

**GOVERNMENT MANDATED LABOR  
AGREEMENTS IN PUBLIC CONSTRUCTION**

**Their History and Factors to Consider**

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# **THE HISTORY OF GOVERNMENT MANDATED LABOR AGREEMENTS IN THE CONSTRUCTION INDUSTRY**

## **How Public Officials and Their Representatives Have Changed The Purposes and Effects of Construction Project Labor Agreements**

### **What are Construction Project Labor Agreements?**

Project labor agreements are unique to the construction industry. Unlike collective bargaining agreements between other industrial employers and their unions, collective bargaining agreements in the construction industry usually apply only to work performed by signatory contractors in specified counties or other well-defined geographic areas. Project labor agreements are even more specialized and focus on one particular construction project. They are often referred to as “prehire” agreements because they are usually negotiated between construction contractors and one or more building trade union in advance of submitting a bid for the project, and before anyone is actually hired to perform the work.

The terms and conditions of a project labor agreement generally: (1) apply to all work performed on a specific project or at a specific location, (2) require recognition of the signatory union(s) as the exclusive bargaining representatives for covered workers, whether or not the workers are union members, (3) supersede all other collective bargaining agreements, (4) prohibit strikes and lockouts, (5) require hiring through union referral systems, (6) require all contractors and subcontractors to become signatory to the agreement, (7) establish standard work rules, hours and dispute resolution procedures and (8) establish wages and benefits. When the project is completed, neither the employer nor the union(s) have any further obligations to each other under the agreement.

### **What is the History of These Agreements?**

Project labor agreements were conceived and originated by construction employers and building trade unions within the context of the collective bargaining that they regularly engage in. The necessity and utility of a project labor agreement were decisions made by employers and unions. Likewise, their negotiation was between, and at the option, of construction employers and building trade union representatives. Project labor agreements were intended to address specific problems either created or left unresolved by local area collective bargaining agreements with individual crafts, and date to a time when union construction dominated the national construction market.

Historically, contractors and unions have used project labor agreements for major projects of extended duration that require large numbers of many different crafts. For instance, in the federal sector 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. During and after World War II, many large atomic energy and defense construction projects used project labor agreements for these reasons as well. 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. In 1973, unions represented 40.1 percent. However, in 1999 unions represented only 19.6 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.

It should also be noted that the industry has never universally supported project labor agreements as a means of enhancing competitiveness. Many contractors and subcontractors and their associations invest a great deal of time and resources to negotiate local area collective bargaining agreements with the individual building trade unions in their market. These agreements apply to all the work performed in a defined geographic area by the signatory contractors for the duration of their term, typically 3 years. They address all the terms and conditions included in project labor agreements, as well as circumstances unique to the local market.

Project labor agreements, by definition, are project-specific, with terms and conditions that are frequently different from those found in local agreements. Contractors and subcontractors competing for work on the basis of local agreements can be at a disadvantage. In addition, the terms and conditions of the project labor agreement can negatively impact negotiations on local agreements. The more frequently project labor agreements are used in an area, the less utility local collective bargaining agreements have. The incentive for their negotiation and execution frequently declines accordingly. Many construction labor and management representatives believe that the key to improving the competitiveness of the union sector of the industry is to improve the terms and conditions of local area collective bargaining agreements, and avoid unique and separate agreements that often undermine these agreements.

### **What Has Happened to These Agreements?**

In many instances, project labor agreements remain what they have always been; i.e., privately initiated and negotiated agreements to be applied to public or private construction projects. Unfortunately, in many other instances public officials have either misunderstood or distorted their purposes and effects. While giving lip service to traditional project labor agreements, many public officials are now attempting to use them for something quite different.

Many public officials are using government mandated labor agreements (GMLAs) as a substitute for sound project management and contract drafting to achieve objectives traditionally, and better addressed, in contract specifications. This distortion of the private nature of project labor agreements and their objectives seeks to transform private contractual arrangements into a public mandate. In addition, GMLAs are sometimes used to achieve on behalf of the unions what they have been unable to accomplish on their own. By mandating union membership for all workers employed on a GMLA project as well as that all contractors and subcontractors become signatory, unions are spared from the necessity of demonstrating the merits of union membership to employees or convincing employers that being signatory to union agreements can be competitively advantageous.

## **What are the Different Purposes of the Traditional Agreements and the Government Mandates?**

The traditional objective of a project labor agreement is to enhance the competitive posture of the signatory contractor with respect to a specific project. An agreement unique to the project may be preferable because the local collective bargaining agreements that would otherwise apply to the work for signatory contractors contain terms and conditions that are not as cost-effective as those used by competitors. Negotiations are usually initiated by the contractor, but sometimes by the union(s), before a bid is formulated. To improve their competitive position and secure the work for their companies and members, contractors and unions engage in what is often called “concession bargaining.” This may include modification of the terms and conditions of existing local agreements to create an agreement unique to the project, or it may include the negotiation of entirely new terms and conditions. If an acceptable agreement is concluded, it becomes the basis for a contractor’s bid and controls the performance of the work if the contractor is awarded the project.

