GOVERNMENT MANDATED LABOR AGREEMENTS
IN PUBLIC CONSTRUCTION

A Contentious, Legally Vulnerable and Unnecessary Intrusion on the Rights and Obligations of Public Contracting Agencies, Construction Employers and Their Employees

GOVERNMENT MANDATED LABOR AGREEMENTS ARE A SOLUTION IN SEARCH OF A PROBLEM

Government mandated labor agreements (GMLAs) are no substitute for sound construction contract drafting and project management. They distort the objectives of what should be, and historically have been, private contractual arrangements between construction employers and their employees.

GMLAs purport to have the same objectives as the traditional project labor agreements used by construction employers and unions for decades; i.e., to create cost efficiencies on public construction that cannot be achieved by open competition among all ready, willing and able contractors. The market characteristics that might justify such a dramatic departure from the open competitive bidding procedures normally used to award public construction contracts, and usually mandated by law, are, however, rare.

Indeed, political considerations, and not economic factors often motivate GMLAs. They substitute government representatives for experienced construction industry negotiators to arrive at the agreement, and are often used more to reward supportive building trade unions than to achieve the most cost-effective expenditure of taxpayer dollars.

It should be noted that construction employers that do perceive it to be in their best interest may at any time seek a project labor agreement with the building trade unions. Construction employers are always free to do so, without a government mandate. By the same token, employees are always free to join unions of their choosing.

WHAT IS A GOVERNMENT MANDATED LABOR AGREEMENT?

A government mandated labor agreement (GMLA) is a prehire agreement that establishes the terms and conditions of employment for the craft workers that will work on a publicly funded construction project before the government has selected the construction contractor(s) that will actually employ those workers. GMLA terms and conditions usually:

- Apply to all work performed on the project;

- Require recognition of the signatory unions as the exclusive bargaining representatives for the contractor's employees, whether or not the employees are union members;
- Require the payment of union dues or agency fees (instead of dues, in right-to-work states) by the contractor's employees;
- Supersede all other collective bargaining agreements;
- Require hiring through union referral systems;
- Potentially conflict with prevailing wage laws; and
- Mandate contributions to specific union benefit funds.

Representatives of one or more of the 15 building trade unions and the public agency responsible for the project usually negotiate the GMLA. Although they have the greatest stake in the outcome, construction employers are usually excluded from the process. The GMLA is then imposed through contract specifications, without regard to the labor and employment practices of the affected contractors, or their employees' preferences, or the market conditions prevailing in the area of the project.

WHAT'S WRONG WITH THE GOVERNMENT NEGOTIATING THESE TERMS AND CONDITIONS AND IMPOSING THEM ON CONTRACTORS?

This approach to public construction projects raises a host of questions and problems. It leaves government officials vulnerable to their own inexperience. It is unlikely to enhance the cost-efficiencies of a project. And it infringes on the rights of employers and their employees. For example:

Negotiating a GMLA

Government representatives usually have little or no experience with the construction industry, or in negotiating with building trade unions. GMLAs negotiated under these circumstances frequently include costly terms and conditions. In addition, even when construction employers are included in the negotiations, they have little bargaining leverage once the public agency has decided that a GMLA must be used. Knowing that a deal must be struck as a condition of the construction contract, the unions are in a position to demand and hold out for terms and conditions that do not prevail in the private market for the same type of project.

Private Market Terms and Conditions

There is no evidence that GMLAs are more cost-effective than open competition for public construction projects. A major reason for this is that many local collective bargaining agreements between construction employers and unions are already state-of-the-art and contain many of the benefits that GMLAs are said to provide, including:

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

The terms and conditions negotiated by government officials are rarely more competitive or cost-effective than the terms and conditions found in local agreements, and may unlawfully interfere with existing contractual relationships. In fact, GMLAs frequently conflict with the local agreements.

In a largely open shop market, unions may not be able to provide the quantity of workers required to perform the project. In the absence of a GMLA, all open shop and many union contractors have the flexibility to subcontract work to companies based solely upon their bids and past performance, and to hire employees and assign work according to skill, without regard to labor policy or preference. In addition, many union general contractors are signatory to agreements with only two or three unions. A GMLA may require a contractor to employ the members of new or different unions, and to comply with the wage, benefit and labor practices of as many as 15 different unions.

