



JIM JEFFORDS



UNITED STATES SENATOR • VERMONT

**COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE**

**HEARING ON THE PROPOSED EXECUTIVE ORDER ON
PROJECT LABOR AGREEMENTS**

APRIL 30, 1997

- 1. Press release announcing the hearing**
- 2. Witness list**
- 3. Testimony of witnesses received by April 29, 1997**

Press Contact: Joe Karpinski - (202) 224-6770

JIM JEFFORDS



UNITED STATES SENATOR • VERMONT

For Immediate Release
April 23, 1997

Contact: Joe Karpinski
(202) 224-6770

ADMINISTRATION'S PROPOSED LABOR EXECUTIVE ORDER TO BE SUBJECT OF LABOR COMMITTEE HEARING

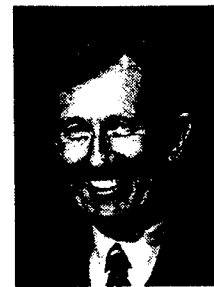
WASHINGTON, D.C. -- The Administration's proposed Executive Order on project labor agreements will be the subject of a hearing by the Senate Labor and Human Resources Committee. The hearing will be held on Wednesday, April 30, 1997 at 9:30 a.m. in SD-430. The hearing will also be broadcast on Senate channel 12.

Entitled "Equal Opportunity in Federal Construction", the hearing will examine the proposed Executive Order and its impact. For the hearing, the Committee will invite witnesses from the Administration, organized labor and the construction industry. Sen. Tim Hutchinson (R-AR), author of S. 606 "The Open Competition Act of 1997", will also testify.

On April 16, 1997 all ten Republicans on the Labor Committee signed a letter to President Clinton, initiated by Chairman Jeffords (R-VT), expressing their "grave concerns" about the draft Executive Order. Among the issues to be explored by the Committee, will be the impact of the exclusion of non-union workers from \$60 billion in federal construction contracts as a result of the Clinton Administration proposal.

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JIM JEFFORDS



UNITED STATES SENATOR • VERMONT

For Immediate Release
April 29, 1997

Contact: Joe Karpinski
(202) 224-6770

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

HEARING ON THE PROPOSED EXECUTIVE ORDER ON PROJECT LABOR AGREEMENTS APRIL 30, 1997

WITNESS LIST

Panel One

Senator Tim Hutchinson (R-AR)

Panel Two

The Honorable John Koskinen, Deputy Director for Management, Office of
Management and Budget, Washington, D.C.

Panel Three

Mr. Bruce Josten, Senior Vice President for Membership Policy, U.S. Chamber
of Commerce, Washington, D.C.

The Honorable John T. Dunlop, Lamont University Professor, Emeritus, Harvard
University, Cambridge, Massachusetts

Panel Four

Mr. Robert A. Georgine, President, Building and Construction Trades
Department, AFL-CIO, Washington, D.C.

Mr. Tom Rolleri, on behalf of the Associated General Contractors, Labor
Relations Manager for Granite Construction Company, Watsonville, CA.

Mr. Peter G. Vigue, on behalf of the Associated Builders and Contractors,
President, Cianbro Corporation, Pittsfield, Maine

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STATEMENT OF
SENATOR JAMES M. JEFFORDS

FAIRNESS IN FEDERAL CONTRACTING
April 17, 1997

I rise today to address a very real threat to the economic well being of our nation. I speak, of course, of the anticipated issuance by Pres. Clinton, of an Executive Order that would likely lead to the exclusion of nonunion contractors from federal construction. I also wish to express my strong support for S. 606, introduced today by Senator Hutchinson, which I have cosponsored.

The strength and prosperity of this great nation are in large part a result of the industrial peace between labor and management, that has been the norm since the passage, in 1935, of the Wagner Act. That Act, and its progeny, form the keystone of our national labor relations policy. The bedrock belief supporting this policy has been to recognize that the parties--workers, employers, and unions--are in the best position to resolve their differences and to set and to achieve their goals. To this end, Congress has maintained a basic hands-off policy, preferring to set only the broadest boundaries, beyond which the conduct of the parties must not stray. I have to say that our Congressional predecessors legislated wisely, for this policy of federal government neutrality has allowed the United States to become the envy of the industrialized world.

This is not to say that there have not be bumps in the road to labor-management harmony. Congress has amended the federal labor laws, and also has considered, and rejected, amendments to the federal labor laws. Attempts by congress to smooth the bumps, however, have been subjected to one overriding process--any changes to the laws that nurture the balance between the parties in the industrial arena will have been forged in the heat of legislative debate and advocacy.

Today, sadly, the Clinton administration considers an action that would displace federal neutrality, thereby renouncing over 60 years of national labor policy, and ignoring 60 years of fine tuning of that policy by Congress and the courts. Simply put, the Executive Order being considered by the Clinton administration would result in most, if not all, federal construction being performed by union shop contractors. This would give a whole new meaning to the term "top down organizing." It would represent union organizing from the very top--the Presidency of the United States.

Further, this Clinton initiative would occur without benefit of the legislative process, the process which in my opinion is mandated by the Constitution of the United States. And I find it even more disheartening that this end run by the Administration, of the policy setting role of the Congress, seems less designed to serve the public interest than to advance political interests.

