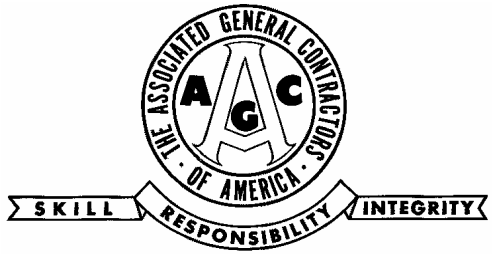

An Analysis of Public Owner Construction Project Labor Agreements

Second Edition

The Associated General Contractors of America, Inc. is the nation's largest construction industry trade association, representing some 7,500 general contractors and 25,000 industry specialty contractors, subcontractors, suppliers, and professional services member firms in 100 AGC chapters nationwide. AGC member firms provide the highest quality services to public and private sector clients in the commercial and public building, highway, heavy industrial and municipal utility construction markets, as well as in international markets. AGC represents equally construction firms that operate with collective bargaining agreements and those that operate on an open shop basis.

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INTRODUCTION

This analysis was produced by AGC in support of its policy opposing public owner project labor agreements. This policy is subscribed to by AGC member firms that operate with collective bargaining agreements and by those that operate on an open shop basis. AGC policy is founded on the well-established and widely accepted principles that taxpayer financed construction must be open to competition among all qualified firms regardless of their labor policy or their employees' collective bargaining choices and that competitive collective bargaining agreements are best achieved through employer-negotiated agreements free of public agency interference.

AGC's policy position on Project Labor Agreements for publicly funded construction projects is as follows:

- The Associated General Contractors of America reaffirms its commitment to free and unrestricted construction markets.

- Fundamental to this principle is that publicly financed contracts are to be awarded without regard to the labor relations policy of the contractor.

- AGC opposes any action that interferes unlawfully or improperly with a contractor's or awarding agency's full and free exercise of its rights in this regard, including acts of violence, intimidation, or regulatory retaliation aimed at excluding construction contractors from projects because of their labor policies, or discriminating against employees or potential employees.

- 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 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.

- Any such actions by government awarding authorities that discriminate against the employees of any employer who is thus prevented from engaging in commerce.

AGC's policy against preferential procurement, based on labor policy, is pursued in an even-handed manner. For example, AGC opposed Executive Order 12818 because it would have barred union sector firms with union subcontracting restrictions from direct Federal and Federally assisted projects.

This analysis has seven parts. Sections I through IV discuss the public policy and fiscal arguments against public agency political concessions to construction unions through preferential procurement practices on public works projects. These Sections include a compilation of various points, authorities and data invalidating the premises advanced for such public agency project labor agreements. Section V is a detailed analysis of many of the legal issues that will arise in the continuing legal challenges to project labor agreements in the event that some agencies remain slow to heed the alarms surrounding such agreements. Section VI outlines the terms of the four executive orders that have been issued by state governors on the subject of PLAs to date. Section VII analyzes the terms of the President's June 1997 memorandum on PLAs for federal construction.

Public owner project labor agreements are pre-hire collective bargaining agreements that typically mandate union wage and employee benefit payment rates, union work rules and practices, union membership and dues payment obligations, and union hiring hall referral procedures on publicly funded construction projects. In exchange for the union-only requirement, the unions usually agree to a no-strike/no-lockout provision. The entire agreement, in turn, is usually incorporated into the project specifications.

In most agreements, either the public agency negotiates directly with representatives of construction unions (to the exclusion of other industrial or other local unions) or the agency directs or permits its project agent or representative to actually negotiate the agreement, which is then imposed by the public agency through the required contract specifications. By whatever means of governmental decision making and authority, the end result is that a public agency encumbers the public works contracting system with a union-only requirement, discriminating against those qualified workers and businesses that insist on their private legal rights to choose their own labor status and still compete for public project awards and employment.

This paper examines the various pretexts for such union labor market preferences in those places where labor organizations have been actively lobbying for preferential treatment in the wake of the U.S. Supreme Court's 1993 *Boston Harbor* decision. Very often, proponents of union-only contracting restrictions and the public agencies that accept such entreaties do not examine the narrow limits of the *Boston Harbor* decision, which addressed only a technical legal pointXthe preemptive effect of the National Labor Relations Act on public project labor agreementsXand did so with respect to a very exceptional 10-year, court-ordered, $6.1 billion mega project. The Supreme Court did not say what public agencies should do in fairly administering public construction procurement.

This analysis supports the conclusion that public project union-only labor agreements as promoted by construction unions on federal, state and local projects are unsound fiscal, social, procurement, and legal policies that waste precious public construction project resources that are badly needed for infrastructure investment necessary for greater industry competitiveness and economic stimulus.

Public agencies that remain susceptible to construction unions who use political importuning to exclude other union-represented and non-represented workers from public works projects put at risk the integrity of open competitive bidding rules; they also waste taxpayer (or ratepayer) resources through diminished competition and lost opportunities to gain project efficiencies through employer-negotiated bargaining or open-shop practices. Moreover, when government power is exercised on behalf of just one element of the industry, the tilt in the free-market forces creates imbalances in private sector bargaining. When this happens, the political favoritism affects even private sector markets because local unions are better able to forestall competitive improvements in the employer-negotiated local area agreements. These imbalances may ultimately diminish the tax base since even private-sector construction clients are forced to locate plants and facilities where public agencies do not interfere with the market rates.

