News

Project Labor Agreements

PRESIDENT CLINTON SIGNS MEMO ALLOWING PLAS ON FEDERAL CONSTRUCTION PROJECTS

President Clinton June 5 issued a presidential memorandum that allows federal agencies to use a project labor agreement "on a large and significant project." The presidential memo was addressed to the heads of executive departments and agencies.

A project agreement may be used on a federal project valued at more than $5 million when such an agreement "will advance the government's procurement interest in cost, efficiency, and quality and in promoting labor-management stability" as well as compliance with federal safety, affirmative action, and employment standards, according to Section 1 of the memorandum. A project agreement would be allowed under these circumstances where no laws applicable to the project preclude the use of a project agreement.

For a project meeting these requirements, a federal agency may require all contractors and subcontractors to negotiate or become a party to a project agreement "with one or more appropriate labor organizations." The memorandum states that the agency "has discretion whether to include such a requirement." A subsequent section states, however, that "This memorandum also does not require contractors to enter into a project labor agreement with any particular labor organization."

Under a typical project agreement, unions representing craft workers and the project's prime contractor agree on terms and conditions of employment for a specific project. The contractor agrees that all workers on the project will join the union with jurisdiction over their craft specialty and agrees to pay wages and benefits dictated by the agreement. Work rules are uniform for all crafts, any form of strike or lockout is prohibited, and unions face stiff fines for any violation of this pledge.

The project agreement specification usually is included in the project bid specifications. The agreement is available to any contractor, union or nonunion. The term and scope of the agreement is limited to that project.

Owned v. Leased Projects

The memorandum takes a different approach regarding federally owned versus federally leased projects. The memorandum applies under Section 1 to projects "owned" by the federal government. However, Section 4 states that project agreement use is not precluded "in circumstances not covered here, including leasehold agreements and federally funded projects."

The memorandum specifically "does not require an executive department or agency to use a project labor agreement on any project."

Project agreements contemplated under the memorandum shall be binding on all contractors and subcontractors on a project "through the inclusion of appropriate clauses in all relevant solicitation provisions and contract documents," and shall allow all construction firms to compete for project work without discrimination based on union or nonunion status.

An appropriate project agreement would contain a no-strike clause, provide for expedited resolution of disputes arising on the project, and provide other mechanisms for "labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health."

The genesis for the memorandum is based in the National Performance Review and other executive branch initiatives seeking to implement "rigorous performance standards, minimize costs, and eliminate wasteful and burdensome requirements," according to the memorandum. In this case, those objectives apply to the "economical and efficient administration and completion" of federal construction projects.

Federal agency heads were instructed in the memorandum to establish within 120 days "appropriate written procedures and criteria for the determinations set forth in Section 1."

Union, Industry Reaction

President Clinton's "reaffirmation of the collective bargaining process" in the memorandum was praised by Robert A. Georgine, president of the AFL-CIO Building and Construction Trades Department. He hailed the memorandum as "a strong vehicle to help achieve decent wages and conditions for all construction workers." At the same time, Georgine said, project agreements "result in economic and quality construction for the American taxpayers."

In Georgine's view, the memorandum "is a symbolic demonstration of this president's commitment to protecting workers' rights and bringing stability and fairness to federal construction projects."

Charles E. Hawkins, executive vice president of the Associated Builders and Contractors, said June 6 that the presidential memorandum was a "dramatic improvement" over the proposed executive order. He cited the $5 million threshold in the memorandum, which he said means that 500 federal projects, instead of 60,000, could be affected by the memorandum.

ABC remains strongly opposed to any form of project agreement directive from the White House. "Anything that distorts the market is unfair to taxpayers," Hawkins said.

The association stands ready to file suit under the Federal Competition in Contracting Act "as soon as one of our members is denied the opportunity to bid on a federal project" covered by a project agreement, he said. "This whole concept flies in the fact of taxpayer justice."

A prominent management attorney said that, as a practical matter, "there are few instances in which a project under $5 million would be covered by a project agreement."

The Business Leadership Council asserted that President Clinton continues, in the memorandum, to urge agency heads "to use union-only construction contracts whenever possible."

David L. Thompson, counsel for the organization, said that "the bad news—indeed the disgrace of this whole affair—is that the President remains committed to abusing the law, American workers, and taxpayers all for the sake of a political payoff to union bosses."

According to Thompson, "If the response to union-only contracts is any guide, the administration will succeed as never before in unifying the business community, social and economic conservatives and the broadest array of public interest groups, all in opposition to what is being called the ultimate union power grab."

One "downside" to the memorandum, a management attorney said, is the requirement under Section 5 for agency heads to develop "procedures and criteria" to determine whether a given project is appropriate for a project agreement. In his opinion, this section "geometrically" increases the work and opportunities for confusion and legal mischief that did not exist before the presidential memorandum was issued.

Origins In Proposed Executive Order

A White House proposal in April for an executive order urging federal agencies to consider using PLAs on their construction projects (43 CLR 161, 176, 4/16/97) drew a fire storm of protest from several contractor associations. Republican leaders in the Senate threatened to delay indefinitely a vote on the nomination of Alexis Herman to be secretary of labor and introduced legislation (S 606) that would bar preferential treatment of organized labor in the awarding of federal contracts (43 CLR 184, 4/23/97).

The White House eventually backed down, saying the president instead would issue a presidential memorandum reminding federal agencies that PLAs are legal when justified by time, cost, and labor-management stability (43 CLR 225, 5/7/97).

Meanwhile, the AFL-CIO Building and Construction Trades Department issued model project agreement language, directed primarily at private-sector projects, that could be used on public projects (43 CLR 317, 332, 5/28/97).

Text of the presidential memorandum begins on p. 380.

By Brian Lockett

Set-Asides

COURT ENJOINS USE OF MINORITY PREFERENCE ON REMAND FROM SUPREME COURT IN *ADARAND*

A federal district court in Colorado has issued a broad injunction against a federal program that provides bonuses to federal prime contractors who subcontract to disadvantaged business enterprises, which are defined to include primarily minority-owned businesses (*Adarand Constructors v. Pena*, DC Colo, Civil Action No. 90-K-1413, 6/2/97).

On remand from the U.S. Supreme Court in *Adarand Constructors Inc. v. Pena*, the district court held that the federal bonus program "does not survive strict scrutiny" required by the Supreme Court for such programs. The subcontracting compensation clause (SCC) programs arising from various federal statutes are "unconstitutional as applied to highway projects in Colorado," Judge John L. Kane Jr. wrote in a 71-page opinion. The program deprives Adarand Constructors Inc., a white-owned company, of its constitutional rights to due process and equal protection, the court decided.

In a 5-4 decision, the Supreme Court in *Adarand* had held that federal affirmative action programs must meet the same stringent "strict scrutiny" applied to state and local programs in order to pass muster under the Constitution's equal protection clause (67 FEP Cases 1828). When race-based programs are used, the justices said that such programs will be considered constitutional only if they are "narrowly tailored measures that further compelling governmental interests."

The Supreme Court vacated a lower court ruling upholding a federal statute that gives preference to minority-owned highway construction firms. The court reinstated a reverse discrimination challenge to the program filed by Adarand, which had lost a federal construction project to a minority-owned contractor despite being the lowest bidder. It then remanded the