Now, I understand that the Administration will probably argue that the proposed order does not mandate the adoption of a project labor agreement, and therefore does not inescapably lead to union only contractors on federal construction projects. The Administration would go on to argue that since the order requires the federal agencies to make a finding that use of a project labor agreement would advance the government's procurement interest, only where that finding

is made would union agreements be required. This argument, however, is suspect. The introductory paragraphs of the draft order clearly indicate the President's preferences as to use of a project labor agreement. Since the boss thinks it is such a good idea, it is not likely that persons that the President selected to head the executive branch agencies would think otherwise.

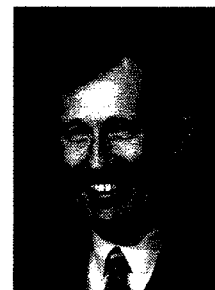
There is one other factor that is very important, and must be noted. Employment in the construction industry, particularly where union agreements are in place, is done through hiring hall referrals. If a nonunion contractor is forced, because of a project labor agreement, to become a party to a union agreement, it is not hard to picture what would happen to that contractor's employees. They would be at the back of the line when it comes to hiring hall referrals. This is despite the fact that the overwhelming majority of construction workers have not chosen to belong to a union.

I, and my Republican colleagues on the Committee on Labor and Human Resources, have written to the President, asking him not to issue this or any similar Executive Order. We noted that if the proposed order were adopted, it would undermine the benefits derived from a nondiscriminatory competitive bidding process, likely resulting in substantially higher federal construction costs to the American taxpayer. We further pointed out that, if adopted, the order would cause harm to the important principle of employee freedom of choice to select or reject representation by a union.

Finally, I congratulate Senator Hutchinson on introducing S. 606, and offer my full support in gaining its passage. The bill would prevent a federal agency from requiring a bidder on a federal contract to be a union contractor. Frankly, it is unfortunate that we need to legislate open competition, and outlaw this type of anti-competitive restriction, in the federal procurement process. The Clinton initiative, however, demonstrates the need for S. 606. I further note, that no matter what one thinks of any specific provision of S. 606, my colleagues, from both sides of the aisle, must be comforted to know, that before any changes are made by S. 606 to federal labor policy, those proposals will be subjected to the debate, opinion gathering, and fact finding, that is the hallmark of the legislative process. And whatever comes out of that process will be better, for this Nation, because of that process.

James M. Jeffords

JIM JEFFORDS



UNITED STATES SENATOR • VERMONT

For Immediate Release
April 30, 1997

Contact: Joe Karpinski
(202) 224-6770

**Opening Statement
Senator James M. Jeffords
Hearing on Equal Opportunity in Federal Construction**

Today the committee will hear testimony from a number of distinguished witnesses on the Clinton Administration's proposed executive order to encourage if not require the use of project labor agreements on federal construction.

A project labor agreement, or PLA, is an agreement between a construction owner or contractor and the various unions that would do the work.

Under the proposed executive order, a PLA would be negotiated between the government and the unions before the work was put out to bid, locking in work rules, wage rates, and so forth. Of course any such agreement would have to be at least what is already required under the Davis-Bacon Act, and presumably more.

Since the passage of the Wagner Act over 60 years ago, the federal government has maintained a position of neutrality in labor management relations. That has been a wise course, in my view.

The architecture of our labor laws is designed to encourage private individuals to decide, without government interference, issues of representation and collective bargaining.

Four out of five construction workers have chosen to work without union representation. Yet the clear implication of this proposed executive order is that these workers may well be unsafe, unskilled or untrustworthy. I think that's ludicrous. And the clear result is that they could well have a union effectively imposed upon them.

This executive order is a solution in search of a problem. It may answer a perceived political imperative of the Administration. But it solves no real problem in federal contracting for construction.

(More)

Perhaps the witnesses will correct me, but I am unaware of problems in economy or efficiency today due to the absence of an executive order governing project labor agreements.

To the contrary, I have spent a good deal of time trying to help Vermont contractors deal with the federal procurement machinery.

I can attest that it is quite substantial and quite thorough. I am surprised if federal procurement officers today are unable to ensure that a contractor deliver a project on time, on budget and to specifications in the absence of a project labor agreement.

If anything, I think we need to streamline federal procurement efforts. That has been the direction of Congress over the past few years, and I thought that was the point of the Administration's effort, led by Vice President Gore, to reinvent government.

I skimmed the Gore proposals for procurement reform contained in the National Performance Review, but found no mention of anything along the lines of the executive order under consideration. To the contrary, it complained that our procurement system "relies on rigid rules and procedures, extensive paperwork, detailed design specifications, and multiple inspections and audits. It is an extraordinary example of bureaucratic red tape." It made recommendations to shift away from rigid rules, to end unnecessary regulatory requirements and to foster competitiveness.

The proposed executive order would fail on all three counts. The federal government would write the wages and work rules of the local building trades into its bidding specifications. It would add yet another unnecessary step to the bidding process, and it would diminish competitiveness by narrowing the scope of the competition and discouraging bidders..

