
# Statement of Associated Builders and Contractors

Testimony of Barbara Hoberock
President
hth companies, inc.

Before the
House Small Business Committee

Impact of Union-Only PLAs on Small Business Opportunities

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**Speaking for the Merit Shop**

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

The issue of equal opportunity and open and fair competition in federal contracting is a critical one. Government contracting 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 to avoid favoritism, fraud, or corruption in the procurement process. These interests are not served when the agency requires a union-only PLA, which discourages the vast majority of the industry (over 80 percent) from bidding, particularly small and minority- or women-owned businesses. Moreover, 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 ensure the contracts are openly bid and awarded to the lowest responsible bidder.

**Union-Only PLAs are Discriminatory**

Union-only PLAs have a discriminatory effect because their requirements state that as a condition of awarding the contract, the successful bidder must agree that it and 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. These requirements force contractors to operate like union firms and disrupt the open shop contractors' entire way of doing business, which strongly discourages them from bidding on the project. Since less than 20 percent of the nation's construction industry is unionized, union-only PLAs discriminate against the vast majority of companies and their 8 out of 10 workers who choose not to join a union, and whose hard-earned tax dollars go toward funding these projects.

Open shop workers are adversely affected by union-only PLAs, even if their employer successfully bids and agrees to perform the contract. Most union-only PLAs limit the number of the company's existing employees that may be used on the project and require all or most workers to be hired through the union hiring halls. Regardless, all of the open shop employees must agree to be represented by the designated union, 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. Additionally, the worker often must pay dues to a union that he or she did not choose to join.

There are also important considerations for workers' benefits, such as health care and pension coverage. If an open shop worker is lucky enough to be selected through the union hiring hall, part of their wages will be required to go to union pension and health plans, not to the plans set up by the worker's employer. And, the open shop 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 currently undergoing a course of treatment under the employer's plan. Unfortunately, the construction workers and their families get caught in the middle and may lose valuable benefits. It is unfair and discriminatory for the federal government to permit these requirements as a condition of performing work on a project.

**Union-Only PLAs Increase Costs**

Basic marketing principles tell us that decreasing competition increases costs. Union-only PLAs have the same effect on construction costs – when you significantly reduce the

number of bidders for government work, you significantly increase the costs for the contract. A recent study conducted an analysis of bids and costs to taxpayers in Roswell Park, New York, 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 their claim of eliminating waste, union-only contracts guarantee it, by forcing open shop contractors to adopt inefficient union work practices and use unfamiliar workers.

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. 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. The same principles of guaranteeing open and competitive bidding to prevent favoritism exist under the federal Competition in Contracting Act. And, contrary to claims by PLA proponents, the Supreme Court's *Boston Harbor* decision only declared PLAs not unconstitutional, the Court did not examine whether union-only PLAs violate open competition requirements under competitive bidding laws.

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

**There is No Evidence to Support Claims for Union-Only PLAs**

- Proponents claim that union-only PLAs are necessary because only union contractors are equipped to perform and man such work:

  *There is no documented evidence to support this theory.* Many of our nation's largest contractors are open shop, and many of our nation's hospitals, banks and office buildings are built by open shop contractors who perform to the utmost standards of quality. There is also no demonstrated difference in the skill level of union and non-union workers and productivity is not determined by unionization. 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 union-only PLAs will ensure local employment:

  *There is nothing to support this claim, and in fact it has been found be quite the opposite.* The union's use of craftsmen to perform both unskilled and semiskilled work often requires them to import "travelers" from outside of the state. 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. 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-only PLAs are also promoted as a requirement to ensure labor peace: *This is a coercive negotiating tool – 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. Open shop contractors do not have this threat – because open shop workers do not strike.

What we know about union-only PLAs -- which is documented in the AFL-CIO Building and Construction Trades Department "model" PLA language -- is that they include requirements forcing contractors to operate like unionized companies. For example the "model" PLA states that all contractors must:

- Recognize the unions as "the sole and exclusive bargaining representatives of all craft employees";
- Be bound by the "referral facilities maintained by the unions" when workers are required;
- Agree that all employees of the contractors "shall become members of the union"; and,
- Agree that none of the contractors or subcontractors can subcontract work to companies who do not agree to become a party to the PLA and perform work under its terms.