Furthermore, political officials who accede to union top-down public project market recovery tactics also overstep the special, limited, exceptions in the labor laws for antitrust and other statutory exemptions reserved only for employers engaged primarily in the building and construction industry and unions in a bargaining relationshipX**not public agencies and their agents acting merely as consumers of industry services.** Playing politics with tested public policy and legal principles at the behest of construction unions serves only the institutional interests of the unions and puts even greater taxpayer resources at jeopardy in the legal challenges that often follow such radical departures from established practices. Even worse, the controversy surrounding such market preferences is a lightning rod for challenges that will undoubtedly delay projects, in many cases, further slowing the economic stimulus and jobs that major public works projects can generate.

Executive Summary

The following are the major points addressed in this analysis of the public policy and legal implications of public owner union-only project labor agreements.

- Public procurement practices providing open competition among all qualified firms, regardless of the labor policies of the employers or the union representation choices of their employees, best serve the taxpayer's (or ratepayer's) interests in cost-effective construction program results.

- Union-only closed procurement policies serve only the interests of the favored unions, diverting badly needed infrastructure investment funds to legal challenges, subsidizing union practices, and delaying badly needed public projects.

- Public agencies are more frequently rejecting exaggerated claims that the Supreme Court's *Boston Harbor* decision countenanced closed public procurement for the benefit of the building trades.

- Many knowledgeable procurement agencies reject union-only project labor agreements early in the political decision making process, thereby saving taxpayers the expense of closed procurement and the attendant legal challenges and project delays.

- Construction industry employers, not public agencies or their agents, are the most knowledgeable and best able to negotiate truly competitive agreements with construction labor organizations.

- Public agencies and their agents that negotiate project labor agreements directly with unions frequently cause many unintended consequences that can affect private-sector industry bargaining and may even overstep narrow legal exceptions for employers in the industry under antitrust and labor laws.

- Public owner project labor agreements may run afoul of a wide variety of federal, state and local laws, including ERISA rules against state laws mandating employee benefits, federal antitrust laws, NLRA union dues restrictions, state constitutions, as well as state competitive bidding laws and administrative procedure requirements.

- Experts in procurement policy have urged state and local officials to resist union-only procurement favoritism and concentrate on proper construction project delivery through open competition and sound fiscal and project management skills.

An Analysis of Public Owner Construction Project Labor Agreements

I. WHAT ARE PUBLIC OWNER PROJECT LABOR AGREEMENTS?

Public Owner Project Labor Agreements (hereinafter called "PLAs") come in a wide variety of shapes and sizes. In order to understand exactly what a Public Owner PLA entails, the terms of the PLA must be carefully reviewed. By definition, Public Owner PLAs require involvement of a public entity. Public entities include federal, state, or local governmental units and many so-called quasi-governmental units such as federal, state and local agencies, boards, commissions, development authorities, public hospitals, tollroad authorities and the like. The line between private sector work and public work can be difficult to draw in some circumstances and may require a careful analysis of the structure of the contracting entity and its relationship with the federal, state or local governmental entity.

The terms of Public Owner PLAs range from a single sheet of paper containing a handful of provisions to complex documents with multiple attachments. Again, careful analysis of each PLA is required to determine its actual impact on the project in question. At a minimum, virtually all Public Owner PLAs require job site contractors and subcontractors to use building and construction trade union hiring halls to obtain craft employees. This is the key *quid pro quo* for the second feature of Public Owner PLAs – no-strike clause by the signatory unions for the duration of the project.

In addition to these two basic features, Public Owner PLA's frequently incorporate some or all of the following:

(1) Mandatory recognition of the signatory unions as the sole and exclusive bargaining agents for all construction craft employees.

(2) Mandatory union membership (in non-right-to-work states) and dues payments.

(3) Mandatory payments into union fringe benefit funds for all employees.

(4) All contractors and subcontractors are obligated to sign the PLA. Under many PLAs, contractors also must sign the local union collective bargaining agreements applicable to all work in the area outside the public project.

(5) Restrictive subcontracting provisions requiring all subcontractors at every tier to execute the PLA and to become signatory to the appropriate local union collective bargaining agreements.

(6) Mandatory grievance and jurisdictional dispute resolution procedures.

(7) Uniform hours of work, holidays and work rules.

(8) Union stewards for all crafts.

(9) Contractor derivative liability for subcontractor wage and fringe benefit payment delinquencies.

(10) Non-discrimination provisions and affirmative action requirements that may be different from otherwise applicable laws.

PLAs typically are negotiated by either the public entity or the entities' construction manager directly with the local unions or the local AFL-CIO Building and Construction Trades Council. In most cases, there is little or no contractor involvement in the negotiations leading to the terms of a Public Owner PLA. PLAs are then incorporated into the project specifications, and they become binding on all successful bidders.

II. WHY ARE PUBLIC OWNER PLAs SO CONTROVERSIAL?

Labor unions have a long history of lobbying governmental agencies to impose PLAs on construction projects in return for assurances of "labor peace" and timely completion of work. That lobbying has hit a high water mark now, however, because of the United States Supreme Court's decision in *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190 (1993). Known as *Boston Harbor*, this 1993 Supreme Court decision **only** concluded that a public PLA requirement imposed on contractors wishing to work on the Boston Harbor cleanup did **not** violate the federal labor law principles embodied in the National Labor Relations Act ("NLRA").

Organized labor, however, has trumpeted *Boston Harbor* as the definitive decision saying "yes" to all public PLAs. As a result, since *Boston Harbor,* public authorities and agencies are increasingly being lobbied by construction unions to mandate union-only specifications on public projects with little or no advance notice, no public comment or debate, and little or no genuine attempt to engage in fact-finding or otherwise demonstrate any rational basis for the governmental exclusion of workers represented by other unions or non-union workers from public project employment. Public agencies, however, should not be deceived in this fashion. *Boston Harbor*, limited to its facts and holding, does not validate all public PLAs. Instead, *Boston Harbor* decided a narrow legal question, concluding that a public agency acting in its *proprietary* capacity was not subject to NLRA preemption. The Court addressed neither policy issues nor any other possible legal challenges to public PLAs. Those policy issues and potential legal issues are what each public agency must consider carefully before deciding to bow to the demands of labor by implementing PLA requirements on public construction projects.

