Order.

¹ The Boston Harbor project agreement was upheld by the U.S. Supreme Court only as against a challenge brought under federal labor law. *Associated Builders and Contractors, Inc. v. Massachusetts Water Resources Authority*, ___ U.S. ___ (1993). The Supreme Court expressly did not reach or consider the question of whether union-only project agreements in the public sector violate state or federal competitive bidding laws. The more recent state court decisions have held that the Boston Harbor case provides no insight to the applicability of competitive bidding laws to union-only project agreements.

3. Why the Executive Order is Bad for Taxpayers and the Public Interest

As noted above, one of the most fundamental principles of our government is that the public is best served by full and open competition for public works. Favoritism in the award of government contracts is a form of corruption which leads inevitably to higher costs and lower performance. Congress has long required that government projects be awarded to the "lowest responsible bidder" after open competition designed to encourage the largest number of bids. The General Accounting Office has also held that open competition is the norm for federal procurement.

The Executive Order departs from the basic principle of open competition by conditioning the award of government construction projects upon the willingness of contractors to sign labor agreements with unions. Such labor affiliations bear no relationship to the ability of contractors to perform construction work, however. In addition, only 20% of all construction workers are represented by any labor union. The result of a union-only requirement is to discourage the vast majority of contractors, who are not signatory to any union contracts, from bidding upon public work.

Recent studies have shown that public sector project labor agreements significantly reduce the number of bidders for government work and significantly increase the costs of construction. An Analysis of Bids and Costs to Taxpayers in Roswell Park, New York, conducted both before and after a project agreement was temporarily imposed in 1995, revealed that there were 30% fewer bidders to perform the work and that costs increased by more than 26%. A GAO study of a Department of Energy project agreement in Idaho found that labor costs on the project were more than 20% higher than the prevailing wage in the area. In a pending case in Nevada, a water authority rejected a responsive bid which was more than \$200,000 lower than all others, solely because the contractor could not and would not sign a union contract.

Open shop contractors are understandably reluctant to sign labor contracts with unions against the wishes of their employees, 80% of whom are non-union. In order to sign PLAs agreements, the open shop contractors are forced to radically alter their normal structure of operations and work rules, which are normally more flexible and less rigid than under union agreements. Unions are using the coercive power of the government to create an exclusive enclave of work, at taxpayer expense.

As to the employees, while the PLA may be "accessible" to them regardless of union membership, the fact remains that they must accept representation by an unwanted labor organization as to each of their terms and conditions of employment, and see part of their wages contributed into union benefit plans over which they have no control, in order to work under a government-sponsored project labor agreement.

Contrary to the Preamble of the Executive Order, public union-only PLAs were quite rare until this decade, and they are still far from common. One of the best known union-only projects, the Boston Harbor Clean-Up, has been widely criticized as suffering from cost overruns, worker fatalities and inefficiency. In each state where PLAs have been adopted by local governments, they have been challenged by taxpayers and contractors and have been struck down or withdrawn in many cases.

4. Flaws in the Stated Justifications for the Executive Order

The Executive Order identifies several goals which PLAs are supposed to achieve. None of these goals will truly result from the imposition of a union-only requirement on federal construction projects.

First, the Order claims that PLAs will help to “minimize costs and eliminate waste and burdensome requirements.” In reality, PLAs inevitably increase costs of construction when compared to open competitive bidding, as numerous studies have shown. Far from eliminating waste, PLAs guarantee it, by forcing non-union contractors to adopt inefficient union work practices and utilize unfamiliar workers. Finally, the Executive Order burdens all federal agencies with a new requirement to issue regulations on this complex issue, all within 45 days.

As noted above, the Executive Order cites no economic studies to support its claim that PLAs will reduce costs or waste. The Order does not give the agencies time to conduct necessary studies or to properly analyze when, if ever, such PLAs will actually be necessary on particular projects.

The Executive Order also claims that PLAs are needed to guarantee efficient work and skilled workers. Yet, it is widely recognized that open shop contractors are able to engage in more efficient work practices without union interference. There is also no demonstrated difference in the skill level or productivity of union and non-union workers, and PLAs operate against efficiency and productivity by depriving non-union contractors of the right in many instances to choose their own workforces. Similarly, unionized workers do not work any more safely than non-union employees, as the Boston Harbor project and recent OSHA workplace fatality statistics have shown.

Next, the Executive Order asserts that PLAs are needed to achieve “labor peace” on government projects. But there have been few if any disruptions of federal government projects in recent decades caused by the performance of work by both union and non-union contractors. Such mixed use construction has become commonplace on both public and private work, and PLAs are completely unnecessary to achieve this alleged goal. Certainly, the Executive Order identifies no specific federal projects where labor “disharmony” has delayed or interfered with construction and which could not be addressed by other lawful means.

In short, imposition of union-only PLAs by federal agencies will achieve none of the stated objectives of the Executive Order. Instead, any PLAs imposed by agencies as a result of the Executive Order will undermine the Congressional mandate of open competition and will increase waste and cost to American taxpayers.