Each of these provisions makes it difficult for open shop contractors to perform the work and discourages them from bidding on the project, in effect serving as preferential policy for unionized contractors. PLAs do NOT guarantee lower costs, rigorous performance standards, or eliminate wasteful and burdensome requirements. A union-only contract only guarantees that any worker who does not agree to be represented by a union cannot work on the project.

There is no justification for the government to embrace such a discriminatory policy by requiring or even encouraging union-only PLAs. In April 1997, President Clinton issued an internal memorandum encouraging agencies to use PLAs. This April, Vice President Gore announced, along with Transportation Secretary Rodney Slater, that federal agencies such as the Department of Transportation will "aggressively pursue" linking federal construction projects to union firms. This is a wasteful and discriminatory policy aimed at serving a single special interest. Use of union-only PLAs effectively eliminates 80 percent of the competition and helps grant a monopoly on federal contracting to unions and unionized contractors. This is at the expense of all taxpayers, who ultimately share the burden of higher public construction costs through and it violates the legislative intent of Congress to guarantee full and open competition.

**Conclusion**

Union-only Project Labor Agreements are purely political initiatives, which guarantee no benefits to the government or taxpayer. It is completely inappropriate for the federal government

to require, encourage or promote such a policy. This only promotes a system of favoritism for unionized contractors. If a union company can bid competitively without a union-only Project Labor Agreement, why is one necessary?

ABC strongly opposes union-only requirements as a condition of awarding public construction contracts. It is outrageous that our nation's top government officials endorse policies and programs that specifically grant special treatment to big labor. Unions do not deserve preferential treatment or set-asides. Every American has the right to make a living and have equal access to federal work, regardless of organizational membership. It is un-American to spend our tax dollars on a policy that blatantly discriminates against 80 percent of workers. We must instead guarantee open competition and competitive bidding for all public projects, to ensure that contracts go to those who will do the best work at the best price, regardless of their labor affiliation. Every American deserves the opportunity to compete, win and execute work based on merit -- not because of race, gender, union affiliation, or any other discriminatory factor.

The Administration's efforts to "encourage" all agencies use union-only Project Labor Agreements is bad public policy and certainly has a negative impact on our nation's open shop construction industry and particularly small, women- and minority-owned businesses by discouraging. Our nation's policies should clearly demonstrate it is unlawful for any government agency to require a contractor or subcontractor to adopt a union-only Project Labor Agreement as

a condition of performing work on a construction project. On behalf of ABC, I urge Congress to prevent such preferential treatment in the federal contracting process by stopping the Administration's efforts to encourage union-only PLAs and by passing open competition legislation to ensure equal opportunity for all Americans to compete for work on government construction projects.

Attachment

# The Case against Union-Only Project Labor Agreements on Government Construction Projects

MAURICE BASKIN*
*Venable, Baetjer, Howard & Civiletti, Washington, DC 20005*

## I. *Introduction*

In recent years, a coalition of labor unions and their political allies has engaged in a concerted effort to impose union-only project labor agreements (PLAs) on a wide variety of public construction projects. This effort has been challenged by taxpayers, open-shop contractors, and business groups, leading to many lawsuits and much political debate. My paper sets forth the case against union-only PLAs in the public sector.

As explained below, PLAs restrict the award of government contracts only to the minority of contractors who are willing and able to enter into collective bargaining agreements. PLAs thereby promote special interest favoritism and undermine fundamental principles of open competition for government work. Imposition of union-only PLAs inherently reduces the number of bidders and increases the costs of government construction, with no concomitant public benefits.

PLAs discriminate against 80 percent of the construction industry's employees who are not members of any labor union and who do not desire union representation. PLAs interfere with the work practices of both union and nonunion contractors by establishing a protected enclave of mandatory union-only government work. Finally, adoption of PLAs as a means of insuring "labor peace" ignores other legitimate methods of achieving the same objective and, in effect, rewards extortionate threats of labor violence.

For each of these reasons, union-only PLAs have been found to violate competitive bidding laws in a number of states, particularly those whose highest courts have focused on the issue. A number of cases remain pending, however, and the Clinton Administration has recently brought the federal government into the legal thicket surrounding PLAs. Nevertheless, as a matter of law and public policy, union-only PLAs should be avoided by public agencies in most, if not all, circumstances for the reasons discussed below.