Project labor agreements will not only reduce competition, they will put the federal government in a position to which it is ill-suited. I am not a government-basher. But with all due respect, if I had to choose between Mr. Koskinen and Mr. Georgine to bargain a project labor agreement for me, I would pick Mr. Georgine every time. He and his members do it for a living. Most of the rest of us are amateurs. I do not see how federal procurement officers will do a particularly good job as the collective bargaining representative for the U.S. taxpayers.

(More)

Even union contractors, which stand to gain from the executive order, object to the government's insertion of itself into the collective bargaining process.

Quite understandably, they do not want the federal government to second guess the agreements they have reached with their local building trades. Project labor agreements negotiated by the federal government would needlessly disrupt their collective bargaining relationships.

Federal procurement officers could also be exposed to enormous political pressure. If a project is to be built in a pivotal electoral state during an election campaign, this executive order would almost invite abuse.

This is especially true if a candidate with support from within the Administration were wooing organized labor. Before anyone is too hasty to deny this could happen, I'd suggest this executive order itself may be a preview of that dynamic, three and a half years in advance of the next Presidential election. What will things be like three and a half weeks before the California primary?

We can argue all morning -- and probably will -- over whether a project agreement will or will not result in greater economy or efficiency.

Ultimately, it is all theory. We have a mechanism for testing this theory though -- it's the bidding process. Why not let the non-union contractor put together his best proposal and bid against the union contractor's best package? That is the best way to find out what is in the interests of the taxpayers, and no one has made a compelling case that we need to, or should, prejudge the outcome of that competition in the marketplace.

I will listen carefully to our witnesses to hear if anyone can, and appreciate their testimony.

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TIM HUTCHINSON

UNITED STATES SENATOR • ARKANSAS

Press Release

April 16, 1997

Contact: Sue Hensley (202) 224-2358

Senator Tim Hutchinson Responds To Clinton Executive Order By Reintroducing Open Competition Act

In response to President Clinton's executive order aimed at creating labor union-only project agreements, Senator Tim Hutchinson will introduce the Open Competition Act of 1997 in the Senate tomorrow. The bill would prohibit discrimination in contracting on federally-funded projects on the basis of certain labor policies of potential contractors.

"The President has failed to achieve his goals by legislative means. Now he's governing by executive order. I am outraged that the President has decided to move forward on this executive order. That's why I'm introducing the Open Competition Act," said Hutchinson. "I believe we should award government contracts on the basis of sound, credible criteria such as quality of work, experience and cost — not the bidders' collective bargaining status."

Hutchinson's bill would prohibit union-only requirements on federal construction projects and protect workers from being forced to join a union in order to work on federal projects.

"President Clinton's proposed executive order is anti-competitive, protectionist and defies the basic American principles of open competition and equal opportunity based on merit. My bill ensures that all American taxpayers have the opportunity to compete fairly on any project funded by the federal government," said Hutchinson.

Hutchinson says his legislation would also ensure that the American taxpayer will pay the market rate for public construction. A 1991 General Accounting Office study shows that union-only project agreements can increase the cost of public construction by as much as 20 percent.

For more information, please contact Sue Hensley in Senator Hutchinson's Washington office at (202) 224-2358.

S.606 As introduced in the Senate, April 17, 1997

105th CONGRESS

1st Session

S. 606

To prohibit discrimination in contracting on federally funded projects on the basis of certain labor policies of potential contractors.

IN THE SENATE OF THE UNITED STATES

April 17, 1997

Mr. Hutchinson (for himself, Mr. Lott, Mr. Nickles, Mr. Mack, Mr. Coverdell, Mr. Thurmond, Mr. Jeffords, Mr. Coats, Mr. Gregg, Mr. Frist, Mr. Enzi, Ms. Collins, Mr. Warner, Mr. McConnell, Mr. Allard, Mr. Brownback, Mr. Sessions, Mr. Hagel, Mr. Kyl, Mr. Roberts, and Mr. Craig) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

A BILL

To prohibit discrimination in contracting on federally funded projects on the basis of certain labor policies of potential contractors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Open Competition Act of 1997".

SEC. 2. PROHIBITION REGARDING CONSIDERATION OF CERTAIN LABOR RELATIONS POLICIES OF OFFERORS ON FEDERALLY FUNDED CONTRACTS.

Section 8(e) of the National Labor Relations Act (29 U.S.C. 158(e)) is amended by adding at the end the following: "Notwithstanding any other provision of this Act, no person may be discriminated against when bidding on a prime contract, funded in whole or in part with funds provided by the Federal Government, where such discrimination is based in whole or in part on requirement that such person enter into or adhere to a collective bargaining agreement or any similar agreement as a condition of performing work under the contract.".

SEC. 3. CONSTRUCTION.

The amendment made by section 2 shall not be construed--

- (1) to apply to subcontractors; or
- (2)(A) to prohibit a contractor from voluntarily entering into a lawful agreement with a labor organization; or
- (B) to discourage contractors who have entered into such an agreement from bidding on Federal contracts.

SEC. 4. APPLICATION.

The amendment made by section 2 shall apply to contracts made directly with any agency of the Federal Government and to contracts made with any entity that is managing or operating a facility owned or controlled by the Federal Government on behalf of the Federal Government.

