Congressional Research Service

MEMORANDUM May 25, 2012

To: Hon. Jeff Flake
Attention: Colleen M. Donnelly

From: Brian T. Yeh
Legislative Attorney, American Law Division
7-5182

Subject: **Effect of the Flake Amendment to the FY 2013 Military Construction/VA Appropriations Bill on Project Labor Agreements**

This memorandum is in response to your request for an assessment of whether the text of an amendment offered by Representative Flake to the Military Construction and Veterans Affairs and Related Agencies Appropriations Act for Fiscal Year 2013 (H.R. 5854) would disallow the use of project labor agreements for military construction projects. As explained below, it appears it would not have such an effect.

The National Labor Relations Act of 1935 (NLRA) gives most private sector workers the right to join or form a labor union and to bargain collectively over wages, hours, and working conditions. The NLRA allows workers in the construction industry to enter into a collective bargaining agreement (CBA) before a project begins. A project labor agreement (PLA) is a CBA that applies to a specific construction project and lasts only for the duration of the project.[1] In February 2009, President Obama signed Executive Order (EO) 13502, which encourages federal agencies "to consider requiring" the use of PLAs on publicly funded large-scale construction projects (where the total cost of the project to the federal government is $25 million or more) "in order to promote economy and efficiency in [f]ederal procurement."[2] However, the EO states that it "does not require an executive agency to use" a PLA on any construction project.[3]

The amendment offered by Representative Flake to H.R. 5854 states as follows:

> Sec. __. None of the funds made available by this Act may be used by any Government authority or agent thereof awarding a construction contract on behalf of the Government, in any solicitations, bid specifications, project agreements, or other controlling documents, to require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations; nor shall such funds be used to discriminate against or give preference to such bidders, offerors, contractors, or subcontractors based on their entering or refusing to enter into such agreements. The previous sentence does not apply to construction contracts awarded before the date of the enactment of this Act.

[1] For more information about PLAs, *see* CRS Report R41310, *Project Labor Agreements*, by Gerald Mayer.

[2] Executive Order 13502, § 1(b), 74 Fed. Reg. 6985 (February 11, 2009); *see also* 48 C.F.R. §§22.501-22.505.

[3] Executive Order 13502, § 5.

Based on the plain language of the amendment's text, PLAs for military construction projects would not be forbidden, as it expressly provides that "[n]one of the funds made available by this Act may be used by any Government authority ...to require **or prohibit** ... bidders ... to enter into ... agreements with one or more labor organizations..." (emphasis added). However, the amendment would have the effect of: (1) preventing federal agencies from mandating the use of PLAs (as Executive Order 13502 encourages) and (2) prohibiting federal agencies from giving preference to a bidder/contractor based on the signing of a PLA.

May 30, 2012

U.S. House of Representatives
Washington, D.C. 20515

Dear Representative:

This diverse group of undersigned construction and business associations writes in strong support of Section 517 of the Military Construction, Veterans Affairs (MilCon/VA) Appropriations Bill for Fiscal Year 2013 (H.R. 5854). We **urge you to oppose the amendment offered by Rep. Michael Grimm (R-NY) and any other amendment that would strike Section 517 from the bill.**

Section 517 of H.R. 5854 ensures fair and open competition on federal construction contracts funded by this legislation. Specifically, Section 517 will prevent federal agencies from ***requiring*** contractors to sign a collective bargaining agreement with unions called a project labor agreement (PLA) ***as a condition of winning a federal construction contract***. It also will prevent federal agencies from implementing a discriminatory PLA preference policy that discourages competition and results in needless waste and favoritism in the federal procurement process.

A ***government-mandated PLA*** is a union collective bargaining agreement specific to a construction jobsite that typically requires construction projects to be awarded ***only*** to companies that agree to recognize unions as the representatives of their employees on that job; use the union hiring hall to obtain workers; follow archaic and inefficient work rules; and pay into union benefit and multi-employer pension plans that nonunion employees will never be able to access—forcing employers to pay "double benefits" into existing plans and union plans and placing firms opposed to these costly provisions at a significant competitive disadvantage. In addition, PLAs typically force qualified workers to pay union dues or join a union if they want to receive union benefits and work on a PLA project.