## II. *A Brief History of Unions and PLAs in the Construction Industry*

Union-only PLAs, contrary to some claims, have only rarely been imposed on government projects prior to this decade. In this regard, it is important to distinguish

between public and private projects and among different types of PLAs. The type of project agreement which has engendered the present controversies is an agreement imposed or approved by a governmental entity that requires competitive bidders to sign a collective bargaining agreement with one or more unions as a condition of being allowed to perform work on a public works project. The PLA typically requires the contractor, upon contract award, to subject its employees to exclusive union representation for all work performed on the project, to pay union wages and benefits, to adhere to union work rules and classifications, to utilize a union hiring hall, and to subcontract only with other union contractors.

Those few PLAs entered into by government agencies during the first half of this century typically sought to establish uniform labor standards without imposing any particular union requirements.[1] Where union agreements were referred to, they arose in an environment where the vast majority, if not all, contractors on a project were known or expected to be unionized already. Indeed, as late as 1947, 87.1 percent of the construction industry labor force were union members. Even in this highly unionized environment, however, those court decisions which considered the issue of public union-only requirements in past decades commonly struck them down as discriminatory and unfair to taxpayers.[2]

Since 1947, the construction industry has undergone tremendous change, heading towards fully open competition between union, nonunion, and mixed contractors. By 1996, the percentage of union membership in the industry had fallen to only 18.5 percent. Largely, this change came about as a result of recognition by construction users that they could achieve greater cost savings from open competition and that they could benefit from the demonstrated ability of open-shop contractors to provide low-cost, high-quality construction services.[3]

As their decline has accelerated, unions have cast about for methods of maintaining or recovering their market share in the face of broad challenges to their ability to provide cost efficient construction services.[4] Viewed in this context, union-only PLAs can be seen to be protectionist devices — an attempt to use the power of the government arbitrarily to impose a specific mode of contracting on an otherwise competitive environment.

## III. *The Problems with PLAs*

Public construction work has long been awarded on the basis of competitive bidding and to the lowest responsible bidder. At all levels of government, it has been rightly perceived that favoritism in the award of government contracts is a form of corruption which leads inevitably to higher costs and lower performance. At the same time, the majority of construction users have recognized that the labor affiliation of a bidding contractor bears no relationship to the ability of the contractor to perform construction work.[5]

In order to sign PLAs, open-shop contractors are forced radically to alter their normal structure of operations and work rules, which are normally more flexible and



less rigid than under union agreements. Particularly where 80 percent of the construction industry performs work on a nonunion basis, union-only PLAs inherently discourage many contractors from bidding for work under such circumstances.

Recent studies have shown that public sector PLAs significantly reduce the number of bidders for government work and significantly increase the costs of construction. One such study in Roswell Park, New York, conducted both before and after a PLA was temporarily imposed in 1995, revealed that there were 30 percent fewer bidders to perform the work under the PLA and that costs increased by more than 26 percent.[6] Similarly, a GAO study of a Department of Energy PLA in Idaho found that labor costs on the project were more than 20 percent higher than the prevailing wage in the area.[7]

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.[8] Similar testimony of inflated costs of PLAs at both the Tappan Zee Bridge in New York and the Central Artery Tunnel in Boston is contained in the record of Senate Hearings on the subject held in 1997.[9]

Supporters of PLAs have asserted that nonunion contractors have in fact bid upon selected work performed under union-only PLAs, and that only a matter of "choice" prevents other open-shop contractors from competing for PLA work. The true question, however, is not whether open-shop contractors are completely precluded from bidding on union-only contracts, but whether imposition of the union-only requirement *discourages* bidders from coming forward, to the detriment of taxpayers.

Clearly, imposition of a union-only PLA has the inherent effect of deterring a large number of contractors from submitting bids, and not merely as a matter of philosophical "choice." Rather, in order to bid on union-only work, nonunion contractors must submit to radical restructuring of their operations — from hiring to work rules to fringe-benefit plans — jeopardizing many of the very characteristics which have made them successful and cost efficient in the first place.[10]

PLAs likewise discriminate against the *employees* of open-shop contractors by imposing on them, by government edict, an unwanted union representative. Regardless of whether the employees are required to pay dues to the union under a PLA, a frequent requirement, they are necessarily bound by whatever agreement the union negotiates as to their wages, hours, and working conditions, regardless of their personal choice. It is little consolation to such employees that their unwanted union status is limited to a particular project — indeed, this fact often results in depriving the employees of any opportunity to vest in any meaningful benefits from the union health, welfare, and pension fund contributions which must be made by their employers to union trust funds under most PLAs.