This is hardly a scenario for cost-effective performance or efficient management.

Wages and Benefits

The Davis-Bacon Act and its state counterparts already require all contractors and subcontractors working on most publicly funded construction projects to pay their employees at the rates prevailing in the relevant area. GMLAs may require labor practices and work assignments that conflict with the applicable prevailing wage law. Any such conflicts can cause not only jurisdictional disputes among building trade unions but also pay

disputes. Prevailing wage laws have their own job classifications.

GMLAs usually require contributions to specific benefit funds. Construction employers using different benefit funds for their employees usually must continue to contribute to these funds, in addition to any others mandated by the government.

Most construction benefit programs require uninterrupted contributions on behalf of participating employees to maintain coverage and eligibility. Because of this, most employees who are not already members of the mandated unions will not qualify for their benefits. In fact, some of these employees may actually lose some or all of their benefits.

Hiring Halls

Beyond a small group of "core" employees, most GMLAs require that all craft workers employed on the project be referred through union hiring halls. Although hiring halls are prohibited from discriminating, the bylaws of most unions require hiring halls to give preference in referrals on the basis of previous union employment.

Union Membership, Dues and Fees

Not only do contractors have to become signatory to the GMLA in order to perform work on the project, most GMLAs require contractor employees to join one or more unions before they can be employed on the project. Employees will be required to accept and pay for union representation regardless of their wishes and without an opportunity to vote. They will be required to pay union dues to one or more unions, or agency fees, instead of dues, in right-to-work states.

GMLA History and Cost Impact

Historically, construction employers and unions have used project labor agreements for major projects of extended duration that require large numbers of many different crafts. For instance, project labor agreements were used for the construction of the Grand Coulee Dam in Washington State in 1938 and the Shasta Dam in California in 1940.

The practice was more common when unions represented the majority of construction workers. For example, in 1947 unions represented 87.1 percent of all construction workers. However, in 1999 unions represented less than 20 percent of the construction work force and the necessity and utility of project labor agreements as a competitive vehicle has diminished along with union representation in the industry.

The General Accounting Office (GAO) confirmed this trend in a 1998 report. The GAO was unable to document any cost efficiencies achieved by GMLAs on federal construction and concluded that such alleged efficiencies could probably never be documented. Likewise, research conducted on GMLA projects in Alaska, California, Massachusetts, Nevada and New York by Wharton School of Business Professor Herbert R. Northrup, Ph.D., documented less competition and increased costs.

ARE GMLAs LEGAL?

In 1959, Congress amended the National Labor Relations Act (NLRA) to permit employers "engaged primarily in the building and construction industry" to negotiate and execute prehire agreements with the building trade unions. At no time has Congress authorized anyone else to sign such agreements.

In its 1993 decision in *Boston Harbor*, the U.S. Supreme Court held only that public entities may use project labor agreements "to the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement." This was far from an endorsement of government mandated labor agreements. It did not even address what a "private purchaser" may do. Among the many federal and state legal issues left unresolved are:

- Whether GMLAs have a disproportionately adverse impact on minority and women business enterprises, in violation of Title VI of the 1964 Civil Rights Act and/or other civil rights laws.

- Whether GMLAs violate the construction industry provisions of the NLRA permitting only employers "engaged primarily in the building and construction industry" to enter into prehire agreements.

- Whether GMLAs between an owner and a labor organization violate the NLRA ban on agreements not to do business with third parties, for the purpose of influencing their labor policies.

- Whether the Competition in Contracting Act or other federal statutes prohibit GMLAs on federally funded construction.

- Whether state competitive bidding laws prohibit GMLAs.

Before public agencies or their representatives consider a government mandated labor agreement for a public construction project, they should thoroughly investigate the local construction market. Likewise, they should investigate the costs and competitive impacts of a GMLA, as well as the legal vulnerabilities that have the potential to delay and increase the costs of needed projects.

AGC believes that the normal competitive procedures used to procure public construction projects are more that adequate to maximize the cost efficiencies of most, and probably all, public construction projects.

The Associated General Contractors of America, Inc., (AGC) is available to answer all your construction questions. For more information, call your local AGC chapter.

Local AGC Chapters