



New Data Weighs on Debate Over Project Labor Agreements

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Government contracts for the construction of public projects raise a host of often controversial questions. One is whether such contracts should include a provision requiring the prime construction contractor and all of its subcontractors to sign and work under a project labor agreement (PLA). Most of the labor unions that represent construction craft workers are strong advocates for such a provision. Most of the employers in the construction industry are equally strong opponents.

For many years, both sides have argued their case. Among other things, the North America Building Trade Unions (NABTU) have claimed that “PLAs are used widely in the private sector” and it has implied that they can “ensure the timely delivery of high-quality construction projects.”¹ For many reasons, construction contractors have disputed both claims. They have, for example, pointed to the latest report on union representation and membership. On January 20, 2022, the Bureau of Labor Statistics revealed that in unions represented only 13.6% of all construction workers and that only 12.6% of such workers were union members.² Logically, it follows that construction contractors successfully deliver most of the projects in the United States without signing any labor agreements, much less project labor agreements.

Suffice it to note that the debate has continued, in part, because empirical data has been scarce. In 1998, the General Accounting Office (GAO) found that “[t]he total number of PLAs in use us unknown because there is no complete or comprehensive database on the use of PLAs in the public or private sector.”³ GAO also found that differences in the success of projects with and without PLAs “could be attributable to [other] factors” and that “drawing definitive conclusions . . . would be difficult.”⁴ Today, one will still search in vain for any comprehensive database on the use of PLAs and each construction project remains unique. Government agencies do, however, have one new body of data to consider. In it lies powerful evidence that mandating PLAs will not improve economy or efficiency in the procurement of public construction projects or otherwise facilitate their delivery.

¹ National Association of Building Trade Unions, “Project Labor Agreements,” https://nabtu.org/workplace_standards/project-labor-agreements/, last visited August 4, 2021.

² Press Release, “Union Members – 2021,” Bureau of Labor Statistics (January 20, 2022), available at <https://www.bls.gov/news.release/pdf/union2.pdf>.

³ GAO/GGD-98-82, “Project Labor Agreements, the Extent of Their Use and Related Information,” May 1998, at 2, available at <https://www.gao.gov/products/ggd-98-82>.

⁴ Id. at 13.

The new data relates to Executive Order 13502 (which then-President Obama signed in February of 2009) and it is the direct product of OMB Memorandum M-09-22⁵ (which the Office of Management and Budget (OMB) issued in July of 2010). The executive order “encourage[s] executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects.” It also defines “large-scale” projects to be those costing “\$25 million or more” and authorizes the relevant agencies to require PLAs “on a project-by-project basis” where the agencies find that doing so would “advance . . . economy and efficiency in Federal procurement” (among other things). The memorandum required the relevant federal agencies to file quarterly reports on their implementation of the executive order from June of 2010 (when OMB issued it) until June of 2017 (when OMB rescinded it). Each report had to “indicate whether a PLA was required in the solicitation” and “provide a brief explanation of the considerations in deciding whether a PLA was appropriate for the project.”

Pursuant to the Freedom of Information Act, AGC of America has sought and received copies of all of the available reports. They include 27 reports that the U.S. Department of Defense submitted to OMB between the fourth quarter of 2009 and the fourth quarter of 2016. For that period, the only missing report is the Department’s report for the fourth quarter of 2017.

The data they provide is powerful because experienced and professional staff of the U.S. Department of Defense (DOD), including the staff of the U.S. Army Corps of Engineers, and the Naval Facilities Engineering Command, were the ones deciding whether to require PLAs. In addition, they made these decisions during an administration that was, if anything, exerting pressure to increase the number of PLAs required for federal construction projects. These non-partisan professionals had no reason to disfavor PLAs and were not under any pressure to do so. Their only mission was to deliver of high-quality construction projects on time and within budget.

