Testimony of Tom Rolleri
of
Granite Construction Company
on behalf of

The Associated General Contractors of America

Presented to the

Senate Committee on Labor and Human Resources

on

Project Labor Agreements

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The Associated General Contractors of America (AGC) is a national trade association of more than 33,000 firms, including 7,500 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

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SUMMARY OF AGC'S TESTIMONY ON PUBLIC PROJECT LABOR AGREEMENTS

The Associated General Contractors of America (AGC) has long opposed public owner project labor agreements (PLA's). As the largest and most diverse trade association in the construction industry, representing both open shop and union contractors, AGC maintains that publicly financed projects should be open to competition among all qualified firms, without regard to labor policy. In 1992, when the Bush Administration issued an executive order excluding many union contractors from federal work -- because those firms had agreed to limit their subcontracting to other union firms -- AGC took the same position and opposed that order.

To the surprise of many outside the construction industry, AGC has found that public owner PLA's are detrimental to both open shop and union firms. Public owner PLA's effectively prevent open shop contractors from bidding competitively on these projects. For union contractors, public owner PLA's substitute the government for the contractor in the collective bargaining process. By negotiating with the government, the building trade unions are able to take advantage of the lack of expertise the government has in labor/management negotiations and remove the free market economic forces that underlie the collective bargaining process.

The problems open shop contractors face with a public owner PLA's include:

- The inability to use their own employees: Public owner PLA's prohibit open shop contractors from using their employees on a project.

- Disregard for competitive bidding procedures: Public owner PLA's inject political considerations into what would otherwise be fair and open competition.

For union contractors, the problems caused by public owner PLA's are:

- The removal of the contractor from the collective bargaining process: PLA's take control of the collective bargaining process away from contractors and give it instead to the government contracting agency.

- Agreements that tilt in favor of union interests: Since the government is not experienced in construction labor/management relations, public owner PLA's typically favor unions.

- Disrupting local labor conditions: Public owner PLA's typically include terms and conditions that the local building trade unions cannot obtain through the normal collective bargaining process. Public owner PLA's create this situation by removing the market factors that drive labor/management collective bargaining negotiations.

AGC's testimony before the Senate Labor and Human Resources Committee is being presented by Tom Rolleri, the Labor Negotiator for Granite Construction Company of Watsonville, California.

AGC represents both union and open shop construction firms in 99 chapters in all 50 states and Puerto Rico. Its 32,500 member firms are involved in building, highway, heavy, municipal-utility, and industrial process construction projects.

THE STATEMENT FOR THE RECORD FROM THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, PRESENTED BY TOM ROLLERI

Good morning Chairman Jeffords. I want to thank you and the rest of the committee for allowing me the opportunity to testify this morning.

My name is Tom Rolleri. I am the labor relations manager for Granite Construction Company of Watsonville, California. I am also the chairman of the Union Contractors Committee of the Associated General Contractors of America (AGC). AGC is the largest trade association in the construction industry, representing more than 33,000 firms, including 7,500 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation protects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing developments. I am testifying today on behalf of the AGC.

I. Introduction

AGC has long opposed public owner project labor agreements (PLA's). As the largest and most diverse trade association in the construction industry, representing both open shop and union contractors, AGC maintains that publicly financed projects should be open to competition among all qualified firms, without regard to labor policy. In 1992, when the Bush Administration issued an executive order excluding many union contractors from federal work -- because those firms had agreed to limit their subcontracting to other union firms -- AGC took the same position and opposed that order.

To the surprise of many outside the construction industry, AGC has found that public owner PLA's are detrimental to both open shop and union firms. Public owner PLA's effectively prevent open shop contractors from bidding competitively on these projects. For union contractors, public owner PLA's substitute the government for the contractor in the collective bargaining process. By negotiating with the government, the building trade unions are able to take advantage of the lack of expertise the government has in labor/management negotiations and remove the free market economic forces that underlie the collective bargaining process.