JAMES M. JEFFORDS, VERMONT, CHAIRMAN

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MICK LITTLEFIELD, MINORITY STAFF DIRECTOR AND CHIEF COUNSEL

<http://www.senate.gov/~labor/>

United States Senate

COMMITTEE ON LABOR AND
HUMAN RESOURCES

WASHINGTON, DC 20510-6300

April 16, 1997

The President
The White House
Washington, DC 20500

Dear Mr. President:

It has been widely reported that the Administration is preparing to issue an Executive Order promoting the use of "project labor agreements" on federal and federally funded construction projects. We have reviewed a published draft of this proposed order and are writing to you to express our grave concerns regarding this initiative.

The proposal would require executive branch agencies, which are preparing to implement or fund a construction project, to determine whether the use of a project labor agreement on that project would "advance the government's procurement interest 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..." While these are laudable objectives, we note that federal law already requires that they be met.

Under the proposal, after an agency has made the requisite determination, the ensuing construction project could be performed only pursuant to an agreement with a union. We note that any agency would be hard pressed not to answer this determination in the positive, given that in the introduction of the proposal, you extol the use of project labor agreements. The bottom line of this proposed Executive Order is that most, if not all, federal construction would be performed by union shop contractors.

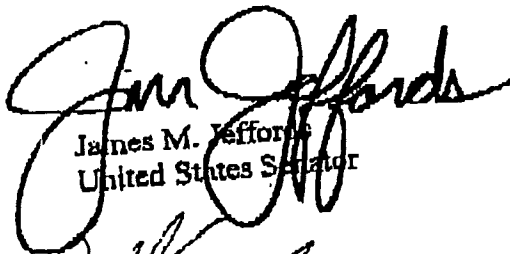
If the proposed order is issued, union status might well trump savings to the taxpayers. Even if a qualified non-union contractor might be able to bid the project at a substantial savings to the American taxpayer, a higher-priced union bidder would be awarded the contract under your proposal. Even though the overwhelming majority of construction workers have not chosen to belong to a union, they would be effectively barred from federal construction work. It comes as no surprise that the head of the AFL-CIO Building and Construction Trades Department is reported to have participated in the drafting of this proposal.

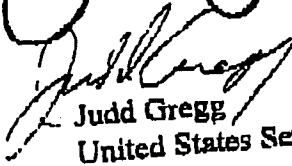
The President
April 16, 1997
Page 2

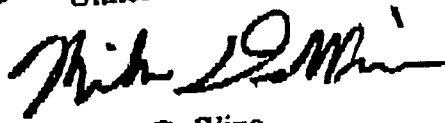
We believe that this proposed order threatens to undermine the benefits derived from a nondiscriminatory competitive bidding process, likely resulting in substantially higher federal construction costs to the American taxpayer. Further, the order would reverse the over sixty years of neutrality in matters of labor-management relations by the federal government. It also would injure an overarching principle of our nation's labor relations policy, that of employee freedom of choice to select or reject representation by a union.

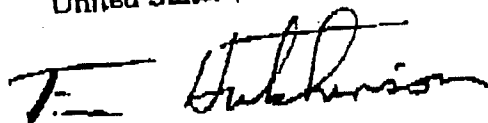
We urge you in the strongest terms to reconsider this initiative, and not promulgate this or any similar Executive Order giving greater encouragement to project labor agreements for federal and federally assisted construction.

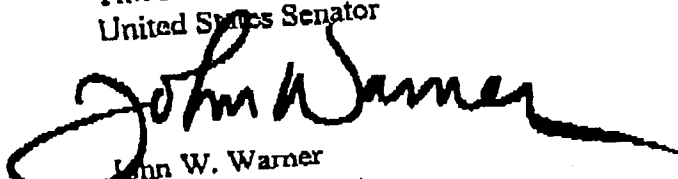
Sincerely,


James M. Jeffords
United States Senator

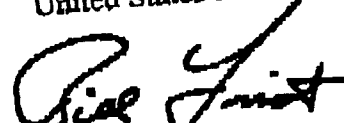

Judd Gregg
United States Senator



Mike DeWine
United States Senator


Tim Hutchinson
United States Senator

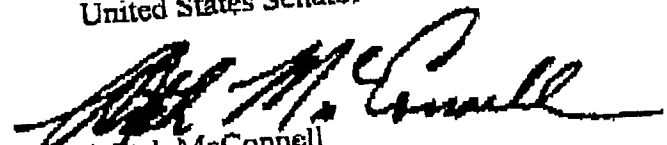

John W. Warner
United States Senator


Dan Coats
United States Senator


Bill Frist
United States Senator


Michael B. Enzi
United States Senator


Susan M. Collins
United States Senator


Mitch McConnell
United States Senator

U. S. S E N A T E



Republican Policy Committee

Larry E. Craig, Chairman Jade West, Staff Director 347 Russell Senate Office Building (202)224-2946 <http://www.senate.gov/~rpc/>

April 11, 1997

It's Political Pay-Back Time At 1600 Pennsylvania Ave.

Clinton Shows Big Labor The Money

"If properly implemented, these initiatives [i.e., Clinton's forthcoming regulations and executive order] will affect the expenditure of hundreds of billions of dollars every year. In any given year federal contracts total as much as \$200 billion..."