Even many union contractors, who might be expected to benefit from union-only PLAs, in reality are disadvantaged by them. According to Associated General Contractors, an association representing many union contractors, public sector PLAs

unfairly remove contractors from the collective bargaining process and give unwarranted leverage to union officials who deal directly and advantageously with government procurement managers.[11]

In each of these instances, it is the taxpayers who suffer most directly from governmentally imposed union-only PLAs. Unlike private sector agreements, in which corporate directors and shareholders can evaluate the risks and rewards of labor agreements in direct relation to market forces, there are no similar restraints on government officials exercising control over public construction dollars. Union-only PLAs threaten to undermine the public trust in the competitive bidding process.

## IV. *The Flawed Justifications for Public Sector PLAs*

In response to the many legal and policy challenges to union-only PLAs, their advocates have presented a variety of rationales in support of such bidding restrictions. None of these justifications provides a valid basis for imposing union-only PLAs in the public sector.

First, PLA advocates have contended that these agreements can reduce costs and increase efficiency when compared to union construction work which is conducted under a variety of different contracts and work rules. This argument applies only to situations where all or most of the performing contractors are in fact already unionized, as was frequently the case fifty years ago. There is no known study finding increased efficiency or lower costs when a union-only PLA is compared to a fully competitive, open, or mixed-use construction project. In addition, by forcing more efficient nonunion contractors to adopt wasteful and unfamiliar union work rules and practices, a union-only PLA deprives construction users of the demonstrated cost advantages of open-shop construction.

Ironically, many union-only PLAs have been proposed in areas where the government projects are already subject to prevailing wage legislation, which are supposedly designed to prevent nonunion contractors from undercutting their unionized competitors at the expense of employee salaries. Yet, even in these jurisdictions, open competition has been shown to result in cost savings, as compared to union-only requirements.[12]

Second, PLA supporters have claimed that PLAs are necessary in order to insure a steady supply of skilled or productive workers. This argument is impossible to support in a market where 80 percent of the industry is nonunion and where every type of large project, from industrial plants to stadiums, has been built on an open-shop basis over the last several decades. Similarly, OSHA workplace fatality statistics have shown, contrary to the claims of PLA supporters, that there is no safety advantage in union versus nonunion construction and that open-shop employees have suffered fewer fatalities.[13]

Finally, PLA advocates contend that union-only requirements are needed to maintain "labor peace" and to avoid delays and disruption of construction timetables arising out of labor disputes. As one judge has correctly pointed out:



> [A] determination to use a project labor agreement in order to avoid the costs associated with such activity smacks of capitulation to extortion. It is no less antithetical to the interests embodied in the competitive bidding statutes than would be the disqualification of an otherwise responsible bidder in order to assuage a threat of vandalism by an unsuccessful bidder.[14]

Moreover, submission to threats of labor disruption ignores the many other means of controlling and limiting the effects of picketing and related tactics in the construction workplace. Separate entrances for union and nonunion employees, court injunctions, and police protection have all proven to be effective in thousands of open-shop or mixed-site construction projects over the course of decades.

It is also significant that a number of public entities have been able to negotiate "labor peace" on their large construction projects without the inclusion of draconian union-only requirements. Nondiscriminatory "labor standards" PLAs, containing wage standards, uniform work rules, and prohibitions against strikes, but containing *no* union-only provisions, have been agreed to by building trades unions and contractor associations in such disparate locations as Denver, Colorado and Baltimore, Maryland.[15] The existence of these project agreements belies the claim that union-only requirements are necessary to avoid delays or union disruption.

## V. *The Limited Holding of the* "Boston Harbor" *Decision*

In 1987, the Massachusetts Water Resources Authority ("MWRA") and Kaiser Engineering entered into a precedent-setting PLA for the court-ordered cleanup of Boston Harbor. The project was unusual in its size ($6.1 billion), time pressure, and difficulties of access. Previous labor disputes had caused delays in the early phases of construction. Finally, the Boston area was heavily dominated by construction unions. Under these conditions, MWRA and Kaiser agreed with Boston area unions to impose a union-only requirement on all work to be performed on the project, in exchange for a no-strike clause and other concessions.