III. WHAT'S WRONG WITH PUBLIC OWNER PLAs?

Public owners, as a rule, are not engaged in the construction industry on a full-time basis and usually do not directly employ construction industry workers. Therefore, they lack experience in negotiating collective bargaining agreements with building and construction trade unions. The net result is that many PLAs appear to have been written by the unions themselves with no discernible management involvement. Consequently the terms of most PLAs are overwhelmingly favorable to the building trade unions and reflect few meaningful concessions to management. Thus, as a first conclusion, the terms of most PLAs are heavily weighted in favor of union interests and contain relatively few management benefits.

The second major problem with Public Owner Project Labor Agreements is that they are frequently motivated by political considerations and not by an effort to obtain the best work at the lowest price. Public Owner PLAs in actual operation tend to **add** costs and expenses to construction projects and typically conflict with state and local competitive bidding requirements. The reality is, if a PLA requires that all construction work be performed by craft workers referred from union hiring halls under union rates of pay and work rules, then this tilts the free play of market forces in the construction industry by depriving open shop contractors of their right to use their own employees on public work. This fundamental intrusion into contractor methods of operation lies at the heart of the many problems created by Public Owner PLAs.

Union claims that open shop firms are not foreclosed from bidding on projects governed by

project labor agreements are disingenuous. Open shop employment practices may be very different from union practices in a variety of material respects. In many cases, open shop employers spent years building teamwork, management and work practices that form the basis of project performance and bidding. Radical changes to these practices under project labor agreement hiring hall requirements and work rules can severely disrupt company operations.

It is AGC's policy to oppose Public Owner PLAs. AGC supports the well-established principle that taxpayer-financed construction must be open to all qualified firms regardless of their labor policy.

AGC is further opposed to public owner interference in the negotiation of collective bargaining agreements between construction trade unions and contractors. A PLA covering a large public project with a guarantee that work will continue regardless of a union strike against local contractors has a destructive and destabilizing impact. A single large public PLA project can provide work for a sufficient number of union trade workers to effectively negate any contractor leverage in a strike/lockout situation on other projects in the area. Consequently, Public Owner PLAs actually encourage higher wage settlements in negotiations by creating market distortions and significantly reducing the ability of contractors to counter a selective strike by an industry lockout.

IV. WHAT STRATEGIES ARE AVAILABLE TO COUNTER PROPOSED PLAs?

There are a number of equitable and legal arguments against the use of Public Owner PLAs. What follows are summaries of the key policy arguments in this area. Section V of this report outlines specific legal issues that might arise in combating Public Owner PLA's.

A. Public Owner PLAs Operate as Top-Down Organizing Tools for Construction Trade Unions and Violate the Principle that Public Agencies Should Not Become Involved in Private Sector Labor Relations

It is no secret that membership in unions generally and in construction unions in particular has steadily declined for the last 20 years. According to data from the Construction Labor Research Council (CLRC), union-representation rates declined from just over 40% of the construction industry work force in 1973, to 19.2% in 1996; while at the same time union (all crafts) wage and benefit rates have risen from just under $10/hour in 1973 to over $28/hour in 1996 (See Exhibit 1). Exhibit 2 is an AGC bar chart showing total industry employment, total nonunion employment, and total union-represented workers in each year for which data is available from 1973 through 1996. This chart is derived from data published by the Bureau of Labor Statistics and CLRC.

Industry surveys by union-sector management organizations, including AGC, the National Erectors Association (NEA), and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) all indicate that the union membership/representation decline has coincided with overall loss of market share for union-sector construction firms. For example, fully 86% of union-sector firms responding to the AGC 1991 Collective Bargaining Survey reported a loss of market share to open shop contractors, while only 14% reported having no loss of market share to open shop firms. In addition, 54% of responding firms predicted that the market decline would continue, while only 7% said the union-sector share would increase. Thirty-eight percent of respondents to the AGC survey said that the relative market shares of the union and open shop sectors would remain relatively the same in the future.[1]

Faced with this constant membership and market loss, construction labor organizations have initiated a variety of market recovery tactics that have met with strong opposition from owner (customer) groups. For example, in January 1993,

union top-down market recovery tactics designed to compel project owners to use union labor for construction projects were roundly criticized by the large private construction project owners represented by The Business Roundtable (BRT). The BRT's white paper, *The Growing Threat to Competitiveness: Union Pressure Tactics Target U.S. Construction Owners*, included union-only project agreements in its listing of construction labor's "tool box" of pressure tactics. According to the BRT document:

> [Union-only project agreements] have been a preferred tactic by some building trades unions to attempt to exclude non-union contractors. Often, such agreements are the result of pressure tactics, and at times have been signed erroneously by the owner when in fact **construction labor agreements should be the contractors' responsibility**. [Emphasis added]
>
> These agreements usually state that construction contracts on a specific project will be awarded only to contractors who agree to recognize construction trade unions as the sole representatives of their employees on that job. Frequently, the agreements require that all contractors agree to use the union hiring hall, pay union wages and benefits, and recognize only union work rules, job classification and dispute resolution procedures.