(John Sweeney, President AFL-CIO, March 25, 1997 memo to Union presidents)

For 'The Right Price' Clinton Scraps Competitive Bidding

Despite a 50-year old federal right to work law, President Clinton will soon take the unprecedented step of issuing an executive order that in practice would screen out non-union businesses from participating in federal construction projects.

In a direct assault against fair and open bidding for government construction contracts, the Clinton order will allow federal agencies to "require that every bidder on the project agree to negotiate or become a party to a project labor agreement [i.e., union-only agreement] for the project with one or more appropriate labor organizations." Under the Clinton order, even those businesses whose employees have voted overwhelming to reject union representation can be forced to work under a labor agreement as a precondition of even entering into a "competitive" bidding process.

Through his executive order, Clinton will bypass Congress and the regulatory process to establish as official policy the federally sanctioned discrimination against non-union businesses and their employees. By executive fiat, Mr. Clinton will have effectively barred 89 percent of the private sector workforce, who have chosen not to be represented by a union, from participation in federal construction projects. This is especially alarming since, according to the National Labor Relations Board, when workers are given the choice (in secret ballot elections), 54 percent of the time they vote against union representation in their workplace. The Clinton order will render employee choice and employees' votes meaningless.

The "Solicitor-in-Chief" Keeps His Promises

In describing the high stakes "quid pro quo" at work in the White House-Big Labor project, Tommy Preuett, an organizer with the Plumbers and Pipefitters Union, stated that support for Al Gore (in the 2000 presidential race) will depend "on what he can deliver between now and the end of the term." (*Houston Chronicle*, February 19, 1997)

Recent events have made it abundantly clear that Vice President Gore fully intends to "deliver" exactly what organized labor is demanding. On February 18, 1997, in Los Angeles, Mr. Gore delivered a speech to the AFL-CIO Executive Council in which he outlined two major new White House initiatives targeting federal construction projects and federal contracting procedures. These initiatives are just the first installment in a long series of repayments for labor's generous support in the 1996 election cycle.

Special Treatment For Special Interests

The next phase is the Clinton executive order (already mentioned) making special treatment for special interests official federal government procurement policy. Currently, the law provides that the federal government procurement process be open to all bidders without discrimination based on their status as union or non-union employers. The Clinton order will tilt the balance in the awarding of federal construction contracts clearly in favor of union shops. The executive order will mandate that:

- "Executive departments or agencies authorized to implement or fund a project for the construction of a facility to be owned or used by a federal department, agency or other entity shall determine on a project-by-project basis (a) whether a project labor agreement will advance the government's procurement interest 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."

Given the vast array of considerations (like the somewhat vague if not completely arbitrary "labor standards and other matters") that could be used to justify an agency's determination that a project labor agreement will advance government interests, i.e., option "(a)", the prospects of fair and equal treatment of non-union participants appear extremely remote. In any case, once an agency makes a determination that a project labor agreement would advance government interest, the door to the bidding process is completely shut to non-union businesses and their employees. Specifically, the executive order states that a federal department or agency:

- "may either (a) enter directly into such an agreement with one or more appropriate labor organizations, 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."

Staff Contact: Jack Clark, 224-2946.

TALKING POINTS on "Project Labor Agreement" Executive Order

- This executive order will, in practice, create a union-only mandate for all federal construction projects.
- No single special interest should have an exclusive claim on government work.
- The federal government should be *maximizing competition* and *promoting participation* in the bidding process, not discriminating against 89 percent of the private American workforce who have chosen not to be represented by unions.

Summary

Vice-President Gore is expected to announce in a speech to the AFL-CIO Building and Construction Trade unions at 1:30 p.m. today, an executive order mandating "project labor agreements" (union-only agreements) on all federal construction projects. Although cleverly written to appear not to officially mandate the use of such an agreement, the practical effect of the executive order will be to mandate these agreements for all federal construction projects. The following are talking points on the executive order.

Payback: The First Installment

Vice President Gore delivered a speech to the AFL-CIO Executive Council on February 18, 1997, in Los Angeles where he outlined two major new initiatives from the Administration regarding federal construction projects and federal contracting. These initiatives are the beginning of the White House attempt to pay back the AFL-CIO for their support in the 1996 election cycle.

- Their first installment on the AFL-CIO debt comes in the form of an executive order. This executive order will "promote the use of project labor agreements" when they would "increase the government's procurement interest in economical, efficient, and timely high quality project performance."

Union-Only Federal Construction Projects

According to a draft, the executive order will mandate:

- "executive departments or agencies authorized to implement or fund a project for the construction of a facility to be owned by a federal department, agency or other entity SHALL determine on a project by project basis whether a project labor agreement will advance the government's procurement interest 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 . . ."

- Once arriving at that determination, if it is in the affirmative, the executive department or agency “may either (a) enter directly into such an agreement with one or more appropriate labor organizations, 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 labor organizations.”

What this means, if a project labor agreement (union-only agreement) would destabilize labor and management relations, and lessen compliance with legal requirements governing safety and health, lessen equal employment opportunity and weaken labor standards, then that particular agency is NOT forced to use a union-only agreement.

- The executive departments and agencies will have to prove that a project labor agreement would result in the above stated circumstance, otherwise the department or agency under this executive order must use a project labor agreement for the proposed federal construction. The result of this situation, set up by this executive order, will be to grant all federal construction projects to union-only shops.