GMLAs purport to have the same objectives; i.e., to reach an agreement that will create cost efficiencies on public construction that cannot be achieved by open competition between contractors using local collective bargaining agreements and open shop contractors. However, the market characteristics that require such a dramatic departure from the open competitive bidding procedures traditionally used to award public construction contracts, and usually mandated by law, are rarely explained or documented. Instead, GMLAs are often motivated by political considerations, not economic factors, and frequently substitute government representatives for experienced construction industry negotiators to arrive at the agreement. GMLAs executed under these circumstances are often used more as a vehicle to reward supportive building trade unions than as a means to achieve the most cost-effective expenditure of taxpayer dollars.

## **What are the Different Effects of Government Mandated Labor Agreements vs. Traditional Project labor Agreements**

### **Impact on Collective Bargaining**

In the practice associated with traditional project labor agreements, contractors and/or subcontractors and building trade unions mutually decide whether a project labor agreement is appropriate for a particular project. If the parties agree, they then negotiate mutually acceptable terms and conditions to be used as the basis for bidding and performing the work. However, a government mandated labor agreement (GMLA) is not optional and is often motivated by political considerations.

Because of their mandatory character and the inexperience of those often negotiating their terms, GMLAs on publicly funded construction can impact local collective bargaining. GMLAs frequently set patterns and establish precedents for the industry that do not exist in the private market. Unions can be put in a position to insist that contractors accept the terms and conditions of GMLAs for private work. Contractors will find it difficult to refuse these demands when a substantial portion of the union work force is employed on construction subject to

GMLAs. In this type of market, there are few disadvantages to unions of a strike directed at work not subject to a GMLA, since GMLA work can continue to employ the bulk of the union work force. In areas where these projects constitute a significant volume of the work, government mandates for these agreements will seriously compromise local employers in the negotiation of local area labor agreements.

### **Impact on Competition**

A GMLA can significantly increase the cost of a project for open shop contractors by eliminating the flexibility to employ multi-skilled and semi-skilled personnel and to deploy them accordingly. The effects of these inefficiencies are compounded by the requirement that the majority of the work force be referred through union hiring halls. Typically, the employer is permitted to select the first 5 or 10 nonsupervisory employees. Additional employees must be referred by the appropriate union hiring hall. Under the criteria used by most hiring halls, craft workers who are not members of the union are not likely to be referred to the project. Contractors on GMLA projects are thus working with a largely unfamiliar labor force.

In addition, a GMLA typically causes open shop contractors to incur new expenses and operate less efficiently by subjecting them to other terms and conditions of collective bargaining agreements that would not be required under the operation of the Davis-Bacon Act, or most other prevailing wage laws that typically apply to publicly funded construction work. These terms and conditions include overtime for more than 8 hours of work in a day, travel time, "show-up" pay, supervisor or crew size minimums, as well as others. For example, the mandatory union benefit fund contributions normally required by GMLAs force contractors that provide employee benefits in a different fashion to (1) suspend those benefits, (2) to pay twice or (3) simply decline to work on the project. In addition, most employees that are not members of the GMLA signatory union(s) before starting work on the project will not qualify for the benefits because of time-based vesting and eligibility requirements. In fact, some employees may actually lose some or all of their benefits. These factors increase the cost of the project significantly and prevent many qualified, economical open shop contractors, as well as union contractors that are not already contributors to the GMLA signatory unions' benefit plans -- especially small businesses - from bidding on the project.

Likewise, a GMLA can increase the cost of the project for the union contractor. Rather than bidding and performing work on the project based on the costs related to the terms and conditions the contractor has agreed upon with its signatory unions, upon substantial investments of time and resources over years of negotiations, the contractor under a GMLA is subjected to the costs of new terms and conditions often with different and more numerous unions. This can create jurisdictional disputes that would not otherwise exist. Because contractors are not usually given an opportunity to participate in the negotiations for a GMLA, there is no opportunity to harmonize the terms of different contracts to achieve a cost-efficient outcome. Moreover, even when included in the negotiations, the contractor has little bargaining leverage once the public agency has decided that a GMLA will 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 costly wages (above applicable prevailing wage standards), hours and other terms and conditions.

Faced with these uncertainties, many contractors will simply decline to bid on public work that requires compliance with a GMLA. Others will incorporate the estimated costs imposed by the GMLA into their bid, reducing their competitiveness or increasing the costs to the public

### **Impact on Workers**

Workers seeking employment on GMLA projects are required to join one or more designated unions and pay union dues, or agency fees instead of union dues in right-to-work states, regardless of their preference for union representation and without an opportunity to vote on that choice. Furthermore, whether or not they are employed on the project will depend on how their experience and past union affiliations conform to union hiring hall priorities, not on credentials evaluated by employers.