The BRT document concludes that even in the private sector, where project agreements have been less controversial, "if the union-only agreement option is selected, the contractor(s), not the owner, should negotiate the agreement."[2]

A fundamental problem with Public Owner PLAs is that they force union representation on open shop contractors as a "price" of performing public work. In order for open shop contractors to perform work under a PLA, they will be required to obtain most of its employees from union hiring halls. This usually means that open shop contractors will be required to jettison their own work force, and they will be compelled to get the work completed using a "stranger" work force. This unwelcome result has a predictable consequence – many open shop construction firms will simply avoid working under a Public Owner PLA. Those who try to work under a PLA will find unions representing their employees for the first time, regardless of whether the employees want to be so represented. This is what is called "top-down" organizing. The public entity is forcing union representation on all construction employees working on the public project regardless of their wishes. This has never been a legitimate or proper role for a public entity. Public Owner PLAs violate the well-established principle that public entities have no business in determining the labor policies of private contractors.

B. Public Owner PLAs Also Assist Union Organizing ("COMET") Initiatives

While PLAs represent a traditional "top-down organizing" tool, they also act to give the building trade unions "a leg up" in their new bottom-up organizing program known as *COMET*, Construction Organizing Membership Education Training. *COMET* was introduced at the 1993 AFL-CIO Building and Construction Trades Department Spring meeting in Washington, D.C. The *COMET* program attempts to educate rank-and-file members in the benefits of inside organizing by first overcoming their traditional resistance to expanding membership beyond market opportunities. According to union accounts, "one of the toughest challenges is overcoming resistance to organizing inside local unions."[3] Furthermore, union accounts represent that "*COMET* has taken the negative politics out of organizing. Business managers respond better to organizing if their members favor it."[4] Following is an excerpt from a union analysis of *COMET* that illustrates the relationship between *COMET* and market restrictions, such as public sector union-only project agreements.

> "We have a sign on the union hall, 'A union for every carpenter in the land.'
>
> "There has been a lot of animosity about that sign – like we were being sold out and caused to have less work, if somebody could buy a card. And I was part of that.
>
> "The *COMET* program gave me a different outlook on how I see the nonunion workers and that sign.

"We looked at the position we're in – the erosion that has taken place over the years and why it has happened. For the union to survive, it's going to be necessary to have market share far beyond the 50 percent we have now. We're going to have to bring in every carpenter we can.

"The ideal situation would be if the carpenters in any area were a hundred percent unionized and had **a monopoly in the market**. Then we'd be in a better position to ask what we want in wages and entitlements, a position of power."[5] [Emphasis added.]

Union adherents are using public project labor agreements to assist job salting techniques in order to achieve their "monopoly" position. After the member education process is completed, the *COMET* program is fully implemented by placing union adherents among open shop work forces for the explicit purpose of organizing – a technique known as job salting.[6] Once attached to a non-union work force, the "salt" then begins to organize and provoke expensive legal challenges created by the union activism. Following is an excerpt from a union publication describing the pattern of activity of a *COMET* "salt."

"Our members have been faced with two options under old rules to work at the trade – wait for a Union job and starve, or drop out of the Union and go to work non-union.

"Here's what George did.

"Local Union 312, Kalamazoo, Michigan, had a double-breasted [dual shop] employer, [the company], who was taking work that used to be union by paying substandard wages.

"It was Local 312's goal to level the playing field as much as possible. George was coached on applying for work for both the union and non-union company, exposing himself as a union applicant. The company's agent made it clear to George that the non-union side could not hire him unless he withdrew from the union. They must keep their operations separate to avoid liability under the provisions of the Union Agreement and the NLRA.

"George was passed over and five non-union applicants were hired.

"Local 312 filed an 8(a) 1 and 3 charge [unfair labor practice charges with the National Labor Relations Board] alleging discrimination by [the company] against George. The company responded to the charge by offering George a job, which he accepted.

"During George's first week of employment, his strategy was to work to the best of his ability, be on time, and not violate any company rules.

"On Monday of the second week, George started distributing handbills to the other employees before work, during lunch in non-work areas and after work. At every opportunity, George discussed the benefits of being union with the employees, while inquiring about the conditions with which they may be dissatisfied.

"Every inconsistency in company policy was brought to the company's attention as well as request for compliance with OSHA and betterment of working conditions [*sic*]. After four days of non-stop agitation, George was fired.

"The National Labor Relations Board's Regional Director in Detroit refused to issue a complaint. The organizer simply wrote down the events as they occurred during George's employment and submitted that brief to appeal with the NLRB in Washington. The appeal was sustained (upheld) and [the company] was ordered to comply with standard Board remedy.

"George worked nine days for earnings he would not have otherwise had, and received an additional $3,000 for backpay liability incurred as a result of the employer's discriminatory action."[7]

This pattern of union salts, being more interested in impeding the progress of a job and in filing charges and complaints rather than actually organizing, is confirmed by an AGC survey conducted in 1996. Fifty-two contractors in the survey reported a salting attempt. Only 13 (26.5 percent) of these contractors reported that an election petition was filed as a result. Of the 15 petitions filed by the salting unions, one was dismissed, four were withdrawn and the election was never held in one other case. In the nine elections held, employees voted for a union in three cases and against union representation in six cases.