Discrimination in Contracting

This White House executive order will directly attack the principle of open competition in federal contracting by, in effect, mandating the exclusion from the bidding process 89 percent of the private American workforce who have chosen not to be represented by unions.

- Instead of licensing the federal government to discriminate against all open shop companies which bid for federally funded construction projects, the federal government should be *maximizing competition* in contracting and *promoting participation* in the process.
- This executive order carves out a special interest set-aside for unions on federal construction projects.

Bad Policy for America

- Federal government procurement and grants must be open to all bidders without discrimination based upon their status as open or closed shop companies. It would be unconscionable to make it the policy of the federal government to provide to a special interest supporter of the White House, an exclusive claim on government work.
- It is the obligation of the federal government to award contracts through full, open, and competitive procedures to preserve the rights of taxpayers to have strong public accounting of the use of their tax dollars.

**OFFICE OF MANAGEMENT AND BUDGET
STATEMENT OF JOHN KOSKINEN
DEPUTY DIRECTOR FOR MANAGEMENT
BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE**

APRIL 30, 1997

Mr. Chairman and Members of the Committee:

I am pleased to testify today concerning the President's proposed Executive Order on the use of project labor agreements for federal construction projects.

Let me begin by noting that the President has not yet issued the proposed order. On April 8, 1997, the Office of Management and Budget (OMB) circulated a preliminary draft of the proposed order to federal departments and agencies for their review and comment. A revised draft is now being considered by the departments and agencies for additional comment, so that final drafting of the Executive Order has not been completed. Its terms remain subject to revision.

I do not think that it is appropriate for me to get into the intricacies of the Executive Branch's drafting process. But let me describe in general terms what the proposed Executive Order will not do. It will not require agencies to use project labor agreements. The agencies retain complete discretion. It will not suggest that project labor agreements be used where they would raise the cost of a construction project. The point of the Order is for agencies to consider whether project labor agreements promote economy and efficiency. The proposed Executive

Order will not change or extend the law regarding project labor agreements. It will not shut out non-union contractors from federal construction projects. Everyone is free to bid. Finally, notwithstanding much public comment to the contrary, the proposed Executive Order will not require workers on federal construction projects to join a union.

Let me briefly discuss project labor agreements in general. A project labor agreement (PLA) is a project-specific agreement, negotiated at the outset of a construction project, between the construction owner or contractor and all of the labor unions representing the crafts that are needed for the project. The agreement covers the wages, working conditions, work rules, and dispute-resolution procedures for the duration of the project. It may also specify a source of skilled labor for the project. Most important, a project labor agreement generally guarantees that the project will be built without strikes, lock-outs, or other disruptions, which might delay completion and increase costs.

Project labor agreements have proven valuable in both the public and the private sectors. They can help ensure that projects are completed on-time and on-budget--without accidents, delays, and unexpected costs. By fixing labor costs, specifying a source of skilled, well-trained workers, and eliminating the risk of work stoppages, project labor agreements support the success of a construction project.

In the private sector, project labor agreements have been used successfully in building such large facilities as the Trans-Alaska pipeline, Disney World, and the Saturn Corporation

automobile assembly plant. State and local governments have funded many construction projects--including bridges, office complexes, transit systems, and airports--that were built under project labor agreements. Perhaps the best-known recent example of a public project involving a project labor agreement is the massive sewage-treatment system for metropolitan Boston, ordered as part of the clean-up of Boston Harbor. I understand that the Boston Harbor project is on-schedule and under-budget.

The federal government has long used project labor agreements on large construction projects, like dams, defense installations, and atomic energy facilities. Today, project labor agreements are in effect--and working well--at several Department of Energy sites, including the Savannah River Site in South Carolina, the Nevada Test Site, the Hanford Site in Washington, the Oak Ridge Site in Tennessee, and the Rocky Flats Plant in Colorado.

In light of positive experience with project labor agreements on public projects, state governors in New Jersey, New York, Nevada, and Washington have issued executive orders authorizing their use for state-funded construction, when such agreements will promote efficient, timely, and safe construction of a project.

In contrast, the federal government has not had a clear, uniform policy addressing when project labor agreements may be used on federal construction projects. President Clinton's proposed Executive Order is intended to establish such a policy. Under the policy, the federal government will be able, in appropriate circumstances where efficiency and economy will be

served, to reap the same benefits that private firms and state and local governments have obtained from using project labor agreements.

The proposed Executive Order is a proper exercise of the executive function. The Federal Property Act--designed to achieve economy and efficiency in contracting--gives the President authority to prescribe policies and directives "as he shall deem necessary to effectuate" the Act. 40 U.S.C. §486(a). The federal courts have made clear that this statute gives the President broad discretion. Because they related to economy and efficiency in procurement, executive orders denying contracts to companies that violated federal wage and price guidelines, or that engaged in discrimination, have been upheld by the courts. The proposed Executive Order on project labor agreements clearly meets this test.

The proposed Executive Order will not mandate the use of project labor agreements. Instead, it would simply encourage federal departments and agencies to consider, on a case-by-case basis: (1) whether using a project labor agreement will promote the economical, efficient, timely and high quality performance of a federal construction project; and (2) whether laws applicable to the construction project preclude the use of a project labor agreement. Agencies would make these determinations according to objective, published criteria. This approach will promote more systematic decision-making by federal agencies and will facilitate oversight of their decisions.

