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Project Labor Agreements in Federal Construction Contracts: An Overview and Analysis of Issues

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ABSTRACT

This report defines project labor agreements and briefly discusses the history of their use in the construction industry. It includes a summary of recent legislative and executive actions regarding project labor agreements. In addition, the principal arguments for and against project labor agreements in federally funded construction projects are summarized. This report will be updated in response to legislative developments.

Project Labor Agreements in Federal Construction Contracts: An Overview and Analysis of Issues

Summary

A project labor agreement (PLA) is an agreement between a construction owner or main contractor and the union(s) representing the craft workers for a particular project that establishes the terms and conditions of work that will apply for the particular project. The agreement may also specify a source (such as a union hiring hall) to supply the craft workers for the project. The agreement is typically binding on all contractors and subcontractors working on the project, and specifies wage rates and benefits, discusses procedures for resolving labor and jurisdictional disputes, and includes a no strike clause.

The use of PLAs has received more congressional attention partly as a result of the issuance of a June 5, 1997, memorandum by the Clinton administration encouraging their use. And, a 1993 Supreme Court ruling in the Boston Harbor case, which may open the way for more use of public funds in construction projects using PLAs, has also focused more attention on the use of PLAs. Proponents of PLAs argue that they ensure a reliable, efficient labor source and help keep costs down. Opponents of PLAs argue that they inflate project costs and decrease competition. There are little independent data available to sort out these conflicting assertions and authoritatively determine whether PLAs contribute to higher or lower project costs.

In April 1997, the Clinton Administration circulated a draft executive order that would have encouraged federal agencies to require project labor agreements for federally funded construction projects. The draft executive order was the subject of significant controversy. Some members of Congress as well as some contractor associations strongly opposed it. Following negotiations, the Clinton Administration agreed to drop plans to issue an executive order on project labor agreements, instead agreeing to issue a memorandum on the subject. On June 5, 1997, a memorandum was issued to federal agencies allowing the use of project labor agreements on large and significant construction projects (valued at more than \$5 million). The issue resurfaced in April, 1998, when Vice President Gore made a public speech in which he mentioned a new directive by Rodney Slater, Secretary of the Department of Transportation, encouraging project labor agreements. Some members of Congress expressed concern about the directive and the project labor agreement issue came up in the course of consideration of the FY1999 DOT appropriations bill. The final spending bill did not include a PLA provision.

Legislation has been introduced in the 106th Congress (S. 1194/H.R. 2088) that would, if enacted, prohibit federal agencies from discriminating against potential bidders for federal contracts on the basis of whether they agree to adhere to a collective bargaining agreement as a condition of performing work under the contract.

Contents

Background	1
Characteristics of the Construction Industry	2
The Growth of the Nonunion Sector	2
Labor Law Exceptions in the Construction Industry	2
Recent History	3
The Bush Administration	3
The Clinton Administration	3
Debate Over PLA Provision in FY1999 Department of Transportation Appropriations Bill	4
Legislation in the 106 th Congress	5
Project Labor Agreements—Pro and Con	5
Conclusion	7

Project Labor Agreements in Federal Construction Contracts: An Overview and Analysis of Issues

Project labor agreements (PLAs) received heightened congressional scrutiny after the Clinton administration issued a draft executive order that would have encouraged their use. Controversy over the draft resulted in a compromise, with the Clinton administration ultimately agreeing to issue a memorandum (dated June 5, 1997) instead of an executive order on PLAs. Controversy over the issue resurfaced in April, 1998, after Vice President Gore told a union group that the Department of Transportation Secretary was "aggressively pursuing opportunities to use PLAs."¹ Construction unions and their supporters strongly support PLAs because they believe that PLAs help ensure access for union members to federal and federally funded construction projects. Non-union construction firms and their supporters believe that project labor agreements unfairly restrict their access to federal and federally funded construction projects.