### **Impact on Cost-Effectiveness**

The General Accounting Office (GAO) was unable to document any cost efficiencies achieved by GMLAs on federal construction and, furthermore, concluded that such alleged efficiencies could probably never be documented [*Project Labor Agreements: The Extent of Their Use and Related Information* (GAO/GGD-98-92, May 1998)]. In addition, research conducted on GMLA projects in Alaska, California, Nevada and New York by Wharton School of Business Professor Herbert R. Northrup, Ph.D., documented less competition and increased costs [*Journal of Labor Research*, John M. Olin Institute for Employment Practice and Policy, Department of Economics, George Mason University, Vol. XIX, No. 1 (Winter 1998)].

### **Do the Differences Have Any Legal Significance?**

In 1993 the U.S. Supreme Court ruled on the legality of a government mandated labor agreement for the Boston Harbor clean up project [*Building & Construction Trades Council v. Associated Builders & Contractors* (“*Boston Harbor*”), 113 S. Ct. 1190 (1993)]. The Massachusetts Water Authority (MWA) imposed the agreement through its construction manager. The Court was asked only to decide whether the MWA was acting as a purchaser of construction services, as opposed to a government regulator of labor relations, and if so, whether its imposition of the agreement was lawful.

Accordingly, the Supreme Court issued a very narrow decision. The Court ruled that public entities could use project labor agreements only “to the extent that a private purchaser may choose a contractor based upon that contractor’s willingness to enter into a prehire agreement.” That extent, in turn, is limited by the National Labor Relations Act (NLRA) to employers “engaged primarily in the building and construction industry.” The Court was not asked, and did not decide, whether the MWA or any other public agency is such an employer.

The *Boston Harbor* decision has been advanced by proponents of government mandated labor agreements as an unqualified endorsement of these agreements for publicly funded construction. However, the Court’s decision contains no such endorsement. Among the many federal and state legal issues left unresolved are:

- (1) 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 its state counterparts.
- (2) 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.
- (3) Whether GMLAs between an owner and a labor organization violate the NLRA prohibition against agreements restricting an employer’s right to do business with any other employer or person.
- (4) Whether the Competition in Contracting Act or other federal statutes prohibit GMLAs on federally funded construction.
- (5) Whether state competitive bidding laws prohibit GMLAs.

### **What is AGC’s Policy on Project Labor Agreements?**

The Associated General Contractors of America, Inc., (AGC) does not oppose traditional project labor agreements. Even though they have some negative effects on local area collective bargaining, AGC strongly supports open competition and the traditional agreements have tended to encourage such competition. Without hindering other firms, or dictating labor policy for other firms, these agreements have enabled some union contractors to be more competitive.

AGC is committed to free and unrestricted construction markets. AGC opposes the imposition of exclusionary project labor agreements by public owners, or their representatives, on any publicly funded construction project. A public owner or its representative should not require the use, or negotiation, of a government mandated 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 believes that GMLAs on publicly funded construction are a solution in search of a problem. AGC is not aware of any documentation that indicates that the terms and conditions allegedly ameliorated by GMLAs (work stoppages and labor unrest, uniform work rules and providing labor through union hiring halls) have materially impacted the costs or schedules of public construction, or that free and open competition without the impediments created by GMLAs are not equally effective. Likewise, there is no evidence that public resources are used in a more productive fashion by imposing the same one-size-fits-all agreement on all competitors for public works.

To the extent that GMLAs remove the free market economic forces that underlie both the competitive bidding laws and the collective bargaining process, they subvert the objectives of those laws and that process and make it difficult, if not impossible, for the public to benefit from the full competition that it is entitled to expect. AGC does not believe that this is a proper role for government at any level or a proper use of public funds.



## **GOVERNMENT MANDATED LABOR AGREEMENTS IN PUBLIC CONSTRUCTION: FACTORS TO CONSIDER**

### **Questions That Public Officials and Their Representatives Need to Address**

1. How is labor policy normally addressed on publicly awarded construction projects?
2. Have any publicly awarded construction projects suffered from any of the problems allegedly addressed by government mandated labor agreements (GMLAs), such as labor unrest or labor shortages? If so, did they affect the cost or completion of the project?
3. What firms normally perform the same type of project in the private and public markets for which a GMLA is being contemplated? Are the contractors and subcontractors that normally perform this type of construction union or open shop?
4. How would a GMLA affect the ability of open shop contractors and subcontractors in the area to compete for and perform work on a project subject to a GMLA?
5. How many contractors and subcontractors that normally compete for and perform public construction work are signatory to local area collective bargaining agreements with the building trade unions? How would a GMLA impact the union contractors and subcontractors that normally compete for and perform public construction work?
6. What are the terms and conditions of those local area collective bargaining agreements?