But let me emphasize again: Federal agencies will retain discretion in each case to decide if

a project labor agreement should be used on a particular construction project. The proposed Executive Order will not require that a project labor agreement be used on any individual project, much less on every project. We have taken pains to make this clear in the Order

If a federal agency did choose to require a project labor agreement, no business would be excluded from bidding on the contract for the project. Any contractor could bid on--and win--a federal contract that required a project labor agreement, whether or not the contractor's employees were represented by a labor union. That same principle of open competition would protect subcontractors, as well. Again, we have taken pains to make this abundantly clear in the Order. Project labor agreements will be made available to all contractors and subcontractors wishing to compete for contracts and subcontracts on the project.

Subcontractors whose employees are not represented by a union nevertheless have bid successfully on construction projects covered by project labor agreements. For example, I am told that roughly one-half of the subcontractors on the Boston Harbor project and at the Energy Department's Savannah River site do not have employees who are regularly represented by a labor union.

Just as all bidders would be free to compete for contracts, so all qualified workers would be eligible for employment on projects covered by project labor agreements, whether or not they were members of a labor union. On this issue, too, the proposed Executive Order will be specific. Project labor agreements are to be made accessible to employees without discrimination on the basis of union membership or non-membership.

Certainly, it is true that some project labor agreements call for recruitment of some workers at union-administered hiring halls, a provision that helps ensure a reliable source of skilled, qualified workers. But under the National Labor Relations Act, union hiring halls must be open to all workers, union members and non-members alike. And under the same law, no worker can ever be compelled to join a union, or to pay fees for union activities that are unrelated to collective bargaining. In so-called "right-to-work" states, workers cannot be required to pay any union fees at all. All workers, of course, receive the benefits of any collective bargaining agreement that covers them, and would be governed by the agreement's no-strike and dispute-resolution procedures.

The proposed Executive Order is fully consistent with the National Labor Relations Act. In a 1993 case involving the Boston Harbor project, the Supreme Court itself has upheld a state-required project labor agreement, rejecting the claim that the National Labor Relations Act pre-empted the state's use of such an agreement. Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts, 507 U.S. 218 (1993). As the Supreme Court observed, "To the extent that a private purchaser may choose a contractor based upon the contractor's willingness to enter into a pre-hire agreement, a public entity as purchaser should be permitted to do the same." That principle supports the use of project labor agreements by federal, as well as by state, agencies. And, indeed, a federal appeals court has upheld the use of a project labor agreement at a Department of Energy facility. Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co., 966 F.2d 1513 (6th Cir. 1992).

In this important respect, the proposed Executive Order on project labor agreements is easily distinguishable from the President's earlier order addressing the use of striker replacements by federal contractors. And unlike the earlier order, the proposed order will not bar federal agencies from dealing with certain contractors. Instead, agencies are permitted to consider, case-by-case, whether a project labor agreement would promote efficiency and economy. As I have explained, all contractors will remain free to compete for contracts, including contracts that incorporate a project labor agreement requirement.

Apart from attacking the legality of the proposed Executive Order, some critics of the order suggest that project labor agreements will necessarily increase the cost of federal construction. This argument is premised on the notion that unions typically win higher wages and benefits for workers. Even accepting that premise, the fact remains that wage and benefit rates cannot be considered in isolation from the over-all cost of a project. Project labor agreements are intended to keep these costs down. 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.

I hope that I have been able to clarify what the Administration intends to do--and what it has been careful to avoid--in connection with the proposed Executive Order. The Order will

reaffirm that federal agencies may use a project labor agreement, when it serves the ends of economy and efficiency. State governments, local governments, and private firms all have found that project labor agreements, in the right circumstances, make good sense. The federal government should be able to follow their example. That is all that the proposed Executive Order is intended to permit.

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Statement of the U.S. Chamber of Commerce

**ON: THE DRAFT EXECUTIVE ORDER
ON PROJECT LABOR AGREEMENTS**

**TO: SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES**

DATE: APRIL 30, 1997

BY: R. BRUCE JOSTEN

The U.S. Chamber of Commerce is the world's largest business federation representing an underlying membership of more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 71 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- numbers more than 10,000 members. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 78 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. Currently, some 1,800 business people participate in this process.

STATEMENT
on
THE DRAFT EXECUTIVE ORDER ON
PROJECT LABOR AGREEMENTS
before the
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
by
R. Bruce Josten

April 30, 1997

Good morning, Mr. Chairman. I am R. Bruce Josten, Senior Vice President of the U.S. Chamber of Commerce, the world's largest business federation representing an underlying membership of more than three million businesses and organizations of every size, sector, and region. The U.S. Chamber of Commerce was founded in 1912 as President Taft urged that a national chamber of commerce be established to ensure business concerns were represented in Washington, D.C. Founded on the principles of our free enterprise system, the U.S. Chamber has been the definitive voice of a wide diversity of businesses for more than eight decades.

It is in this capacity that I come before you today -- to voice the deep concern and bitter disappointment of the business community at-large regarding the President's draft executive order that would virtually require project labor agreements (PLAs) to be utilized for all federal and federally funded construction projects. This draft executive order is a transparent overture to organized labor that will have a negative impact on the economy, business, millions of non-union employees, and taxpayers.