What Are Public Owner Project Labor Agreements?

Public owner PLA's come in a wide variety of shapes and sizes. By definition, public owner PLA's involve a public entity, such as the federal, state or local government. A public owner PLA can also involve local agencies, boards, commissions, development authorities, public hospitals, and toll road authorities. The line between a private PLA and a public owner PLA can be difficult to draw and may require a careful analysis of the structure of the contracting entity and its relationship with the governing entity.

The terms of a public owner PLA can range from a single sheet of paper to a complex document. A public owner PLA typically requires jobsite contractors and subcontractors to use building and construction trade union hiring halls to obtain craft employees for the project. In exchange for using only union labor on the project, the union will agree to a "no-strike" clause for the duration of the project. In addition to these two basic features, a public owner PLA may

include some or all of the following:

- Mandatory recognition of the signatory unions as the sole and exclusive bargaining agents for all construction employees.

- Mandatory union membership and dues payments in non-right-to-work states.

- Mandatory payments into union fringe benefit funds for all employees.

- Restrictive subcontracting provisions requiring all subcontractors at every tier to execute the PLA.

- Mandatory grievance and jurisdictional dispute resolution procedures.

- Uniform hours of work, holidays and work rules.

- Union stewards for all crafts.

- Derivative liability for subcontractor wage and fringe benefit delinquencies.

Public project labor agreements are negotiated either by the public entity or its agent directly with the local unions or the local AFL-CIO Building and Construction Trades Council. There is no contractor involvement in the negotiations. Once negotiated, the public owner PLA is incorporated into the project specifications and becomes binding on all successful bidders.

II. Why AGC Opposes Public Owner Project Labor Agreements

It is AGC's long-held policy to oppose public owner PLA's. Instead, AGC supports the well-established principle of open competition among all qualified firms for taxpayer-financed construction opportunity, regardless of the contractor's labor policy.

The problems open shop contractors face with public owner PLA's include:

- The inability to use their own employees: Public owner PLA's prohibit open shop contractors from using their own employees on the project.

- Disregard for the competitive bidding procedures: Public owner PLA's inject political considerations into what would otherwise be fair and open competition. These agreements run counter to the Competition in Contracting Act and the Federal Acquisition Regulations that require federal agencies engaged in "procurement for property or services to obtain full and open competition."

For union contractors, the problems caused by public owner PLA's are:

- Removal of the contractor from the collective bargaining process: Public owner PLA's take control of the collective bargaining process away from contractors and give it instead to the government. The government does not have the experience or expertise to negotiate with union officials.

- Agreements that tilt in favor of union interests: Since the government is not experienced in construction labor/management relations, public owner PLA's typically favor unions.

- Disrupting local labor conditions: Public owner PLA's typically include terms and conditions that the local building trade unions cannot obtain through the normal collective bargaining process. Public owner PLA's create this situation by removing the market factors that drive labor/management relations.

Other problems associated with public owner PLA's are:

- Increased cost of public construction projects: Public owner PLA's discourage many companies from bidding on a project, and impose extra costs on those who do.

- Conflicts with other federal laws: Public owner PLA's on federal construction may conflict with other federal laws, such as the Employee Retirement Income Security Act (ERISA), the National Labor Relations Act, and in the case of the President's executive order, the Davis-Bacon Act.

How Public Owner Project Labor Agreements Hurt Open Shop Contractors

Although public owner PLA's do not expressly exclude open shop contractors, they prevent open shop contractors from bidding competitively for the work that they cover.

The payment of union wages and benefits does not prevent open shop contractors from participating on public owner PLA's. Most public projects are covered by state and local prevailing wage laws, and federal contractors must comply with the requirements of the Davis-Bacon Act. Instead, the problem open shop contractors face when bidding under public owner PLA's is that they cannot use their own employees on the project. Instead, the open shop contractor must hire the majority of trade workers through union hiring halls. However, open shop contractors already have their own employees and management practices that are usually different from the union practices. It is not cost-effective for an open shop company to hire a new workforce and develop an entirely new set of work rules and employment practices, while maintaining its current workforce.

