Statement of

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to the

Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform

Committee on Oversight and Government Reform
U.S. House of Representatives

For a hearing on

"H.R. 735 and Project Labor Agreements: Restoring Competition and Neutrality to Government Construction Projects"

June 3, 2011

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

AGC is the leading association in the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

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The Associated General Contractors of America (AGC) is pleased to have this opportunity to explain where and how project labor agreements (PLAs) fit into the larger framework of collective bargaining in the construction industry, how Executive Order 13502 and implementing regulations have threatened to disrupt the federal government's procurement of construction, and why the Federal agencies need not, and should not, require Federal construction contractors to have such agreements.

As the leading association in the construction industry, AGC is in a unique position to bring the highest level of sophistication and experience to the debate over *government mandates* for project labor agreements. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly undertake construction for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration, and other federal departments and agencies. Most are small and closely-held businesses. Among them are both union and open-shop companies, and AGC remains committed to equally representing both.

Project Labor Agreements and the Construction Industry

Collective bargaining agreements in the construction industry are unique. Each one is typically limited to coverage of the men and women working in a specific craft, such as carpentry or masonry, but applies to all of the work in a certain geographic area, such as a set of contiguous counties. Because construction projects are complex and typically require several if not many crafts to construct, multiple agreements with different trades often apply to each project in the area they cover. PLAs are an alternative to these area-wide agreements, and their traditional purpose is to eliminate inconsistencies between and among these other agreements. While limited to a particular project, PLAs typically cover most if not all of the crafts needed to construct that project so that work rules, contract duration, and other terms are uniform across trades.

Over the last sixty years, however, the use of collective bargaining agreements in the construction industry, and the percentage of construction workers represented by a union, has

dramatically declined. In 1947, unions represented 87.1 percent of all construction workers. By 1973, that number had dropped to 40.1 percent. By 1998, it had dropped to 18.4 percent. And by 2010, it had dropped to 13.7 percent. As it dropped, the size and sophistication of the open shop sector of the industry steadily increased; today, open shop contractors can handle even the largest and most complex projects.

In this new environment, union contractors and their counterparts in the building trade unions may resort to PLAs for the different purpose of making these contractors more competitive. Where the area-wide agreements would make it difficult for union contractors to meet their open shop competition but the unions do not want to renegotiate those agreements, the unions may agree to engage in a limited degree of "concession bargaining" to apply to a particular project simply to ensure that their members have work. While motivated more by the competitive pressure on union contractors, and less by the difference among the area-wide agreements that would otherwise apply, these PLAs are also the product of private and voluntary negotiations.

AGC's Position on Project Labor Agreements

AGC neither supports nor opposes PLAs *per se*. What AGC strongly opposes are *government - mandates* for PLAs on any publicly funded construction project. The competitive process for the selection of federal contractors tends to enhance quality and the efficient use of resources. Specifications for a project are distributed to contractors and subcontractors to obtain cost-effective bids and ensure that the bidders fully understand all job requirements. Ordinarily, this process encourages contractors to compete with one another to offer the best possible value that meets the project specifications. To be competitive in this environment, every contractor has significant day-to-day incentives to maintain labor policies with employees that promote productivity and quality, while increasing skill and teamwork. Both federal agencies and contractors greatly benefit from this system.

When the government undertakes construction, considerations other than price and quality can, however, enter the equation. The obligation to serve the public's best interests by obtaining the highest quality construction at the best possible value can sometimes be clouded by partisan political agendas. When the potential for this increases, both Congress and the Executive Branch have a responsibility to remind everyone of the lines between politics and procurement.

Executive Order 13502 encourages Federal agencies to consider using PLAs under certain circumstances. When a Federal agency decides to require execution of a PLA, and to make such execution a condition of contract award or a condition of the contract itself, the government has mandated a PLA. The government has also removed the contractor from the process of establishing and maintaining its own labor relations, potentially increasing project costs, and undermining professionalism in collective bargaining. In the end, *government mandates* for PLAs create an artificial and economically distorted environment for public works construction and ultimately erode the competitive bidding process.

AGC is committed to free and open competition in all public construction markets and believes that publicly financed contracts should be awarded without regard to the labor relations policy of the government contractor. AGC believes that neither a public owner nor its representative

should mandate the use of a project labor agreement that would compel any firm to change its labor policy or practice in order to compete for or to perform work on a publicly financed project. AGC further believes that the proper parties to determine whether to enter into a PLA and to negotiate the terms of a PLA are the employers that employ workers covered by the agreement and the labor organization representing those workers, since those are the parties that form the basis for the employer-employee relationship, have a vested interest in forging a fair and stable employment relationship, and are authorized by the National Labor Relations Act to enter into such an agreement.