As a result of these terms and conditions, government-mandated PLAs can unfairly ***discourage competition*** from nonunion contractors and their employees, who comprise 86 percent of the U.S. private construction workforce.

President Obama's Feb. 6, 2009, Executive Order 13502 encourages federal agencies to require PLAs on federal construction projects exceeding $25 million in total cost on a case-by-case basis in order to "advance the economy and efficiency in federal contracting."

In contrast, recent government-mandated PLAs and PLA preferences on federal projects have resulted in increased costs, delays and discrimination. Likewise, studies of construction projects subject to prevailing wage laws found PLA mandates increase the cost of construction between 12 percent and 18 percent compared to similar non-PLA projects.

Unfortunately, the executive order and related FAR regulations have exposed agency procurement officials to intense political pressure from politicians and special interest groups to mandate anti-competitive and costly PLAs on federal projects, even when they are not appropriate.

Section 517 counteracts potential special interest favoritism by prohibiting federal agencies from ***mandating*** PLAs and implementing PLA preferences when issuing solicitations for construction services for projects funded by this bill. However, it also permits federal agencies to award contracts

to businesses that ***voluntarily*** enter into PLAs—a right guaranteed by the National Labor Relations Act and supported by established legal precedent.

Section 517 will curb waste and favoritism in the procurement of federal construction projects and ensure taxpayer dollars are spent wisely by letting contractors—and therefore the free market—determine if a PLA is appropriate. We ask that you take a stand against discrimination and special interest handouts in government contracting and **OPPOSE** the Grimm amendment and any other amendments that attempt to strike Section 517 from H.R. 5854.

Protecting Section 517 will create a level playing field in the procurement of government construction contracts; increase competition; help small businesses grow; curb construction costs; and spread the job-creating benefits of federal contracts throughout the construction industry, which suffers from a 14.5 percent unemployment rate.

Sincerely,

American Council of Engineering Companies (ACEC)
Associated Builders and Contractors (ABC)
Associated General Contractors (AGC)
Business Coalition for Fair Competition (BCFC)
Construction Industry Round Table (CIRT)
Independent Electrical Contractors (IEC)
Merit Elevator Contractors Association of America (MECAA)
National Association of Women in Construction (NAWIC)
National Black Chamber of Commerce (NBCC)
National Federation of Independent Business (NFIB)
Small Business and Entrepreneurship Council (SBEC)
U.S. Chamber of Commerce
Women Construction Owners & Executives, USA (WCOE, USA)

Associated Builders and Contractors, Inc.

May 30, 2012

KEY VOTE

U.S. House of Representatives
Washington, D.C. 20515

Dear Representative:

On behalf of Associated Builders and Contractors (ABC), a national association with 74 chapters representing more than 22,000 merit shop construction and construction-related firms, I am writing in strong opposition to an amendment likely offered by Rep. Grimm (R-NY) to strip Section 517 of the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act for Fiscal Year 2013 (H.R. 5854). ABC strongly **OPPOSES any amendments striking Section 517 from** H.R. 5854 and will consider this vote a "**Key Vote**" for our 112th Congressional Scorecard.

Section 517 of H.R. 5854 ensures fair and open competition on federal construction contracts funded by this legislation. Specifically, it will prevent federal agencies from requiring contractors to sign an anti-competitive and costly project labor agreement (PLA) as a condition of winning federal construction contracts. It also will prevent federal agencies from implementing a discriminatory PLA preference policy that discourages competition and results in needless waste and favoritism in the federal procurement process. Section 517 prohibits federal agencies building projects funded by this bill from mandating PLAs and implementing PLA preferences as a result of President Obama's Executive Order 13502.