Background

A project labor agreement (PLA) is an agreement between a construction owner or main contractor and the union(s) representing the craft workers for a particular project that establishes the terms and conditions of work that will apply for the particular project. It may also specify a source (such as a union hiring hall) to supply the craft workers for the project. PLAs are most often used on large construction projects, including federal and federally funded construction projects. The agreement is typically binding on all contractors and subcontractors working on the project, and specifies wage rates and benefits, discusses procedures for resolving labor and jurisdictional disputes, and includes a no strike clause. Most PLAs are used in the private sector; however, a Supreme Court ruling² upholding a PLA in the Boston Harbor cleanup may lead to the wider use of PLAs in the public sector.

¹ Daily Labor Report. April 23, 1998. p A-11.

² For a discussion of the Supreme Court ruling upholding the legality of a PLA in the Boston Harbor case see: U.S. Library of Congress. Congressional Research Service. *Project Labor Agreements Under Federal and New York Law*. American Law Division General Distribution Memorandum, by Vince Treacy. September 13, 1995.

Characteristics of the Construction Industry

The Growth of the Nonunion Sector. The changed union-nonunion mix in the industry is a significant factor underlying the debate on PLAs. The construction industry experienced a significant decline in unionization beginning in the 1950s which accelerated in the 1970s.³ U.S. Bureau of Labor Statistics' data indicate that in 1973, 40% of employed construction workers were members of unions, but by 1998, that figure had dropped to 17.8%.⁴ Nonunion construction firms have become more numerous over recent decades. The majority of U.S. construction is now performed by nonunion contractors. Additionally, it is becoming increasingly common for union workers to accept nonunion work, in addition to union work, as a rising share of available work is nonunion. Nonunion firms argue that PLAs unfairly limit their access to federal and federally funded construction projects. The increasingly significant nonunion sector of the industry would like to ensure its access to all construction projects, including federal construction projects, while unions would like to ensure that their members have access to jobs involving federal contracts.

Labor Law Exceptions in the Construction Industry. PLAs and prehire agreements were originally permitted in the construction industry because the short-term nature of most construction jobs made the usual method of union organizing (which includes a union election and can take considerable time) impractical and, because contractors wanted predictable labor costs and a steady supply of skilled workers. As a consequence, Congress provided exceptions to the National Labor Relations Act (NLRA) for the construction industry. Section 8(f) provides an exception to usual union representation requirements, by permitting employers and labor unions that represent employees in the construction industry to sign so-called prehire agreements setting wages and working conditions before workers have been hired. In essence, Section 8(f) permits a short-cut to union representation. In addition, Section 8(e) of the NLRA permits unions and employers in the construction industry to agree to limit contract or subcontract work at a construction site to union workers. In other words, Section 8(e) permits the prehire agreement signed by a union and the general contractor for a particular job to require that all other contractors/subcontractors performing work on that particular job agree to be bound by the terms of that prehire agreement. In essence, section 8(e) permits PLAs.⁵

³ This growth in the nonunion sector of the construction industry has been attributed to a variety of factors including: the long term decline in the rate of unionization across all industries; the relative ease with which new firms can enter the construction industry; the rise in building activity in the South, traditionally a region with low unionization; and an increase in the number of firms seeking out general contractors who solicit only nonunion bids.

⁴ Construction Labor Research Council. Union/Nonunion Employment in Construction, July, 1991. Data were provided by the U.S. Department of Labor (DOL) based on the Current Population Survey.

⁵ Thus, Section 8(f) explicitly permits employers in the construction industry, but no other employers, to enter into prehire agreements with labor unions. Prehire agreements may legally provide for (1) recognition of the union before its majority status has been established, (2) mandatory payment of union dues or equivalent by all employees within seven days of hire, (3) use of union hiring halls to refer all workers to the project, and (4) recognition of union training and seniority requirements. Section 8(e) permits an agreement that no other contractors may perform work on the
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PLAs restricting work on a particular job to union contractors/subcontractors and pre-hire agreements with unions are not uncommon practices in the construction industry. However, because of the growth in nonunion construction, these practices have come under increased scrutiny. Moreover some union-only contractors are repudiating their pre-hire agreements and operating both union and nonunion operations (dual shop or double-breasting). Increasingly, nonunion contractors are objecting to restrictive project agreements.