Accordingly, AGC is disappointed that the Administration, via the Executive Order, has adopted a policy that encourages "executive agencies to consider *requiring* the use of project labor agreements in connection with large-scale construction projects" (emphasis added). The government does need such requirements to reap the economic or other benefits of any PLAs that make sense. If a PLA would benefit a particular project, the construction contractors otherwise qualified to perform the work would be the first to recognize that fact, and in the absence of any mandate, they would voluntarily enter into such an agreement.

Complications Created by *Government-Mandated* Project Labor Agreements

Such requirements are not merely unneeded. They are, in fact, quite damaging. They distort the purposes of PLAs, restrict competition, and have a number of unintended consequences. Government-mandated PLAs typically require contractors – especially but not exclusively open shop contractors – to make fundamental changes in the way they do business, such as adopting different work rules, hiring practices, and wages and benefits, as well as restraining their ability to use their current employees on the project. These changes increase the contractor's risk profile for the project. Among other things, the typical PLA will require open shop contractors: (1) to pay for benefits that their employees will never see, (2) to carve up the work that one multi-trade worker would normally perform among several different unions members, (3) to limit the universe of subcontractors to which they can turn, and (4) to comply with unfamiliar work rules. Preparing and submitting a bid or proposal for a government contract is an expensive process, and open shop contractors have to weigh that cost against their limited chances for success. The reality is that many make the rational decision to forgo the expense and the risk. Therefore, the effect of government mandates for PLAs is to decrease the number of potential bidders and competition, which leads to increased costs to the government and, ultimately, the taxpayers. This is contrary, both in letter and spirit to the March 4, 2009, Presidential Memorandum to the Heads of Executive Departments and Agencies on Government Contracting which states:

> The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers….When awarding Government contracts, the Federal Government must strive for an open and competitive process.

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiates the PLA terms and when the PLA must be submitted to the agency.

The practice by some contracting agencies of requiring all offerors on a project to negotiate a PLA and submit an executed copy of the agreement with their bids, is highly inefficient and unduly wasteful of both the bidders' and labor organizations' time and resources, not to mention that of the agencies that must review all of the proposals. Furthermore, many contractors interested in submitting an offer – particularly where construction in the project area or of the project type are typically performed by open-shop contractors – have no relationship with the unions there and do not know how to begin to comply with the requirement. What's more, the contractors in such a situation cannot control whether they are able to fulfill the negotiations obligation because they have no means to require labor organizations to negotiate, much less agree, with them.

Absent an established collective bargaining relationship with the contractor under Section 9(a) of the NLRA, unions have no legal obligation to negotiate with any particular contractor and have no legal obligation to negotiate in a good-faith, nondiscriminatory, and timely manner. Even if the prospective offeror is able to identify representatives of appropriate labor organizations and attempts to contact them to request negotiations for a PLA, unions will rarely have any obligation to reply. Absent a 9(a) relationship, they have no duty to negotiate, and in no circumstances do they have a duty to actually settle on an agreement. The unions are free to ignore open shop contractors and even the union contractors with whom they merely have pre-hire agreements. The unions are equally free to vary the terms and conditions of the agreements they will sign with different contractors. They have no obligation to offer the same terms and conditions to each and all of them. When and where the government mandates a PLA, the building trade unions have the broad discretion to determine which contractors will qualify to perform the work and even to pick the winner.

On the other hand, if the agency requires only the apparent successful bidder to execute a PLA after offers have been considered, or if it requires only the successful bidder to execute a PLA after the contract has been awarded, then cost terms may be too uncertain at the time that offers are considered to elicit reliable proposals. Also, these options again create a serious risk of granting labor organizations excessive bargaining leverage. The agency could be putting the contractor in the untenable position of having to give labor organizations literally anything they may demand or lose the contract. Parties involved in collective bargaining should never be required to reach an agreement but should be required only to engage in good-faith bargaining to impasse, consistent with the mandates of the NLRA.

Despite the repeated claims that PLAs will "promote economy and efficiency in Federal procurement," it is clear the potential for a government-mandated PLA to raise project costs, create inefficiencies, restrain competition, and be vulnerable to legal challenge should not be underestimated.

The Potentially Harmful Effect of PLAs on Union Contractors

AGC would hasten to add that government mandates for PLAs can also harm union contractors in unique ways. They deprive such contractors of the opportunity to work under the area-wide agreements that these contractors have already succeeded in negotiating. Over half of AGC's 95

chapters negotiate area-wide agreements with the building trade unions, and many of these state-of-the-art agreements already provide the benefits that PLAs are said to provide, such as:

- Common or similar grievance and arbitration procedures;
- Common or similar jurisdictional dispute resolution procedures;
- Common work rules, hours of employment, holidays and shift provisions; and
- No-strike, no-lockout clauses.

Under these circumstances, a PLA is unlikely to offer any economic advantages to the government and may well make matters worse. Government mandates insulate the unions from any economic pressure they would otherwise feel. The unions are free to demand whatever they want, knowing that the contractors have to either meet their demands or disqualify themselves for the work. Either way, union members will get the jobs.