Although the results of salting campaigns were minimal in terms of organizing, they were quite significant with respect to the expenses incurred by salted contractors. Two hundred fifty-one charges or complaints were filed against 36 of the 52 salted contractors in the AGC survey. The average cost of defending each charge was $8,681.88. Costs increased dramatically for contractors subject to both unfair labor practice charges under the National Labor Relations Act and complaints under other federal or state laws and regulations. These contractors spent an average of $10,762.40 per charge, and $214,052.22 per company, defending their interests. Significantly, of the 251 charges filed, 63.3 percent were dismissed, 15.9 percent were settled and 3.1 percent were withdrawn. Two of these contractors became signatory to agreements with salting unions to settle the litigation. In the end, only 5 of the 52 salted contractors (9.6 percent) became signatory to a collective bargaining agreement because of a salting campaign.[8]

Public agency project labor agreements play into these union salting campaigns by forcing employers that want to participate in the public construction market to use union hiring hall referrals, which can provide easy placement of "salts" in the work force. Under National Labor Relations Board election eligibility rules, such referrals may remain eligible to vote in a representation election for up to two years.[9] It is wholly inappropriate for a public agency to implicate governmental action in the exercise of private legal rights under the National Labor Relations Act.

Public agencies and officials should be wary of political dissembling and misstatements about just what the U.S. Supreme Court did and did not decide in the *Boston Harbor* decision.

The Boston Harbor clean up is a unique mega project. The Supreme Court in the *Boston Harbor* case decided only the very narrow, legalistic question of whether the National Labor Relations Act (NLRA) preempted the ability of the Massachusetts Water Resources Authority to enter into a project labor agreement under the exigent circumstances presented by that case. In that case, the public agency was engaged in a 10-year, $6.1 billion environmental cleanup project that was mandated by court order, with severe contempt penalties for completion delays. Further, tight physical characteristics of various project sites severely constrain project access and project management options with respect to reserved gates in the event of picketing over the term of the project. In view of those circumstances, the court ruled that the NLRA did not prohibit the public agency from imposing a project specification adopting the union-only project agreement negotiated by its representative and the building trades unions in exchange for a no-strike pledge.

The Supreme Court held only that the NLRA did not prohibit the use of the project specification, insofar as the public agency made the decision in the exercise of its proprietary function (to the same extent that a private business owner is privileged to make construction purchasing decisions), as opposed to its governmental or regulatory function.

To a surprising extent, labor organization project labor agreement promotion kits are gulling public agencies into making exaggerated claims about public exigencies relating to routine public projects. The mere fact that a public project is planned to meet some necessary public function or service does not reach the threshold for exceptional circumstances that were present in the Boston Harbor project. It simply is not sufficient to say that because a public project is necessary, competition for that project award must be limited to union signatory firms based on unsubstantiated claims of exigent circumstances.

C. Many Public Entities in the U.S. Don't Want To Operate under Union-Only PLAs—They Increase the Cost of Construction and provide No Real Benefit to the Public Entity

Responsible state and local government procurement and purchasing officials have a well-considered policy opposing preferential procurement restrictions that reduce competition and impede cost-effective procurement of construction. Attached as Exhibits 3 and 4, are Resolutions adopted by the Board of Directors of the National Institute of Governmental Purchasing in furtherance of that policy. Moreover, the 1992-1993 Research Committee of the National Association of State Purchasing Officials elaborated on that view in its book, *State and Local Government Purchasing* as follows:

> The past decade has seen substantial growth in other types of procurement preferences such as "Buy American" acts and preferences for the goods and services of small business, minority or women-owned business, veterans, or labor area legislation. These preferences, too, are political products. Unfortunately, there has been little substantive demonstration of program cost or quality effectiveness. Rather, there have been strong indications of increased administrative costs and unnecessary limitations on competition. And unrealized (and unreasonable) expectations attached to these procurement preferences have resulted in frustration and criticism of procurement programs.
>
> * * *
>
> In view of the costly and harmful effects that legislation can have on a public procurement program, the central procurement office should implement policies assuring that it is routinely informed of proposed legislation, regulation or administrative policy that will affect business or competition, and should take advantage of each opportunity to comment on the effects of the proposed policy or legislation on the procurement process. At a minimum, procurement personnel should become and remain familiar with laws and policies in effect that may affect their ability to rely on the benefits of competition.[10]

With respect to the inadvisability of public owner project labor agreements, the negative assessment of government intervention in free-market construction procurement made in 1972 in *Industrial Relations and Manpower in Construction* remains valid today.

> In general, where public policy confronts a private industrial relations system of considerable strength and complexity, as in construction, public initiatives must, if they are to be successful, adapt themselves to the mode of operation of the private system. Successful implementation of policy requires cooperation of important parties in the private sector. Without a degree of cooperation, there can only be the most limited success, if not actual failure. This offends some persons who prefer to imagine that public policy may be designed independently of those it is intended to affect and that it may then best be implemented by imposition (for example, by enactment of the objectives into law or by order of the public executive). But government legislation or decree, without the consent of the affected parties, is often ineffectual. In fact, following such a pattern of policy in construction is almost certain to lead to considerable conflict and to be the continual frustration of public purposes.[11]

The United States Army Corps of Engineers has rejected a proposed building trade monopoly at West Point. In a prominent example of responsible action by a preeminent construction procurement and delivery organization, the U.S. Army Corps of Engineers refused to accede to union political lobbying to close the market for the benefit of construction unions on dormitory construction projects at the U.S. Military Academy at West Point. Exhibit 5 is a copy of a Corps of Engineers letter confirming its determination not to use a PLA and rejecting the local building trades attempt to bring political influence on the Corps of Engineers to declare a War Powers Act national defense exception to open competition under the Federal Acquisition Regulations. Apart from the exercise of

exemplary judgment by a leading construction agency, the episode also demonstrates the circuitous paths and exaggerated claims that are typically made to justify a building trade monopoly on public works projects.

