

PUBLICATION

Federal Project Labor Agreements: Preparing for Change...Again

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During his campaign, "change" was then-candidate Obama's mantra. Now that he's president, government contractors really want to know how to take advantage of, or at least not be surprised by, whatever changes occur. Some proposed changes are more obvious than others. For example, one of President Obama's priorities, according to his aptly named website (www.change.gov) is a "National Infrastructure Investment" funded by a "National Infrastructure Reinvestment Bank." This investment is based on President Obama's belief that "it is critically important for the United States to rebuild its national transportation infrastructure – its highways, bridges, roads, ports, air, and train systems – to strengthen user safety, bolster our long-term competitiveness and ensure our economy continues to grow."¹ The new administration appears to be serious about this and has tied it to another national priority, the creation of jobs.

Other planned changes, while not hidden, are not broadcast by major news outlets. These proposed changes present a greater opportunity for surprise. Looking a bit forward, consider this scenario: you're preparing to bid on a new infrastructure project which is funded, in whole or in part, by the United States. In reviewing the bid package you come upon a specification requiring that each successful bidder and all subcontractors agree to abide by an agreement between the government (as owner) and a particular labor union. The agreement, executed by the owner and the union prior to bid solicitation, provides for the following: recognition of the union as the exclusive bargaining agent for all project employees; use of pre-determined methods of resolving labor-related disputes; use of labor halls to supply project labor; a requirement that all employees be subject to union security provisions compelling them to become union members within seven days of their employment; and a requirement that all contractors and subcontractors agree to be bound by the agreement.

Hold on a minute. Your company is not unionized and you are not particularly fond of the limitations and requirements of this Project Labor Agreement (PLA). Can the government consider your bid nonresponsive if you don't agree to this specification? The answer to this question is presently "no", but that answer is likely to change in short order.

Battle of Executive Orders

On October 23, 1992, President George H.W. Bush signed Executive Order 12818 instructing that no executive agency bid specification, project agreement or other controlling document may require that bidders, offerors, contractors or subcontractors enter into or adhere to agreements with labor organizations or become members of labor organizations. The Order further forbade discrimination against contractors and subcontractors who declined participation in any labor agreement. PLAs thus became unenforceable as the administration sought to "(1) promote and ensure open bidding on Federal and federally funded construction projects; (2) increase competition in Federal construction contracts and contracts under Federal grants or cooperative agreements; (3) reduce construction costs; (4) expand job opportunities, especially for small businesses; and (5) uphold the associational rights of workers freely to select, or refrain from selecting bargaining representatives...." ² In aid of these goals, Project Labor Agreements were off limits for federal projects.

President Bush's order was short lived. Less than one year later, on February 1, 1993, a newly elected President Clinton issued Executive Order 12836 "in order to eliminate Executive Orders that do not serve the

public interest.” Without fanfare, President Clinton ordered that “Executive Order No. 12818 of October 23, 1992 (prohibiting the use of project agreements on Federal construction contracts), and Executive Order No. 12800 of April 13, 1992 (requiring Federal contractors to post a notice that workers are not required to join unions), are revoked.” Project Labor Agreements were back on the table and executive agencies were free to require adherence by government contractors.

President Clinton's revocation meant that there was no executive order governing the use or non-use of PLAs. This was not acceptable to a newly elected President George W. Bush, and on February 17, 2001, President Bush signed Executive Order 13202. Like the order under the prior Republican administration, this order purposed to ensure open competition, expand job opportunities and reduce construction costs. But this order also had the stated purpose of maintaining “government neutrality towards Government contractors' labor relation....” Thus, executive agencies were prohibited from requiring or prohibiting contractors' entry into or adherence to labor agreements. Implementation of this Executive Order was temporarily stayed when, in the case of *Building & Construction Claims Digest, AIC-CIO v. Allbaugh*, 172 F. Supp. 2d 138 (D.D.C. 2001) a U.S. District Court found it unconstitutional. The District Court was reversed by *Building & Construction Claims Digest, AIC-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) and the stay was lifted. In other words, PLAs were off the menu again. That's where we stand today.

Back to the Question

So, recall the discussion of the “National Infrastructure Investment” and the question raised by the surprising specification. Can the government consider your bid nonresponsive if you don't agree to a specification requiring adherence to a PLA already in place? The answer for now is that it cannot, because that would be contrary to the Federal Acquisition Regulation implementing Executive Order 13202. But President Obama has promised change, and revocation of the present policy is easily accomplished and almost certainly (many say absolutely) on the agenda. According to the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), President Obama's stance is that “the government uses project labor agreements to encourage completion of projects on time and on budget.”³ Couple this with the president's stated positions on labor relations in general,⁴ and it should come as no surprise when, in these first weeks of his administration, President Obama issues an Executive Order putting mandatory Project Labor Agreements back on the menu.

1. See http://change.gov/agenda/economy_agenda/

2. Exec. Order No. 12818, 57 FR 48713 (1992).

3. See www.aflcio.org/issues/politics/obama_jobs.cfm quoting a 4/15/08 Barack Obama speech to the Building Trades Conference.

4. See http://change.gov/agenda/economy_agenda/