Thus, it is true but irrelevant that open shop firms are free to work under a public owner PLA. What matters is that a public owner PLA requires open shop contractors to so fundamentally change the way they do business that such firms cannot competitively bid for the work.

Public owner PLA's, as envisioned by President Clinton's proposed executive order, would go a long way towards realizing two goals of the building trade unions. First, the proposed executive order would take a major step towards eliminating open shop employee competition with the unions. For example, if an open shop contractor decided to bid on a public owner PLA, the employees of the open shop contractor could, conceivably, work on the project. The employees of the open shop contractor, however, would be at the bottom of the union's referral list. They would be the last workers referred to the job, if they were referred at all. The end result of the President's proposed executive order would be to remove the opportunity for open shop workers to work on federal or federally funded projects.

In addition, the proposed executive order would achieve a second and more important goal for the building trade unions -- it would increase the number of union members. Since 1973, the percentage of construction industry employees that belong to one of the building trade unions has declined from 40% to less than 20%. Moreover, union contractors have been losing market share to their open shop competitors. By greatly increasing the use of project labor agreements, which generally have the effect of requiring union membership as a condition of working on a project, the President's executive order would increase union membership from the top down, without regard to the workers' support for or opposition to union representation.

Public Owner Project Labor Agreements Hurt Union Contractors

It would seem that union contractors would benefit from the President's proposed executive order. However, AGC has found that public owner project labor agreements are also detrimental to union contractors. The most harmful effect public owner project labor agreements have is that they remove contractors from the collective bargaining process. In the case of the President's proposed executive order, collective bargaining would be performed by the federal government, instead of the contractor. AGC does not believe that the public's interests will be best served by substituting a government procurement officer for the industry's own negotiators. A government procurement officer lacks the experience in construction labor-management relations necessary to negotiate a competitive, cost-effective agreement with the building trade unions.

By eliminating the contractor from the collective bargaining process, the proposed executive order would undermine the direct, face-to-face negotiations that lie at the heart of collective bargaining. In fact, the proposed project labor agreement executive order is directly contrary to the collective bargaining process that the National Labor Relations Act was created to encourage and regulate. These agreements replace the free market as the mechanism for determining wages and benefits, by allowing parties who have little incentive to seek cost-effective agreements to negotiate wages, benefits and other conditions of employment.

Public Owner Project Labor Agreements Increase Construction Costs

By effectively shutting out open shop contractors from the project, public owner PLA's limit the number of contractors that can bid on the project. Public owner PLA's also impose union wage rates on a construction project. As mentioned before, public owner PLA's also remove the market forces that otherwise serve to determine wages and benefits, and replace experienced contractors with disinterested government officials. To the great extent that they limit the competition for public work, or otherwise increase the cost of improving our schools, hospitals, highways, bridges and other public infrastructure, public project labor agreements threaten everyone's quality of life.

Public Owner Project Labor Agreements May Violate Several Federal Laws

Public owner project labor agreements may run counter to several federal laws. Among the various laws public owner PLA's could violate include:

The Federal Employee Retirement Income Security Act (ERISA)

The Federal Employee Retirement Income Security Act (ERISA) preempts any and all state laws which relate to employee benefit plans. Most public owner PLA's require contractors to contribute to specific building trade fringe benefit plans. These mandatory contributions may violate ERISA. In addition, project labor agreements that mandate participation in apprenticeship programs could be in violation of ERISA.