In the specific and unique context of each project, these professionals consistently found that PLAs had no merit. The details include the following:

- The 27 reports cover a total of 610 decisions.
- In 52 cases, the professionals decided to not require a PLA because the contract was a MATOC or other IDIQ contract, or DOD had inadvertently omitted the project from consideration for a PLA. In seven other cases, involving projects in Guam, they included the project in their report but neglected to indicate whether they had required a PLA.. Subtracting those 52 decisions from the raw total brings the number of decisions that the reports cover down to 558.
- In another 241 cases, the professionals decided to not require a PLA because, at the time, the FAR Counsel had yet to finalize the implementing regulation and/or DOD had yet to issue guidance. Also subtracting those decisions from the raw total brings the number of decisions that the professionals made on the merits down to 317.

⁵ Peter R. Orzag, Implementation of the President’s Executive Order on Project Labor Agreements (M-09-22), OFFICE OF MANAGEMENT AND BUDGET (July 10, 2009) available at: https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-22.pdf.

- In 315 (or 99.4%) of those cases, the professionals decided not to require a PLA. In only 2 (or 0.6%) of those cases did they decide, to the contrary, to require a PLA.

The individual explanations for their decisions to not require PLAs for those 315 projects are far from uniform. In many cases, the professionals expressly stated their reasons for not requiring a PLA, but in others, they simply stated the factors they had considered in the process of deciding to not require a PLA. In addition, the professionals gave or identified more than 12 different reasons for, or factors in, their decisions. And they combined and recombined those reasons and factors in many different ways. One does find that some of the explanations are identical. In one report, the professionals provided the same explanation for 22 decisions. In another, they provided they provided the same explanation for 10. A large majority of the explanations are, however, unique to the individual projects on which they were made.

Other details that the reports reveal include the following:

- In the process of explaining 156 of their 317 decisions on the merits (or 49.2% of the time), the professionals made an express reference to economy or efficiency, and in each and every one of those 156 cases (or 100% of the time) , they decided not to require a PLA.
 - In 152 of those 317 cases (or 48% of the time), they found that requiring a PLA would not promote economy or efficiency.⁶ In another 4 of those cases (or 1.2% of the time), they did not go that far but did indicate that economy and efficiency were among the factors they considered (and perhaps the only factors) before deciding not to require a PLA.
- In the process of explaining 41 of their 317 decisions on the merits (or (13% of the time), the professionals determined that requiring a PLA would not be suitable or appropriate.⁷
- Together, the preceding account for 197 of the 317 decisions on the merits (or 62% of the total). In that large majority of the cases, the professionals found that requiring a PLA would not promote economy, that those factors did not tip the balance in favor of requiring a PLA, or that a PLA simply would not suit the project.

In addition, the reports provide insight into several of the specific issues that run though the debate over government policy on project labor agreements. For example, the reports also reveal the following:

- In the process of explaining 218 of their 317 decisions on the merits (or 68.8% of the time), the professionals made an express reference to the risk of labor shortages or the need for an

⁶ This includes findings a PLA would not achieve, add, advance, enhance, establish, furnish, improve, increase, provide, or support economy or efficiency, or contribute to economy or efficiency, or meet or advance the goals of economy and efficiency. In addition, it includes finding that a PLA was not necessary to accomplish one or more of the preceding.

⁷ This includes finding that a PLA not practical, feasible, beneficial or warranted for the project, or would not benefit the project, or would not be in the best interest of the government. In one case, the professionals decided to make a PLA a voluntary option, as a way to determine whether a PLA would be “suitable,” and later made the award “without a PLA.”

adequate labor supply. In 217 of those 218 cases (or 99.5% of the time), they decided not to require a PLA.