The United States General Accounting Office (GAO) questioned the use of a project labor agreement at a Department of Energy site. In response to a congressional inquiry, a GAO study in 1991 questioned the efficacy of a project agreement (Site Stabilization Agreement) at the Department of Energy's Idaho National Engineering Laboratory (INEL). The GAO report concludes as follows:

> Nonunion contractors said they believe that the Agreement puts them at a disadvantage by requiring them to go through union hiring halls and, in some cases, make double payments for certain employee benefits. Their reluctance to bid on DOE contracts because of these provisions in the Agreement may reduce the level of competition, thereby resulting in increased costs to the taxpayer. Also questions may arise whether the wage rates required under the Agreement and the alleged union practice of allowing contractors to charge lower wage rates for private construction outside INEL are in the best interest of the government.
>
> While we do not mean to imply that DOE is doing anything improper, we believe these aspects of the Agreement **should be reviewed from two perspectives: legal and public policy**. In the legal realm, **some** of the issues raised here are in litigation and may be resolved by the courts. **But regardless of the legal issues**, we believe the Agreement's provisions that are troublesome to nonunion contractors and raise questions in terms of costs should be evaluated by DOE from a public policy perspective. [Emphasis added.][12]

The GAO report coincides with the industry view that Public Owner Project Labor Agreements fail on two grounds – a host of legal issues and broader public policy principles. In addition, it should be noted that the two evaluations are not interrelated. That is, even if some courts were to issue narrow labor law and antitrust rulings that continue to permit public agencies and their agents to act as an "employer in the industry," even against the plain meaning of the labor law, the public policy infirmities still remain. In other words, just because a judicial parsing of the labor law and justifications from the legislative record some 35 years ago may not specifically bar such practices, that does not mean that public agencies should cave in to political appeals for procurement favoritism and thereby violate the public trust to respect fair fiscal and procurement practices for the benefit of all the taxpayers.

Public project labor agreements are not cost effective and squander essential public construction resources. Public owner project labor agreements squander badly needed public construction resources by limiting competition for the work, inviting protracted legal challenges that delay the projects, and failing to gain the full cost advantages of unfettered private sector employer collective bargaining or open-shop practices. According to an analysis of several public owner PLAs conducted by the Construction Labor Research Council (CLRC), an employer-sponsored research organization in Washington, D.C.:

> They [the PLA agreements] represent a new direction in project agreements in which economic gains are minimal or non-existent. While assuring that the projects are performed union, they offer little, if any, savings to the owner. In addition, they provide little, if any, increase in competitiveness of the union contractor and may be disruptive to other owners and contractors involved in the local construction market (See Exhibit 6).

The CLRC study was based on a random selection of four currently proposed or effective public owner project labor agreements (Boston Harbor, Tappan Zee Bridge, Illinois Toll Road Authority and the Port of Seattle Central Waterfront Project). It compares the terms of those agreements with both the local area collective bargaining agreements, which would otherwise govern a union firm's project performance, and the terms of the Heavy and Highway Construction Project

Agreement, which is negotiated by employers in the industry and might otherwise have been available to union-sector firms were it not for the public agency interference in the industry's free-market mechanisms.

On both bases of comparison, according to the CLRC study, the public agencies failed to achieve **any** benefit for the taxpayers on the face of the agreement. Research by Wharton School of Business Professor Herbert R. Northrup and Linda E. Alario confirms the lack of savings with respect to the Boston Harbor project. In 1996, Massachusetts Water Resources Authority officials admitted that contracts were being awarded on bids that were above those budgeted and were rising.[13]

The Boston Harbor project demonstrates that PLAs accomplish little to improve cost-effectiveness, efficiency or quality. Assurances of timely completion and proper quality are already incorporated, expressed or implied, into every construction contract. Furthermore, a mandatory PLA is not merely ineffective but can be detrimental to the interests of cost-effectiveness and efficiency, as explained below.

The elements of cost and efficiency on public construction projects are substantially impacted by prevailing wage laws. The impact of these laws on public construction can best be explained by outlining the application and operation of the Davis-Bacon Act. The Davis-Bacon Act covers virtually all federal and federally assisted construction. It applies to every contract, competitively bid or negotiated, of $2,000 or more to which the United States or the District of Columbia is a party for construction, alteration or repair, including painting and decora-ing, of public buildings or public works. It requires that all contractors and subcontractors performing work on a covered contract (project) pay prevailing wages to all "laborers and mechanics" (construction craft workers) they employ on the project. Prevailing wages are determined by the U.S. Department of Labor and are published as general wage decisions applicable to a particular type of construction (building, heavy, highway or residential), performed in a particular state and in one or more counties of that state. Department of Labor regulations, as well as Federal Acquisition Regulations, require the appropriate wage decision to be included in all contract bid documents for all covered projects before requests for proposals are solicited.

Davis-Bacon wage decisions prescribe the minimum wages and benefits that construction craft workers must receive on covered federal construc-ion. They also identify the source of those wages as originating from the open shop or union sector of the industry. If they originate from the union sector, the wage decision will identify the craft union and local (e.g. Bricklayers Local 4, Laborers Local 131) which the Department of Labor has identified as the source of the prevailing wage for that type of construction, in that state and county. If the wage rate for a particular craft originates from a union, all contractors and subcontractors performing work on that project are not only obligated to pay the wage and fringe benefit rate listed in the wage decision, they are also obligated to comply with the labor practices recognized by that union local. Labor practices dictate what work the particular craft classifications may perform and the tools they may use to perform it. This obligation exists regardless of the job title or skill level of the individual employed to perform the work and whether or not the con-ractor or subcontractor is signatory to a collective bargaining agreement with the union local listed in the wage decision, another union or no union.