Executive Order 13502 strongly encourages federal agencies to consider mandating union-favoring PLAs on federal construction projects exceeding $25 million in total cost. The order repealed President George W. Bush's Executive Orders 13202 and 13208, which had protected hundreds of billions of dollars' worth of federal and federally funded construction projects from government-mandated PLAs since 2001.

When a government agency mandates a PLA, it requires contractors and subcontractors to sign a collective bargaining agreement with unions as a condition of winning federal construction contracts. PLAs typically force employers to recognize unions as the representatives of their employees on that jobsite; use the union hiring hall to obtain craft workers; pay into union pension and benefit plans even if businesses have their own plans; obtain apprentices only through union apprentice programs; and obey restrictive and inefficient union work rules. In addition, PLAs typically force qualified craft workers to pay union dues or join a union if they want to receive benefits and work on a PLA project.

In short, coercive PLA mandates and PLA preferences discourage competition from qualified contractors that want nothing more than to deliver to taxpayers and the government the best possible construction product at the best possible price.

Congress must ensure construction projects funded by H.R. 5854 are cost-effective and administered without favoritism or discrimination. According to the U.S. Department of Labor's Bureau of Labor Statistics, only 14 percent of America's construction workforce belongs to a union. This means government-mandated PLAs and preferences discourage competition from the

employers of more than eight out of 10 construction workers who would otherwise work on taxpayer-funded construction projects.

These special interest handouts also harm taxpayers. Several independent and academic studies of construction projects subject to prevailing wage laws found PLA mandates increase the cost of construction between 12 percent and 18 percent compared to similar non-PLA projects.

If contractors want to **voluntarily** enter into a PLA on a federal construction project funded by H.R. 5854, there is **nothing** in current law, Section 517 or H.R. 5854 **that would prevent them from doing so voluntarily**. In fact, the National Labor Relations Act has always permitted contractors to voluntarily enter into a PLA to build a project. What Section 517 of H.R. 5854 does is eliminate inefficiencies in the federal contracting procurement process, increase competition, reduce costs and create construction jobs while protecting the public interest.

Again, ABC strongly **OPPOSES the Grimm amendment or any other amendment striking Section 517 from H.R. 5854** and will consider this vote as a "**Key Vote**" for our 112th Congressional Scorecard.

Sincerely,

Geoffrey G. Burr
Vice President, Federal Affairs

Talking Points <u>OPPOSING</u> Grimm Amendment to H.R. 5854

Promoting Government-Mandated PLAs on MilCon/VA Appropriations for FY 2013 (H.R. 5854)

May 30, 2012

- As reported by the Appropriations Committee, H.R. 5854 ensures fair, open and competitive bidding by all qualified businesses for federal construction contracts funded by MilCon/VA Appropriations FY 2013 legislation.
- As early as Thursday afternoon, proponents of government-mandated project labor agreements (PLAs) are expected to offer an amendment striking PLA neutrality language (Section 517) from H.R. 5854. A diverse coalition of construction industry trade associations and employer groups **OPPOSE** such an amendment, likely to be offered by Rep. Michael Grimm (R-NY), including **ABC, AGC, NFIB, U.S. Chamber, National Black Chamber of Commerce and others.**
- In February 2009, President Obama signed Executive Order 13502, which encourages federal agencies to **require** PLAs on federal projects exceeding $25 million in total cost.
- A **government-mandated** PLA is a requirement that qualified contractors preemptively submit to a union collective bargaining agreement as a condition of winning government construction contracts. PLA mandates typically restrict jobs to construction workers referred from union hiring halls, effectively **shutting out 86 percent of the nation's construction workforce**.
- Studies have found that **PLA mandates increase the cost of construction between 12 percent and 18 percent** compared to similar non-PLA projects subject to prevailing wage laws.
- The Obama executive order and related regulations have exposed agency procurement officials to **intense political pressure** from special interest groups, the Obama administration, agency political appointees and members of Congress to mandate PLAs on MilCon and VA projects even when they are not appropriate.
- Government-mandated PLAs and PLA preferences **increase costs** to taxpayers, **reduce construction job creation** and **inject favoritism** into the federal procurement process.
- PLA neutrality language will revert to the policy of the Bush administration, under which **$147 billion worth of federal construction projects were built without PLA mandates and without incident**.