Government mandates can also disrupt the local bargaining over the area-wide agreements. PLAs enable unions to strike the work that PLAs do not cover and still keep their members working. Particularly where inexperienced parties are handling the negotiations, PLAs can introduce wage rates, or reintroduce work rules, that will make it harder for union contractors to compete in the future. Within the union sector of the construction industry, there is considerable concern that government mandates for PLAs will empower the unions to bypass the local bargaining that remains critical to union contractors' future success.

Achieving Economy and Efficiency in Federal Procurement

In May of 1998, the Government Accounting Office (GAO) reported that it could not document any of the alleged benefits of mandating PLAs for federal projects, and expressed great doubt that anyone would ever succeed in doing so (*Project Labor Agreements: The Extent of Their Use and Related Information*, GAO/GGD-98-82). It is therefore far from surprising that President Obama's Executive Order on such agreements stopped well short of making any categorical claims that such agreements will always or necessarily advance the government's interest in economy and efficiency in federal procurement. The Executive Order merely provides that Federal agencies "may" require project labor agreements on a "project-by-project basis" where certain conditions are met.

Nevertheless, AGC believes that the Executive Order goes too far, and AGC urges Congress to prevent federal agencies from ever mandating a PLA. As explained, Federal agencies do not need such mandates to reap the benefits of any PLA that will actually improve economy and efficiency in federal procurement. Their primary effects are to distort the purposes of PLAs, to empower the building trade unions to play a wholly unwarranted role in the selection of federal contractors, to restrict the competition for federal work and to erode the local bargaining that remains critical to union contractors' future success.

But even worse is the confusion that the Executive Order has caused among the Federal agencies.

Federal Agency Execution of Executive Order 13502

The GSA Experience

On April 30, 2010, GSA issued *Procurement Instructional Bulletin 10-04: Guidance on the Use of Project Labor Agreements in Construction Projects Greater than $25,000,000* ("The Bulletin"). AGC has several concerns over the manner in which this bulletin requires GSA's regional offices to implement the Executive Order. Our concerns over the Bulletin are summarized in four key areas:

- GSA has conclusively and unilaterally presumed that project labor agreements reduce project risks on *all* projects over $25 million, directly conflicting with the Executive Order and its requirement for a project-by-project evaluation of the merits of utilizing a PLA;
- GSA exceeded its authority granted by the Executive Order and the FAR rulemaking by granting a 10 percent evaluation preference for projects that include a PLA;
- The Bulletin disregards the Congressional mandate that all projects be subject to full and open competition, except in those rare situations where Congress itself has made an exception; and
- The Bulletin was a significant change in GSA's procurement policy and should have put out for public comment.

AGC believes that the GSA's PLA policy runs afoul of the Competition In Contracting Act (CICA) as well as the Federal Acquisition Regulation (FAR). AGC also believes that a PLA preference and PLA mandate may run afoul of other laws as well.

The Army Corps of Engineers Experience

On October 15, 2010, the U.S. Army Corps of Engineers (USACE) issued *Procurement Instruction Letter (PIL) 2011-01, USACE Policy Relating to the Use of Project Labor Agreements for Federal Construction Projects*. The PIL rightly instructs contracting officers to do the following:

- Consider the potential for a PLA on projects only exceeding $25 million;
- Prepare a memorandum documenting justification for the use of a PLA on a project-by-project basis; and
- Require USACE districts to undertake a labor market survey as part of their PLA evaluation process.

AGC believes that the USACE has taken the realities of the construction marketplace in greater account, and recognizes the potential costs as well as benefits of a *government-mandated* PLA.

H.R. 735 –The "Government Neutrality in Contracting Act"

AGC has long supported Representative Sullivan's legislation, which is intended to ensure that construction projects are awarded based on price and quality and not based on the labor practices of a particular contractor. Our analysis tells us that the legislation, if enacted, would in effect nullify President Obama's executive order on government-mandated PLAs.

We offer two suggestions to make this legislation achieve the true neutrality that it clearly seeks:

1) Section 3(d)(2) should be amended to ensure that any exemption from the legislation should not be based on the possibility or existence of a labor dispute concerning either *signatory or* non-signatory contractors, or the employees working on a project.
2) The legislation should also be amended to ensure that the awarding of projects should not affect the lawfulness of otherwise lawful collective bargaining agreements (such as area-wide agreements) authorized by the National Labor Relations Act.

We urge the Committee to take action on this legislation and report it out as soon as possible for full consideration by the House of Representatives.

Concluding Remarks

AGC thanks the Committee for its consideration of our testimony. To reiterate, AGC opposes any Federal policy that would effectively discriminate against either open shop or union contractors in the competition for or performance of publicly funded construction projects. The construction industry is healthiest when both of these sectors thrive, and government procurement is most economical and efficient when contracts are awarded with impartiality and with preferential treatment for none.