Recent History

The Bush Administration

On October 23, 1992, President Bush issued Executive Order 12818 requiring federal and federally assisted construction projects to bar union-only project agreements, subcontracting restrictions and broad union security clauses. The Associated General Contractors of America summarized the requirements of the executive order as follows:

The order directs that contracting agencies 'ensure' before the award of any construction contract that neither the agency, nor any construction manager or contractor in bid specifications, project agreements, or other 'controlling documents,' requires bidders, offerers, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the project or related projects...⁶

The Clinton Administration

On February 1, 1993, President Clinton issued Executive Order 12836 rescinding President Bush's executive order barring union-only project agreements.

In April 1997, the Clinton Administration circulated a draft executive order that would have encouraged federal agencies to require PLAs for federally funded construction projects. The draft executive order was the subject of significant controversy. Some members of Congress as well as some contractor associations strongly opposed it, and Senate Republicans held up a confirmation vote on President Clinton's nominee for Labor Secretary, Alexis Herman, pending resolution of the controversy. Following negotiations, the Clinton Administration agreed to drop plans to issue an executive order on PLAs, instead agreeing to issue a memorandum on the

⁵(...continued)

site unless they sign the project labor agreement. Employees may petition the National Labor Relations Board to decertify the union or reject the union dues requirement after they are hired. U.S. Library of Congress. Congressional Research Service. *Project Labor Agreements Under Federal and New York Law*. American Law Division General Distribution Memorandum, by Vince Treacy. September 13, 1995.

⁶ The Associated General Contractors of America. *Collective Bargaining Bulletin #9-92*, November 5, 1992. p. 1-2.

subject. Senate Republicans then allowed a vote on Alexis Herman's nomination and she was confirmed on April 30, 1997.

On June 5, 1997, President Clinton issued a memorandum to federal agencies allowing the use of PLAs on large and significant construction projects (valued at more than \$5 million).

The substance of the text in both the memorandum and the proposed executive order was similar, although not identical. A significant difference between the two documents is that the draft executive order would not have been limited to large projects, whereas the memorandum only applies to construction projects valued at more than \$5 million. In addition, an executive order must be published in the Federal Register and garners more visibility than a memorandum. However, both presidential executive orders and memoranda: "...if used under a valid claim of authority and published, have the force and effect of law and courts are required to take judicial notice of their existence."⁷ The two instruments appear to differ more in form than in substance. The White House clerk's office has stated that both forms of presidential directive have authority under Article II of the Constitution. In addition, the clerk's office has stated that both executive orders and memoranda can continue in force after the expiration of a President's term in office, so long as they are not superseded by law or actions of subsequent Presidents.⁸

Debate Over PLA Provision in FY1999 Department of Transportation Appropriations Bill

On April 22, 1998, Vice President Gore spoke to delegates of the AFL-CIO's Building and Construction Trades Department. In his speech, Gore stated that Rodney Slater, the Secretary of the Department of Transportation (DOT), was directing DOT agencies to "aggressively pursue opportunities to use PLAs" on projects receiving federal funds. The Secretary's memorandum directing DOT agencies to "seriously consider" the use of PLAs was issued on April 22, 1998. Some members of Congress expressed concern about this directive, and partly as a consequence, PLAs became an issue in the FY1999 DOT appropriations bill.

The Senate Appropriations Committee adopted the FY1999 Department of Transportation appropriations bill on July 14, 1998, including a controversial provision added in the Subcommittee on Transportation, which would have prohibited the use of any appropriated funds for PLAs except where they are specifically provided for by law. The House did not include a comparable provision in its version of the DOT appropriations bill. During full Senate consideration of the FY1999 spending bill a compromise was reached to include language which stated that no appropriated funds could be used:

⁷ U.S. Library of Congress. Congressional Research Service. A Comparison of Presidential Memoranda and Executive Orders. General Distribution Memo, by John Contrubis. May 6, 1997. P. 2. And Executive Orders and Proclamations. CRS Report 95-772 A, by John Contrubis. July 3, 1995. p. 2.