The National Labor Relations Act (NLRA)

Whether public owner project labor agreements violate the National Labor Relations Act (NLRA) focuses on whether the interests of the government are proprietary or regulatory. If the interests of the government are proprietary, meaning that the government is acting to protect its interests as a property owner, then the use of a project labor agreement may not violate the NLRA. This was the essence of the *Boston Harbor* case decided by the Supreme Court in 1993. If, on the other hand, the actions of the government are *regulatory* in nature, the NLRA may preempt. A federal court decision in *Alameda Newspapers, Inc. v. City of Oakland,* 146 LRRM 3103 (N.D. Cal. 1994) was decided along this line of reasoning, consistent with the *Boston Harbor* decision.

Another area public owner PLA's could violate the National Labor Relations Act is in Section 8(f) of the NLRA. Public owner PLA's substitute the government for the employer in the collective bargaining process. By doing this, a public owner project labor agreement effectively amends the National Labor Relations Act. Section 8(f) of the National Labor Relations Act allows only employers primarily engaged in the construction industry to negotiate and enter into pre-hire agreements with their counterpart unions. Under the proposed executive order, federal agencies, which are not employers primarily engaged in the construction industry, will be permitted to negotiate labor agreements.

The Davis-Bacon Act

Almost all federal and federally funded construction is subject to the Davis-Bacon Act, which requires all contractors and subcontractors performing work on a federal project to pay prevailing wages and benefits as determined by the Department of Labor. The wage determinations issued by the Department usually cover one or more counties.

In determining prevailing wages and benefits, Department of Labor identifies the source of those wages and benefits as those paid by either union contractors or open shop contractors, then includes them in the wage determinations it issues. In the case of wages and benefits that originate from union contractors, the Department also identifies the local union contract they came from. Not only must contractors and subcontractors performing work on the project pay these rates, they must also comply with the labor and jurisdictional practices of that union local.

If a federal agency negotiates a project labor agreement under the proposed executive order in an area where the Labor Department has determined that union rates and practices prevail, is it free to negotiate different rates and practices than those mandated by the Department under the Davis-Bacon Act? Must the agency negotiate with the same unions identified by the Department as determining the prevailing rates and

rates and practices in that area, or can it negotiate with others for a better deal?

If the area has been identified by the Labor Department as one where open shop wages, benefits and labor practices prevail, can a federal agency negotiate with unions and/or union contractors to impose nonprevailing rates and practices on the project? Can the agency negotiate with the open shop contractors in the area for a project labor agreement? If an agency is a party to a project labor agreement that is inconsistent with the practices required by the Labor Department under the Davis-Bacon Act, would the agency share liability for violations?

If the Davis-Bacon Act cannot be superseded by the proposed executive order, what is the purpose of issuing the executive order? What terms and conditions can be negotiated? If the executive order supersedes the Davis-Bacon Act, and the government is no longer required to respect local wages, benefits and labor practices, does the executive order effectively repeal the Davis-Bacon Act?

Many of these outstanding questions raise issues to the true intention of the proposed project labor agreement executive order. If the executive order simply reaffirms the Davis-Bacon Act, there is no reason to issue it. However, if the order goes beyond the requirements of the Davis-Bacon Act, then its proponents cannot argue that the cost of federal projects will be unaffected by the executive order.

III. PRESIDENT CLINTON'S PROPOSED PROJECT LABOR AGREEMENT EXECUTIVE ORDER

The Draft Executive Order

On February 18, in a speech before the AFL-CIO Executive Committee, Vice President Al Gore promised that President Clinton would be issuing an executive order instructing federal departments and agencies to consider using project labor agreements when undertaking federal and federally funded construction projects. In early April, a draft of the proposed executive order was circulated. The President has yet to issue the executive order, due in part to the political controversy surrounding this issue and questions raised by federal procurement agencies.

The preamble of the proposed project labor agreement executive order states the Clinton Administration's commitment to meet "rigorous performance standards, minimize costs and eliminate waste and burdensome requirements." The draft executive order goes on to say that project labor agreements, "guarantee efficiency, timely and quality work; establish fair and consistent labor standards and work rules; supply a skilled, experienced and highly competent workforce; establish set labor-related costs over the project's life; and assure stable labor-management relations." The preamble concludes by stating, "In light of the continuing high demand for public capital investment, competing budgetary pressures and limited government resources, the federal government should reap the benefits of project labor agreements, where appropriate, on its own construction projects as a matter of consistent policy."