Open-shop contractors challenged the union-only requirement on several grounds, but the issue of labor law preemption under the National Labor Relations Act was the only issue to reach the U.S. Supreme Court. The Supreme Court upheld the state-imposed PLA only against the labor law challenge, finding that, so long as the government agency acted in a proprietary (as opposed to regulatory) capacity, the NLRA "does not preempt enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful pre-hire collective bargaining agreement negotiated by private parties."[16] The Court expressly did not reach such issues as whether the Boston Harbor PLA was lawful under state competitive bidding laws.

Supporters of PLAs immediately sought to expand the *Boston Harbor* decision into a broad endorsement of union-only PLAs, and a number of state and local agencies began to impose PLAs wherever the unions could muster enough political support. The limited nature of the Supreme Court's *Boston Harbor* holding soon became apparent, however. Certainly, nothing in that decision mandates the imposition of

on federal projects are already "protected" as to their wages and benefits by the Davis-Bacon Act and numerous other federal laws and regulations.

Thus, the Presidential Memorandum, and the agency procedures resulting therefrom, depart from the Congressionally mandated policy in favor of open competition expressed in the Competition in Contracting Act,[28] and the related provisions of the FAR,[29] with no justification whatsoever. This unwarranted federal initiative will certainly be challenged in court on its full implementation.[30]

## VII. *Conclusion*

Imposition of union-only PLAs in the public sector cannot be shown to serve the public interest. The government should not enter into the realm of labor management relations by arbitrarily creating a protected enclave for union work at the expense of taxpayers and to the detriment of fair and open competition. Government agencies that impose union-only PLAs in response to short-term political pressure from labor organizations will suffer long term consequences, in the form of litigation, increased costs of construction, and adverse taxpayer reaction.

## NOTES

*Mr. Baskin is a partner with the Washington, D.C. law firm of Venable, Baetjer, Howard & Civiletti, LLP. He focuses on all aspects of labor and employment law representing management and serves as General Counsel of Associated Builders and Contractors, Inc.

[1]See Memorandum of NLRB Chairman Reynolds, reporting projects on various public works prior to 1951, none of which apparently involved a union-only project agreement. Hearings on S.1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 82d Cong., 1st Sess. 31, 87, 97, 103, 105 (1951).

[2]See Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A. 2d 745 (1945); State ex rel. United Dist. Heating v. State Office Bldg. Comm., 125 Oh. State 301, 181 N.E. 129 (1932); Anthony P. Miller v. Wilmington Housing Auth., 165 F. Supp. 275, 280 (D.Del. 1958); Davenport v. Walker, 68 N.Y. 161 (1901); Elliott v. City of Pittsburgh, 6 Pa. Dist.Rpts. 455, 456 (1897).

[3]See Northrup, Open Shop Construction Revisited (Wharton 1984).

[4]Northrup and Alario, "Boston Harbor"-Type Project Labor Agreements in Construction, XIX Jnl. of Labor Res. 1, 6 (Winter 1998).

[5]The Business Roundtable, representing a substantial percentage of major construction users, has declared its opposition to union efforts to restrict competition in the construction industry, in a White Paper published in 1992.

[6]Analysis of Bids and Costs to Taxpayers in Roswell Park, New York (ABC 1995), cited in New York State Chapter AGC v. New York State Thruway, 88 N.Y. 2d 56 (1996).

[7]"Labor-Management Relations, Construction Agreements at DOE's Idaho Laboratory Needs Reassessing" (GAO/GCD-91-80BR (1991).

[8]Affidavits filed in ABC, Southern Nevada Chapter v. Miller, Case No. A359730 (Nev. Dist. Ct. May 6, 1997), appeal pending.

[9]See Testimony of Peter Vigue before the Senate Labor Committee, April 30, 1997.



[10]Sworn testimony from many open-shop contractors to the deterrent effects of union-only PLAs is contained in the record of many of the state court decisions on this issue. See, e.g., ABC Southern Nevada Chapter v. Miller, supra n.9.