We strongly urge the President to reconsider issuing such an executive order and that the

Congress take action to ensure that it is not implemented. Our reasons for such action are compelling. First, 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, 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.

The Chamber continues to be an active and vocal leader of the small business community regarding the proposed rewrite of Part 15 of the Federal Procurement Regulations which, if implemented as previously published, will change the basic tenets of the procurement process. The requirement to use PLAs for federally funded construction contracts will result in further erosion of the competitive process and will almost guarantee a shut out of a number of large and small businesses that cannot compete in a PLA environment. Full and open competition for government contracts assures that competitive market forces are alive and that the taxpayer receives the biggest bang for the buck.

The suppressive effect of PLAs on the market will necessarily drive the price of such construction projects upward. In addition, because the PLAs essentially require these construction projects to be union projects, labor costs will also increase. Since there will be little real competitive bidding on these contracts, there will be no constraints on wage demands by the unions, making the cost of these projects rise again dramatically. Non-partisan General Accounting Office studies show "union-only" project agreements cause construction costs to increase 17 to 20 percent. In real numbers, the Employment Policy Foundation has estimated that the requirement that all federal construction be performed under PLAs would increase

project costs by as much as \$4.8 billion a year. Or, alternatively, there would have to be a 30 percent reduction in construction to accommodate the additional PLA costs. Now, this "gift" will result in suppressed market forces, higher construction costs, and higher wages.

While we understand that higher wages mean more dues to the unions, it also means an adverse impact on competition, the economy and the American public in general. Let's look at the American public first. As we speak, Congress is considering legislation to assist with the flood clean-up in North Dakota and other areas of the country. Additionally, President Clinton is proposing to increase the amount of funding that communities could use for the construction or rehabilitation of school buildings. Further, cities and states have joined with business to develop programs for moving welfare recipients off the government tab and into the workforce.

It is your responsibility as lawmakers to examine how the President's executive order will impact these pressing priorities of the American public. But clearly the executive order would raise the cost of clean-up projects and education construction. Consequently, the federal dollar will not go as far as it will currently to assist the flood victims and school children. Additionally, the higher construction wages that will result from the PLAs will effectively preclude the hiring of unskilled or lesser experienced welfare workers on these new projects. The biggest loser of all will be the American taxpayer.

Equally compelling is the fact that the executive order is a slap-in-the-face to 81.5 percent of American construction workers who have chosen, as is their right under federal law, not to belong to a union. These workers will be almost completely shut-out of government-funded construction work. They, too, will be victims of the President's executive order.

Most importantly, the executive order bypasses the lawmaking powers of the Congress --

the body constitutionally vested with the authority to pass laws on such a critical and wide-sweeping policy issue. Both the Competition in Contracting Act and the Federal Acquisition Reform Act indicate a firm Congressional commitment to full and open competition in federal procurement.

Since 1935, Congress has provided statutory guidance in the labor relations area. In 1995, the President attempted to circumvent the lawmaking powers of the Congress through an executive order barring government contracts to companies which hired long-term striker replacements for workers engaged in an economic strike. In a suit brought by the U.S. Chamber -- U.S. Chamber of Commerce v. Reich -- a federal appellate court struck down the executive order, declaring that the President cannot issue an executive order to override a law passed by Congress. By limiting government-funded construction to PLAs, the President is again disregarding and bypassing the lawmaking authority of Congress and interfering with the protections afforded by Congress in the federal procurement arena.

Existing federal labor laws are designed to minimize government's role in labor relations and the collective bargaining process. The executive order will virtually require unprecedented overbearing government involvement in collective bargaining in the construction industry. Unions will be dealing directly with government agencies on important contract matters such as wages, hours, employee benefits and working conditions. Thus, collective bargaining in this industry sector will be hampered by government interference to the detriment of labor relations generally.

We have seen no rational justification for the executive order. There is no hue and cry from taxpayers that such a step is needed. Its sole purpose is to give organized labor a monopoly

in a significant portion of an entire industry -- to the detriment of the American taxpayer. Most importantly, the executive order cuts against bipartisan efforts to further reduce the reach of the government.

Our mission at the U.S. Chamber of Commerce is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity and responsibility. A presidential executive order on project labor agreements for federally funded construction contracts would be contrary to our mission and the interests of business owners, employees and the American taxpayer.

The U.S. Chamber commends the committee's responsiveness on this critical subject, and we look forward to working with you on policies that truly enhance the U.S. economy and prepare us for the challenges of the 21st century.

**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

April 30, 1997



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 Roller, 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 projects, 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 Roller, 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, Roller 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." Roller went on to 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.

Roller 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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ASSOCIATED GENERAL CONTRACTORS OF AMERICA • 1957 E STREET, N.W., WASHINGTON, D.C. 20006





Statement of Associated Builders and Contractors

**Testimony of Peter G. Vigue
President
Cianbro Corporation**

**Before the
Senate Labor Committee**

Equal Opportunity in Federal Construction

April 30, 1997

Speaking for the Merit Shop

**1300 North Seventeenth Street
Rosslyn, Virginia 22209
(703) 812-2000**

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.