Section 1 of the draft would require the federal contracting agent on a project-by-project basis to determine "(a) whether a project labor agreement will advance the government's procurement interests in economical, efficient, and timely high quality project performance by promoting labor-management stability and project compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor standards, and other matters, and (b) whether laws applicable to the specific construction project preclude the use of the proposed project labor agreement." If the requirements of Section 1 are met, Section 2 requires the department or agency to "(a) enter directly into such an agreement (project labor agreement) with one or more appropriate labor organization, or (b) require that every bidder on the project agree to negotiate or become a party to a project labor agreement for the project with one or more appropriate labor organizations."

Sections 3 and 4 of the draft contain several provisions designed to deflect political opposition to the proposed executive order. Section 3(a) makes the project labor agreement binding on all contractors and subcontractors who perform work on the project and Section 3(b) requires the project labor agreement be made available to all contractors and subcontractors. Section 3(c) prohibits discrimination based on *union membership or non-union membership*" (emphasis added). The remaining parts of Section 3 contain guarantees against lockouts, strikes or other labor disputes, require creation of mechanisms for dispute resolution and workplace cooperation, and make the project labor agreement conform to all other applicable statutes, regulations and executive orders. Section 4 of the draft specifically states that the executive order does not require the use of project labor agreements.

The remaining sections of the draft executive order spell out the legal definitions contained in the draft and the time in which the draft will be issued and enforced.

Analysis of the Draft Executive Order

The preamble of the draft executive order is extremely clear in spelling out the Clinton Administration's support of project labor agreements. It states that the Clinton Administration has sought to devise and modify government laws to meet "rigorous performance standards, minimize costs and eliminate waste and burdensome requirements." It goes on to state that "the use of project labor agreements is integral to the attainment of these objectives on federal and federally funded construction projects." Clearly, the Clinton Administration believes that project labor agreements achieve the policy goals of the Administration on federal or federally assisted projects.

Section 1 of the draft requires the federal procurement agent to make a negative determination on project labor agreements. That is, the federal government must determine whether a project labor agreement meets the procurement goals of the government and whether the use of a project labor agreement is precluded by other laws. If the project *does not* meet the criteria in Section 1, then a federal procurement agent can use normal procurement procedures on the project. However, if the project meets the criteria in Section 1(a) and 1(b), then the federal procurement office **must** use a project labor agreement, as described in Section 2. Any other course of action would conflict with the order's stated purpose. In fact, if the criteria of Section 1 are met, **not** using a project labor agreement action would, by definition, result in the uneconomical, inefficient, untimely and/or low quality procurement of a federal or federally funded project. Section 1(b) is a check on section 1(a), but nothing in Section 2 can be said to

vest a department or agency with the discretion to disregard executive order's expressly stated objectives.

Thus, Section 1 does not mandate the use of a project labor agreement. However, if you read the preamble, it is clear that the Clinton Administration believes that project labor agreements serve the procurement interests of the federal government. Section 1 only requires the procurement officer to determine whether "...a project labor agreement will advance the government's procurement interests.." The draft executive order puts the federal procurement officer in the position of determining whether a project labor agreement *will not* meet, on a specific construction project, the government's procurement interests. This will be difficult for the procurement officer, since the preamble of the executive order already presumes that project labor agreements meet the government's procurement interests. Once the procurement officer determines a project labor agreement meets the government's procurement interests, that procurement officer **must** use a project labor agreement as spelled out in Section 2. So while the executive order does not mandate the use of a project labor agreement on all federal projects, if the criteria of Section 1 is met, the federal procurement officer **must** use a project labor agreement.