[11]Testimony of Tom Rolleri on behalf of AGC before the Senate Committee on Labor and Human Resources (April 30, 1997); see also Langworthy, Project Labor Agreements After Boston Harbor: Do They Violate Competitive Bidding Laws, 21 Wm. Mitchell L. Rev. 1103, 1109 (1996)("[PLAs] may also have a detrimental effect on some union contractors, which can become both obligated to many more union trade organizations. . . .")

[12]The Roswell New York study referenced above, and most of the testimony elicited in the decided cases, has demonstrated that open competition can achieve labor cost savings even under prevailing wage laws.

[13]Culver, Comparison of Nonunion and Union Contractors Construction Fatalities (NCCER 1995).

[14]Albany Specialties, Inc. v. County of Orange, No. 7351/96 (N.Y.Sup.Ct. Feb. 6, 1997), revd. 155 LRRM 2856 (App. Div.) pet. for cert. pending.

[15]A nondiscriminatory project agreement was entered into with the building trades unions and affected contractor organizations in connection with construction of the Denver International Airport in 1995. A similar PLA, which called on the government agency to use its "best efforts" to persuade contractors to enter into union agreements but did not mandate union-only construction, was implemented in connection with construction of Baltimore's Ravens Stadium in 1997. Neither project was subsequently impacted by labor-related work stoppages, and both unionized and nonunion contractors performed work according to their normal operating practices.

[16]Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 219 (1993).

[17]See George Harms Const. Co. v. New Jersey Turnpike Auth., 137 N.J. 8, 644 A.2d 76 (1994).

[18]Northrup and Alario, supra, n.5; see also McGeary & Pellegrino, Project Agreements and Competitive Bidding: Monitoring the Back Room Deal, 19 Seton Hall Leg. J. 423, 431 (1995); Langworthy, Project Labor Agreements After Boston Harbor: Do They Violate Competitive Bidding Laws, 21 Wm. Mitchell L. Rev. 1103, 1109 (1996).

[19]137 N.J. 8, 644 A.2d 76 (1994).

[20]Id. at 44.

[21]143 N.J. 143669 A.2d 1369 (N.J. 1995).

[22]88 N.Y.2d 56 (1996).

[23]Id. at 69.

[24]Id. at 75.

[25]110 Daily Labor Report (BNA) E-1 (June 9, 1997).

[26]Unlike the proposed Executive Order, the Presidential Memorandum does not have the force of law and is not binding on future administrations. The Memorandum also is limited in scope to those "large" construction projects valued at more than $5,000,000. The draft Executive Order contained no such limitation.

[27]The only known study of federal PLAs reported that such agreements increased the government's costs of construction and needed to be "reassessed." GAO Report, supra, n.8.

[28]41 U.S.C. §253.

[29]FAR §1.602-2(b) states that contracting officers have a duty to "ensure that contractors receive impartial, fair, and equitable treatment." FAR §6.101 states that "Contracting officers shall provide for full and open competition. . . ." FAR §22.101-1(b) states that "[a]gencies shall remain impartial concerning any dispute between labor and contractor management." FAR §44.204(e) states that "the contracting officer

union-only requirements by public entities which are expressly exempt from coverage under the National Labor Relations Act.[17]

## VI. *Challenges to PLAs under State Competitive Bidding Laws*

Since *Boston Harbor*, the most significant and successful legal challenges to union-only PLAs on public works have arisen under state competitive bidding laws. It is unnecessary to review here in detail the mounting body of case law dealing with this issue, which has been exhaustively treated elsewhere.[18] It is significant to note, however, that in the only two states whose highest courts have examined public union-only requirements, both New Jersey and New York have held that under most circumstances, governmental union-only PLAs violate state competitive bidding laws.

The New Jersey Supreme Court has acted twice to invalidate union-only PLAs. First, in *George Harms Const. Co. v. New Jersey Turnpike Auth.*,[19] the court struck down a PLA which mandated that all successful bidders sign agreements with a specified building trades union. The court held:

> The paramount policy of our public bidding laws fosters "unfettered competition" in public contracts; the effect of project-labor agreements is to lessen competition. . . . Our function is not to make the policy choice; our function is to assess whether the [government agency's] choice is consistent with the existing State public-bidding policy to foster competition.[20]

The court rejected the argument that the PLA permitted competition because bidding was "open to all," analogizing the situation to one in which the public entity arbitrarily imposed a bid requirement which favored a sole source provider.