In short, the Davis-Bacon Act largely controls the primary variable determinative of labor costs on federally funded construction. It prescribes a floor for wages. In cases where prevailing wages are based only on union rates, Davis-Bacon also prescribes certain labor practices. In cases where prevailing wages include open shop rates, contractors must pay the prescribed rates, but they are not restricted by union labor practices and are free to deploy their work force in the most cost-effective manner possible.

Over thirty states have prevailing wage laws. Many of these parallel the Davis-Bacon Act in application and operation. In this context, a PLA can significantly increase the cost of a project for the

open shop contractor by eliminating the flexibility to employ multi-skilled and semi-skilled personnel and deploy them accordingly. To abide by the often rigid jurisdictional work responsibilities of each union trade involved, the contractor may be required to use three or more employees to perform a task that otherwise could be performed by one multi-craft worker. In addition, a PLA typically causes open shop contractors to incur new expenses and operate less efficiently by subjecting them to the terms and conditions of collective bargaining agreements (e.g. hiring hall requirements, overtime for more than 8 hours of work in a day, travel time, "show-up" pay, supervisor or crew size minimums, etc.). One particularly expensive cost commonly imposed by PLA's is mandatory contribution to union fringe benefit funds. Such impositions require the contractor who is already contributing to a benefit plan (or plans) on behalf of its regular employees to now contribute to a second plan -- a plan that will likely never benefit its employees because they will not be in the union long enough to vest. This factor increases the cost of the project significantly and prevents many qualified, economical open shop contractors, especially small businesses, from bidding on the project.

Likewise, the PLA can increase the cost of the project for the union contractor. Rather than bidding and completing the project based on the costs related to the terms and conditions, the contractor has agreed with its signatory unions upon substantial investments of time and resources over years of negotiations. The contractor under a PLA is subjected to the costs of new terms and conditions often with different and more numerous unions. Historically, contractors are normally accorded no opportunity to participate in the negotiations for a PLA and thus have no opportunity to effect a cost-efficient outcome. Moreover, even when included in the negotiations, the contractor has little bargaining leverage once a public agency has determined that a PLA is required. 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 the prevailing wage standard), hours, and other terms and conditions.

The results of research conducted by Professor Northrup in Alaska indicate that this is exactly what happens. After examining the impact of several different project labor agreement proposals for the construction of electrical transmission facilities, Professor Northrup concluded that the state electric authority could save 9 percent on a $50 million transmission line and substation construction project through open competition, under the state prevailing wage law, as opposed to using a project labor agreement.[14]

The same pattern is seen whenever a direct comparison can be made between bids based on open competition and those based on the mandates of a PLA. When the Southern Nevada Water Authority bid the initial contract for a reservoir project, a fully qualified open shop contractor bid over $240,000 less than the next lowest bid submitted under the terms of the applicable PLA. On a Metropolitan Water District of Southern California electrical subcontract, an open shop bidder basing its estimate on open competition was $100,000 below the next lowest bidder, which based its bid on the terms of the applicable PLA.

The number of bidders and level of competition are also reduced by PLAs. In New York, the state Dormitory Authority imposed a PLA on a $250 million hospital renovation project. The PLA requirement was declared invalid, then reinstated. Research was conducted on the number of bidders and the difference in estimates between the PLA and non-PLA competition.

Bid prices on 39 contract packages bid without a PLA were compared with 17 packages bid with a PLA. The bids that did not require compliance with a PLA were 13 percent below budget. Those that were bid with the PLA, in contrast, were 10 percent over budget. Bid packages that did not require a PLA also had 21 percent more bidders than those requiring a PLA.[15]

In New York, research conducted by the AGC New York State Chapter established that the state Department of Transportation would have paid 65 million dollars more for the same work from 1994 to

1996 if open shop contractors did not bid and perform work on its projects.

It is significant that in all these examples, the bids were submitted by fully qualified contractors based on state or federal prevailing wage requirements.

Neither is a PLA likely to enhance labor-management stability. The National Labor Relations Act and the National Labor Relations Board dictate numerous mandates, policies and procedures to promote labor-management stability. The public agency contemplating imposition of a PLA must consider whether the PLA will promote labor-management stability beyond those protections.

For the union contractor, a project labor agreement would likely do little to promote labor-management stability beyond the protections already dictated by the law and by the collective bargaining agreements to which the contractor is already signatory. For the open shop contractor, a project labor agreement can actually hinder labor-management stability when it requires the open shop contractor to employ union workers on the project whom often harbor ill-will for traditionally nonunion employers. Neither are labor-management relations enhanced when open shop employees are required to pay dues or fees to unions they did not vote for or when their employer is required to make contributions to union benefit funds on their behalf for which they are not likely to ever qualify.

These PLAs may also waste public resources by excluding open shop competition and work practices and removing any incentive for labor organizations to make concessions to improve union contractor competitiveness for those projects. For example, in the New Jersey Supreme Court case striking down the New Jersey Turnpike Authority's (TPA) project agreement, the union contractor whose employees were represented by a non-favored union (the Steelworkers Local 50) claimed that the TPA's preference for building trades unions resulted in **more costly** work rules by some of the building trades on that project than otherwise would have been the case under the usual concessions made by that trade on projects where there was other union or open shop competition.[16] This effect may be compounded by procedures recently imposed by the AFL-CIO Building and Construction Trades Department (BCTD). The BCTD requires all affiliated labor organizations to obtain its approval before they may even begin negotiations for a PLA. If permission is granted to negotiate, the labor organizations must again obtain the BCTD's approval before executing the PLA. They are not free to make final decisions on the terms and conditions (See Exhibit 7).