*Note: It is important to know the characteristics of the market to determine whether a GMLA is appropriate or necessary. In a market dominated by the open shop sector, unions may not be able to provide the quantity of workers necessary to perform the project. In addition, many local area collective bargaining agreements already contain the benefits that GMLAs are said to provide, such as common grievance and arbitration procedures among crafts, common jurisdictional dispute resolution procedures, common work rules, hours of employment, holiday and shift provisions, and no-strike and no-lockout clauses.*

*Regardless of the market characteristics, contractors that perceive it to be in their best interest to seek a project labor agreement with the building trade unions in order to compete for or to perform work on a public project are free to do so.*

7. If it were decided to impose a GMLA, who would negotiate its terms and conditions?
8. How would the terms and conditions of a GMLA improve on the terms and conditions of the local area collective bargaining agreements?

*Note: Because of their mandatory character and the typical inexperience of those often negotiating their terms, GMLAs frequently include costly terms and conditions. In addition, GMLAs can impact local area collective bargaining. GMLAs can set patterns and establish precedents for the industry that do not exist in either the public or private sector.*

9. Will the project be subject to a prevailing wage law? If so, how would the requirements of the law differ from the provisions of a GMLA with respect to wages, fringe benefits and labor practices?
10. Would a GMLA require all contractors and subcontractors performing work on the project to become signatory to it?
11. Would a GMLA supercede all other existing agreements?
12. Are the unions that would be signatory to a GMLA the same unions that are signatory to the local area collective bargaining agreements?
13. Would a GMLA require contractors and subcontractors signatory to local area collective bargaining agreements to assign work to unions with which they have no prior affiliation or experience?

*Note: Open shop contractors have the flexibility to subcontract work to companies based upon cost-effective bids and performance, and to assign work according to the skill level it requires. Contractors signatory to local area collective bargaining agreements frequently have the same flexibility. 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, as well as comply with the wage, benefit and labor practices of as many as 15 different unions.*

14. Would a GMLA require contributions to union benefit funds? If so, would union and open shop contractors be required to continue to contribute to existing funds, as well as additional union funds, to maintain benefits for their employees? Would those contractors' employees actually benefit from these additional contributions to the union funds?

*Note: Most construction benefit programs require uninterrupted contributions on behalf of participating employees to maintain coverage and eligibility. Benefit funds normally have time-based vesting and eligibility requirements that must be met before benefits can be received. Most employees that are not already members of the GMLA signatory unions before starting work on the project will not qualify for union benefits because of these requirements. In fact, some of these employees may actually lose some or all of their benefits.*

15. Would a GMLA require all craft employees to become members of one or more designated trade unions? What is the ratio of union and nonunion construction craft workers in the local area?

*Note: Employees not previously represented by a union will be under the terms of most GMLAs, regardless of their wishes and without an opportunity to vote on their preference. This may reduce the number of craft workers that would otherwise be interested in employment on the project.*

16. Would a GMLA require all craft employees to become union members and pay union dues, or agency fees in lieu of dues in right-to-work states?

17. Would a GMLA require that all craft employees be hired through a referral from a union hiring hall? How many employees would be exempt from this requirement? What would be the hiring hall registration requirements and preferences? How would the GMLA affect the ability of contractors and subcontractors to employ their regular work force?

*Note: The registration requirements and preferences of union hiring halls often require that workers be referred to projects based on previous union employment.*

18. Would a GMLA provoke a judicial challenge? Would it be vulnerable to challenge under federal, state or local laws? Would such a challenge increase the cost of the project or delay its initiation and completion? Would a public hearing be required or appropriate under the relevant procurement laws and regulations?

*Note: Many GMLAs have been challenged and overturned under state competitive bid laws. In addition, other issues impacting the legality of GMLAs include:*

- *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 its state law counterparts.*
- *Whether the Competition in Contracting Act or other federal statutes permit federal agencies, or the recipients of federal funds, to mandate labor agreements on federally funded construction.*
- *Whether GMLAs violate the construction industry provisions of the National Labor Relations Act (NLRA) permitting employers “engaged primarily in the building and construction industry,” but only such employers, to enter into pre-hire agreements.*
- *Whether GMLAs between an owner and a labor organization violate the NLRA prohibition against agreements restricting an employer’s right to do business with any other employer or person.*

*The U.S. Supreme Court decision in Boston Harbor did not address or resolve these issues.*

If, after carefully considering all the above factors and other considerations, public officials or their representatives believe that a government mandated labor agreement is appropriate, the local chapter of the Associated General Contractors of America should be contacted for assistance in negotiating its terms and conditions.