⁸ Daily Labor Report. May 1, 1997. p. AA-2.

to compel, direct, or require agencies of the [Transportation Department] in their own construction contract awards, or receipts of financial assistance for construction projects under this act, to use a project labor agreement on any project, nor to preclude use of project labor agreement in such circumstances.

The Senate passed the FY1999 appropriations bill on July 24, 1998 (S. 2307). The House Appropriations Committee approved the FY1999 DOT appropriations bill without a PLA provision. The final spending bill worked out by the conferees did not include a PLA provision; it was passed by the House on October 19th, and by the Senate on October 21st (P.L. 105-277).

On March 19, 1999, the Department of Transportation issued guidelines to Heads of Operating Administrations on the use of PLAs in large and significant federal and federally assisted construction projects. Large and significant projects are directly funded DOT projects of more than \$5 million; the appropriate dollar threshold of DOT-assisted projects is deferred to the discretion of recipients. These guidelines clarify that PLAs may be considered, but need not be used, or even be considered, on directly funded DOT projects, and on DOT-assisted projects. If a DOT contracting officer does require a PLA on a directly funded DOT project, then information on the PLA requirement must be included in the solicitation and resulting contract.

Legislation in the 106th Congress

On June 6, 1999, the Open Competition and Fairness Act of 1999 was introduced in both the Senate and the House. S. 1194 was introduced by Senator Hutchinson and was referred to the Committee on Health, Education, Labor and Pensions. H.R. 2088 was introduced by Representative Hayworth and was referred to the Committee on Education and the Workforce and the Subcommittee on Employer-Employee Relations. If enacted, these bills would prohibit federal agencies from discriminating against potential bidders for federal contracts on the basis of whether they agree to adhere to a collective bargaining agreement as a condition of performing work under the contract.

Project Labor Agreements—Pro and Con

Several witnesses testified, both pro and con, on the draft executive order at hearings held on April 30, 1997, by the Senate Committee on Labor and Human Resources.

John Koskinen of the Office of Management and Budget testified on behalf of the Clinton Administration. He testified that the proposed executive order would not require federal agencies to grant PLAs but would provide agencies with objective, published criteria to use in making decisions about PLAs, so that such decisions would be more systematic and accountable. Koskinen also testified that the proposed executive order would permit any firm to bid on federal construction contracts, whether its employees were represented by a union or not. It would not require the workers employed on the project to join a union. Furthermore, he contended that PLAs can save the government money:

Lower wages and benefits for workers in the short-term do not benefit the Government, if a project ends up costing more because of factors that project labor agreements are designed to address: like work stoppages, labor shortages, unexpected increases in labor costs, accidents, low productivity, or poor quality work. These considerations will have to be weighed by federal agencies on a project-by-project basis, just as the proposed Executive Order contemplates.⁹

John Dunlop, of Harvard University, testified that there are many legitimate reasons to choose a project labor agreement on large multi-year projects. For example, these agreements can require uniform collective bargaining terms for the project. In contrast, if many differing collective bargaining contracts are in force, their provisions applied separately could create inefficiencies. In addition, he stated that PLAs help ensure a project can proceed to its completion by prohibiting work stoppages.¹⁰

Dunlop also testified that many nonunion builders are, in fact, awarded work under PLAs:

Under other project agreements, contractors without prior collective bargaining relationships have in fact bid for work and have in fact been awarded contracts and have in fact performed the work under the terms of the project agreements¹¹

Opponents of PLAs have argued that such agreements restrict competition and consequently result in higher costs.¹² In addition, these agreements effectively shut-out nonunion contractors from these projects, according to opponents. In testimony before the Senate Labor Committee on April 30, 1997, Bruce Josten of the U.S. Chamber of Commerce argued:

the executive order will interfere with the practice of full and open competition for the \$60 billion spent annually by the federal government on construction. By requiring PLAs [project labor agreements], the number of companies that will be eligible for award of these contracts will be significantly reduced. Granted, any company can bid on a proposal, but unless they can meet the requirements of the PLA, they will not win the award.¹³

⁹ Testimony of John Koskinen, Deputy Director for Management, Office of Management and Budget before the U.S. Congress. Senate Committee on Labor and Human Resources. Hearing on the Proposed Executive Order on Project Labor Agreements. 105th Congress, 1st session. April 30, 1997. p. 7. (Hereinafter cited as Hearing on proposed PLA E.O.)