The New Jersey court reaffirmed and expanded its opinion in *Tormee Construction, Inc. v. Mercer County Improvement Auth.*[21] There, the court observed:

> PLAs can contravene the goals of competitive bidding. By mandating that workers belong to certain limited unions, PLAs restrict bidders to contractors with relationships with those unions. The obvious effect of such a restriction is to lessen competition.

The court invalidated a PLA which would have required contractors to agree to sign union agreements (with any "appropriate" union) as a condition of performing work on county courthouses.

The only other state whose highest court has ruled on PLAs in the public sector is New York. There, the Court of Appeals issued a consolidated opinion reaching different results in deciding two PLA cases, in *New York State Chapt. AGC v. New York State Thruway*; *General Building Constractors v. Roswell Park Dormitory Authority*.[22] Properly construed, the New York court's joint holdings restrict PLAs to only the most extraordinary circumstances (those present in the Thruway case) and prohibit PLAs in the most common public works settings (described in the Roswell Park case).



Finding that "more than a rational basis must be shown" to support a PLA, the Court of Appeals held that a public agency operating under a competitive bidding law "bears the burden of showing that the decision to enter into the PLA had as its purpose and likely effect the advancement of the interest embodied in the competitive bidding statutes."[23] The Court found that a PLA could be permitted on the Tappan Zee Bridge, among other reasons, because substantially all prior work on the bridge had been performed on a union basis, a study had been performed prior to the decision being made, which purported to demonstrate actual cost savings from a PLA, and difficulty of access to the project made it particularly susceptible to labor disruption.

By contrast, in the Roswell Park case, involving the construction of public dormitories, the Court rejected use of a PLA because the above referenced criteria could not be established. In this regard, the court noted that nonunion contractors had established a presence in the construction area, and that no meaningful cost study had been performed which demonstrated any real cost savings from a PLA prior to its implementation. Finally, although a certain amount of labor disruption had occurred during the lobbying process for the PLA, the Court refused to sanction this justification for imposing a union-only requirement under such circumstances:

> To say that [the agency's] adoption of the PLA is justified simply by its desire for labor stability so that the work will be completed on time is tantamount to wholesale approval of PLAs — every public entity wants its projects completed on time, and public projects are presumptively important to the public. The competitive bidding requirements, however, demand that something more be shown in order to justify the significant restrictions imposed by the PLAs.[24]

Many cases have been filed around the country since these New Jersey and New York court decisions, but none has reached any definitive conclusion before the highest courts of any other state. The more persuasive judicial view thus remains that union-only PLAs are in derogation of fundamental policies underlying state competitive bidding laws, and they should not be sanctioned except in the most extraordinary circumstances.

## VII. *The Presidential Memorandum Supporting PLAs*

In June 1997, President Clinton issued a "Memorandum" directing all federal agencies to issue "procedures" for the consideration of union-only PLAs on federal construction projects.[25] The Memorandum was issued only after the President withdrew a draft Executive Order imposing more stringent union-only requirements, in the face of strong Congressional opposition.[26]

The Presidential Memorandum has been widely perceived as a payback to labor unions who contributed millions of dollars to the President's reelection campaign. Certainly, there have been no studies or hearings demonstrating any need for union-only PLAs on federal projects. There have been no cost studies showing any savings likely to result from PLAs.[27] There have also been no significant reported labor disruptions preventing or delaying federal construction projects. Construction workers

shall, when contracting by negotiation, insert the clause . . . Competition in Subcontracting, in solicitations and contracts when the contract amount is expected to exceed the small purchase limitation. . . ." FAR §52.244–5 requires the contracting officer to insert clause in all contracts which states: The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract."

[30]There have been no federal cases directly construing the merits of union-only PLAs under the Competition in Contracting Act. The only case where the issue was raised, Phoenix Engineering, Inc. v. MK Ferguson, 966 F. 2d 1513 (6th Cir. 1993), was ultimately dismissed on grounds of lack of standing, without reaching the merits of the issue. The GAO has rendered ambiguous and contradictory opinions on the issue of union requirements, all predating CICA. Compare To the Secretary of Defense, 42 Comp. Gen. 1 (1962) with Anderson & Wood Co., 83-1 CPD ¶595 (1983).