<u>Contrary to Union Talking Points...</u>

- Section 517 **DOES NOT prohibit the use of a PLA** on any project funded by MilCon/VA, according to a May 25, 2012, **Congressional Research Service** memo**.**
- If a federal contractor wants to enter into a PLA on a construction project, there is nothing in current law, Section 517 or H.R. 5854 that would prevent it from doing so ***voluntarily***.
- Agencies are still **free to award contracts** to businesses that voluntarily use PLAs.
- Section 517 **DOES NOT affect funding** for previously awarded and ongoing construction projects.
- PLA mandates effectively **require a union-only workforce.** Workers must pay union dues, pay into union pension schemes and be referred from union hiring halls to be eligible to work on a PLA project.
- All federal projects require payment of **prevailing wages via the Davis-Bacon Act, *regardless of PLA status*.**
- All federal projects require the use of **E-verify, *regardless of PLA status*.**
- Large corporations may elect to use PLAs ***voluntarily*** in areas with high union density, typically to avoid bannering and other harassing corporate campaign tactics from unions. As private entities, this is their prerogative; they are responsible to shareholders, not citizens, and their projects are financed by private capital, not taxpayer funds.

Legal Questions About Government-Mandated PLAs and Voluntary PLAs

May 29, 2012

In the landmark *Boston Harbor* case, the Supreme Court held that government-mandated PLAs are not prohibited by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. [1] Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f) make special exceptions from other requirements of the NLRA in order to permit employers and unions in the construction industry to enter into PLAs.

The *Boston Harbor* court was not asked to decide whether government-mandated PLAs violate competitive bidding laws at either the federal or state level. As a result, nothing in the *Boston Harbor* decision requires or prohibits government entities from imposing PLAs on government construction contracts, as long as the government entity is acting as a *market participant* for services it is procuring.

On Feb. 17, 2001, President George W. Bush signed Executive Order No. 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects." This Executive Order declared that neither the federal government, nor any agency acting with federal assistance, ***shall require or prohibit*** construction contractors to sign union agreements as a condition of performing work on government construction projects.

The Bush order was challenged by PLA proponents in a lengthy legal case, *Building and Construction Trades Department, AFL-CIO et al., v. Joe M. Allbaugh, Director, Federal Emergency Management Agency, et al.* The unions contended the Bush executive orders conflicted with the NLRA. In January 2003, the U.S. Supreme Court denied certiorari in the case, upholding the U.S. Court of Appeals for the District of Columbia Circuit decision, which upheld President Bush's Executive Order 13202 and 13208.

Section 517 of the MilCon/VA Appropriations for FY 2013 (H.R. 5854) closely mirrors the neutral language used in the Bush executive order and is consistent with legal precedents.

Under the Bush executive order, the federal government awarded $147 billion worth of federal construction contracts without any government-mandated PLAs. During the eight years of the Bush administration, there were no significant labor-related problems on federal construction projects (such work delays, cost overruns or similar problems), without any need for government-mandated PLAs. [2]

The *Allbaugh* case remains the controlling case on government-mandated PLA law. Governments can enact a position of neutrality when it comes to the use of PLAs by contractors.

Any questions about the recent Michigan case overturning Michigan's anti-government-mandated PLA law on state and state-assisted projects can be refuted by saying the activist judge's decision was incorrect. The *Allbaugh* case remains the controlling case on PLA law unless it is overturned by the U.S. Supreme Court. Section 517 to the MilCon/VA FY 2013 (H.R. 5854) bill mirrors the Bush executive order language and complies with the *Allbaugh* and *Boston Harbor* cases.

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[1] Review the *Boston Harbor* case here: http://www.law.cornell.edu/supct/html/91-261.ZO.html

[2] See Prof. David Tuerck report, "Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem,"

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