Section 3(c) of the draft executive order specifically states that the executive order does not permit "..discriminate(ion) on the basis of...union membership or non-membership." This language was added to the executive order to remove the argument that project labor agreements would force workers to join a union in order to be employed on the project covered by the agreement. The fact remains that public project labor agreements uniformly require referrals out of a union hiring hall. Since the executive order mandates a collective bargaining agreement as a condition of bidding on a public project, how is a non-union worker to be hired on these projects? Even if the executive order "protects" non-union workers from discrimination, the practical result of the project labor agreement is to force contractors and subcontractors to hire their skilled craftsmen and laborers from the union hiring halls.

Section 4 specifically states that project labor agreements are not required by the executive order. As addressed previously, that is true. Once again, the presumption of the executive order is that project labor agreements meet the procurement goals of the federal government. The federal procurement officer must determine, on a project-by-project basis, whether a project labor agreement *does not* meet the government's procurement needs.

IV. CONCLUSION

The Clinton Administration was careful to draft the proposed executive order not to mandate the use of project labor agreements. The Administration was also careful to point out that the proposed executive order would not discriminate against non-union workers. However, as described previously, public owner PLA's always mandate that the majority of employees on a project be hired from a union hall. Furthermore, the proposed project labor agreement executive order requires government contracting agents, on every construction project to make a *negative* determination on the use of a PLA. The federal government will not use a PLA only if its use will not meet "rigorous performance standards, minimize costs and eliminate waste and burdensome requirements." If the President is allowed to proceed with this executive order, the use of PLA's on federal projects will increase.

A Dangerous Precedent

Inevitably, public project labor agreements increase the cost of all construction, including the private work that manufacturers and other American businesses find necessary to maintain their competitive edge in a world economy. The proposed executive order would also set an extremely dangerous precedent for manufacturing and other industries. The President's plan raises ominous questions about the government's role anywhere in the private sector. Having set the precedent, will the government presume to negotiate collective bargaining agreements for the aerospace and automobile industries? At what point will the federal government dictate the terms of a collective bargaining agreement between Intel and its employees?

Conclusion

While some federal agencies have long used project labor agreements, the proposed executive order takes the threat of such agreements to new and extremely troubling heights. For the reasons already noted, this executive order would have a negative impact on the entire construction industry, including the substantial segment that continues to work with and under collective bargaining agreements.

I want to thank Chairman Jeffords for the opportunity to testify before the committee.

CONSTRUCTION NEWS RELEASE

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AGC TESTIFIES IN OPPOSITION TO PRESIDENT CLINTON'S PROPOSED EXECUTIVE ORDER ON PROJECT LABOR AGREEMENTS

Washington, D.C., April 30, 1997 -- AGC member Tom Rolleri, Labor Relations Manager for Granite Construction Company in Watsonville, California, testified before the Senate Labor & Human Resources Committee in opposition to President Clinton's proposed project labor agreement executive order.

In his statement before the Committee, Rolleri said, "AGC has long opposed public owner project labor agreements, and maintains that publicly-financed projects should be open to competition among all qualified firms, without regard to labor policy." Rolleri went onto say, "AGC has found that public owner project labor agreements are detrimental to both open shop and union construction firms. The most harmful effect these agreements have is that they remove contractors from the collective bargaining process."

In the case of the President's proposed executive order, collective bargaining would be performed by the federal government, instead of the contractor. AGC does not believe the public's interests will be best served by substituting a government procurement officer for the industry's own negotiators. A government procurement officer lacks the experience in construction labor/management relations necessary to negotiate a competitive, cost-effective agreement with the building trade unions.

Rolleri concluded by saying, "The taxpayers and the federal government would be better served by a contracting system based on full and open competition without regard to labor policy."

AGC represents both union and open shop construction firms in 99 chapters in all 50 states and Puerto Rico. Its 32,500 member firms are involved in building, highway, heavy, municipal-utility, and industrial process construction projects.

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