¹⁰ Hearing on proposed PLA E.O., p. 8-9.

¹¹ Hearing on proposed PLA E.O., p. 14.

¹² Comments on the Boston Harbor case by Joe Ivey, former president of the Associated Builders and Contractors. Daily Labor Report, March 9, 1993. p. AA-3.

¹³ Hearing on proposed PLA E.O., p. 2.

Open shop¹⁴ contractors may be shut-out of bidding because meeting the terms of the project labor agreement is difficult given their current work rules and employee benefits, according to opponents of these agreements:

Mandatory PLAs limit competition. Open shop contractors are dissuaded from bidding because working under a PLA disrupts the open shop contractor's entire way of doing business. The contractor cannot use its own employees but must hire through the union hiring hall and the contractor must make contributions to union pension and health plans as opposed to the contractor's own benefit plans. The practical effect of a mandatory PLA is to make a project union only.¹⁵

In addition, open shop contractors will have to agree to the hiring procedures spelled out in the agreement that, they argue, will have the effect of excluding their regular workers. Tom Rolleri, testifying on behalf of the Associated General Contractors of America, noted:

if an open shop contractor decided to bid on a public owner PLA (Project Labor Agreement), 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.¹⁶

Conclusion

The use of PLAs has received more congressional attention partly as a result of the issuance of a June 5, 1997, memorandum by the Clinton administration encouraging their use. A 1993 Supreme Court ruling in the Boston Harbor case, which may open the way for more use of public funds in construction projects using PLAs, has also focused more attention on the use of PLAs. And, the heightened attention is due to the differing conclusions on the merits of PLAs reached by their proponents and opponents. Proponents argue that PLAs ensure a reliable, efficient labor source and help keep costs down. Opponents of PLAs argue that they inflate project costs and decrease competition. There are little independent data available to sort out these conflicting assertions and authoritatively determine whether PLAs contribute to higher or lower project costs. Controversy over this issue is at the heart of the policy debate surrounding the use of PLAs on federal and federally funded construction projects.

¹⁴ Open shop generally refers to the nonunion segment of the construction industry although open shop can refer to a situation: "where the general contractor is nonunion but some subcontractors operate union, or vice-versa." Northrup, Herbert. *Open Shop Construction Revisited*. Philadelphia, PA, University of Pennsylvania, Wharton School, Industrial Research Unit, 1987. p. 3.

¹⁵ Alario, Linda. *Project Agreements and Government Procurement*. *Journal of Labor Research*, V. XVIII, No. 1, Winter 1997. p. 17-18.

¹⁶ Hearing on proposed PLA E.O., p. 3.

There is no central database or national tracking of federally funded construction projects that include PLAs. Furthermore, comprehensive data on local, state and private sector PLAs are also unavailable. In order to have more information, the Subcommittee on Oversight and Investigations, in a July 9, 1997 letter, requested that agencies notify the Subcommittee of planned PLA use. Presently, much of the information available on PLA use is anecdotal.

In a recent study, the General Accounting Office (GAO) surveyed the literature on PLAs, including a review of available information from 13 federal agencies on their construction projects covered by PLAs. The GAO, among other things, was trying to assess the extent of PLAs, as well as to evaluate the feasibility of comparing the performance of federal contracts with and without PLAs. Because of the difficulty of finding comparable (in terms of cost, size, scope, and timing) PLA and non-PLA projects, the GAO concluded that it would be difficult to compare the performance of such projects. Furthermore, the GAO concluded that:

even if similar PLA and non-PLA projects were found, it would be difficult to demonstrate conclusively that any performance differences were due to the use of the PLA versus other factors.¹⁷

¹⁷ U.S. General Accounting Office. *Project Labor Agreements: The Extent of Their Use and Related Information*. GAO/GGD 98-82, May, 1998. Washington. p. 12.