- In 134 of those cases 218 cases (or 61.5% of the time), the professionals found that the risk of a labor shortage was low, or in the alternative, that they did not need a PLA to ensure an adequate supply of skilled labor. In another 83 of those cases (or 38.1% of the time), they indicated that the risk of a labor shortage, or in the alternative, the need for an adequate supply of skilled labor, was among the factors they considered before deciding not to require a PLA.
- In the process of explaining 95 of their 317 decisions on the merits (or 29.9% of the time), the professionals made an express reference to the risk of labor unrest,⁸ and in 94 of those 95 cases (or 99% of the time), they decided not to require a PLA.
 - In 69 of those 95 cases (or 72.6% of the time), the professionals found little or no risk of labor unrest, and in another 25 of those cases (or 8% of the time), they indicated that the risk of labor unrest was a factor they considered before deciding not to require a PLA.
- In the process of explaining 95 of their decisions on the merits (or 29.9% of the time), the professionals made an express reference to the prior use of PLAs in the relevant area, and in each and every one of those cases (or 100% of the time), they decided not to require a PLA.
 - In 33 of those 95 cases (or 34.7% of the time), they stated that they could not identify any prior use of PLAs in the same area, or at least, that they could not identify any prior use for similar projects. In 62 of those cases (or 65.3% of the time), they indicated that the prior use of PLAs for such projects was among the factors they considered before deciding not to require a PLA.
- In the process of explaining 42 (or 13.2%) of their 317 decisions on the merits, the professionals made an express reference to the risk of a conflict among the multiple contractors and trades they would need to construct the project, or at least to the possibility they would need multiple contractors and trades and contractors. In 41 of those 42 cases (or 99.8% of the time), they decided not to require a PLA.
 - In 5 of those 42 cases (or 11.9% of the time), they indicated that the project would not require multiple contractors and trades, that engaging multiple contractors and trades had not created problems for past projects or that engaging multiple contractors and trades was not a concern. In 36 (or 85.7%) of those cases, they indicated that their need for multiple contractors and trades was among the factors they considered before deciding not to require a PLA.

In the real-world context of individual projects, and with regard to those projects, the professionals also made the following observations:

⁸ This includes references to any history of strikes or other labor disruptions in the relevant area and findings that the risk of labor unrest or instability was low, or in a few cases, that a PLA would not be an effective tool for managing that risk.

- There would be “added expenses associated with the PLA, without offsetting benefits to justify the cost.”
- “[N]o interest in the use of PLA . . . was expressed by any interested parties (e.g. contractors, building trades council, etc).“
- “[T]he applicable Davis-Bacon Wage Determination is . . . sufficient to predict labor costs and ensure efficient and timely completion of this project.”
- “PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining.”
- “Market research revealed negative effects on competition when a PLA was used.”
- “Even though a PLA can establish uniform standards and dispute-resolution mechanisms that may help avoid or solve some workforce problems, market research also revealed that it can exacerbate such problems, causing friction that would not otherwise exist, by forcing a new labor framework onto previously non-union employees. Additionally, the labor market survey shows PLAs cannot prevent strikes, lockouts, and similar job disruptions, as trade organizations are aware of several work stoppages that hindered the progress of PLA projects, notwithstanding the no-strikes provisions included in PLAs.”
- “Market research conducted in the project area indicated the potential for additional administrative burden, direct costs and decreased competition could outweigh any benefits for incorporating a PLA.”
- “Market research reflects that the use of a PLA typically increases project costs by restricting competition. creating delays, discriminating against nonunion employees and places [non-union] contractors at a significant competitive disadvantage.”
- “A PLA may hinder small and disadvantaged businesses efforts to work on the project.”
- “Requiring a PLA would result in less competition and higher prices”
- “A PLA could adversely affect a prime contractor's ability to meet [its] small business goals due to some nonunion small businesses are not willing to bid on a PLA covered project.”
- “The PLA . . . could reduce competition among contractors and subcontractors.

In sum, a significant body of new data is now weighing on the debate over contractual provisions that would require the prime contractor and all of the subcontractors involved in the construction of a public project to sign and work under a project labor agreement. And that data weights heavily against such provisions.