D. Public Owner PLAs Raise a Host of Legal Problems That Will Generate Litigation for Years to Come

In *Boston Harbor*, the Supreme Court did not say that public agencies ought to or should engage in union-only construction procurement preferences, and neither did the Court decide how other federal and state laws may prohibit or impact such agreements. Below is a partial list of the legal issues that remain to be resolved in the wake of the unanswered questions raised by the *Boston Harbor* opinion.

- **NLRA Preemption**. The extent to which public agencies impose PLAs in a regulatory, rather than proprietary capacity, controls the application of *Boston Harbor*. In the former instance, National Labor Relations Act (NLRA) preemption will still apply. (See Section V, Items A-B).

- **ERISA Preemption.** Employee benefit plan contributions required by such agreements may be superseded by the provisions of the Employee Retirement Income Security Act (ERISA) invalidating many state laws relating to employee benefit plans. (See Section V, Item B).

- **Procurement Favoritism.** The extent to which public agencies are prohibited from union-only procurement restrictions under federal, state and local open competitive procurement laws. (Courts in New York and New Jersey have struck down public owner union-only project

agreements in those states). (See Section V, Items C-D).

- **Pre-hire and Hot Cargo Exemption Violations.** Whether public agencies and their agents or representatives can lawfully claim to be covered by the limited exception in the NLRA, which permits pre-hire agreements and union subcontracting restrictions only between unions and "employers engaged primarily in the building and construction industry." A related issue is whether public project labor agreements may lawfully apply to deliveries to or from the site and to offsite fabrication. Finally, subcontracting restrictions applicable to truck drivers delivering or removing supplies and materials may well violate Section 8(e) of the National Labor Relations Act. (See Section V, Item E).

- **Restraint of Trade.** Public agencies and their agents or representatives who negotiate such union-only agreements outside the scope of the NLRA's exception for employers in the construction industry in a collective bargaining setting may be engaged in anti-competitive conduct under the antitrust laws in restraint of trade. (See Section V, Item F).

- **State Constitutional Claims.** Particular state constitutions or local charters may contain guarantees of rights to citizens that are infringed upon by union-only public PLA mandates. (See Section V, Item G).

- **Administrative Due Process.** State administrative procedure laws may require that PLA requirements having a broad and general application must be promulgated through a process known as "rulemaking," which allows interested parties to comment to the responsible agency prior to implementation of a final rule. (See Section V, Item H).

- **Mandatory Union Dues**. The wording and implementation of the union security clauses in such agreements must pass muster under the Supreme Court's *General Motors* and *Beck* decisions allowing non-member dissenters to avoid assessments of dues and fees beyond amounts for collective bargaining representation. (See Section V, Item I).

Furthermore, a host of other difficult legal issues can entrap public agencies and construction employers under particular applications of project labor agreements with respect to discriminatory treatment of individuals under the operation of union hiring halls (see Section V, Item J); union attempts to use the project labor agreement to acquire jurisdiction over work not typically performed by that craft (see Section V, Item K); and agency and contractor exposure to derivative liability for subcontractor defaults on wage and fringe benefit payments (See Section V, Item L).

V. LEGAL ISSUES SURROUNDING PUBLIC OWNER PLAs

A. Understanding *Boston Harbor*

Understanding the parameters of *Boston Harbor* is key to understanding the many legal challenges that can still be raised in challenging public PLAs. In the *Boston Harbor* opinion, the Massachusetts Water Resources Authority ("MWRA") was under court order to clean up the harbor without delay or interruption-- a process expected to take 10 years and $6.1 billion. The MWRA is an independent government agency charged by the Massachusetts legislature with providing water-supply services, sewage collection, and treatment and disposal services to the eastern half of the state. MWRA provides the funds for construction, owns the sewage treatment facilities to be built, establishes all bid conditions, decides all contract awards and pays the contractors. MWRA engaged Kaiser Engineering as its project manager and, at Kaiser's urging, agreed to require all bidders to enter into a project labor agreement with the Building & Construction Trades Council ("BCTC") that Kaiser negotiated with the BCTC as the exclusive representative of all labor to be used on the job. The bid specification read as follows:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the,..Project Labor Agreement as executed

> and effective by and between Kaiser on behalf of [MWRA], and [BCTC]and will be bound by the provisions of that agreement in the same manner as any other provision of the contract.

The Supreme Court concluded contrary to the court of appeals, that federal labor law (*i.e.*, the National Labor Relations Act) did not preempt the MWRA's enforcement of this project agreement requirement. *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190 (1993). The key to the Court's decision was its conclusion that the MWRA was acting in a *proprietary*, rather than a *regulatory* capacity, *i.e.*, the MWRA "owned" the property under construction and had the same right as any other purchaser of services to place conditions on those providing services on and to that property. In doing so, the Court said, "the state is not subject to preemption by the NLRA, because preemption doctrines apply only to state *regulation*" (113 S. Ct. at 1196). Thus, according to the Court, "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity *as purchaser* should be permitted to do the same" (113 S. Ct. at 1198). The Court concluded that the MWRA's bid specification "constitutes proprietary conduct on the part of the Commonwealth of Massachusetts, which legally has enforced a valid project labor agreement" (113 S. Ct. at 1199).

B. Preemption Issues

1. NLRA Preemption: Questions still remain after *Boston Harbor* as to whether state or local PLA requirements are preempted under the NLRA. The key element to any challenge is to determine whether the state or local entity can be deemed to be acting in a *regulatory* as opposed to a *proprietary* capacity. This is perhaps most likely to occur where the project labor agreement requirement is contained in a local ordinance or state legislative enactment of general application, rather than being promulgated, as was the case in *Boston Harbor*, as part of the bid package for a specific project by the agency charged with responsibility for its construction.

Although not involving a project labor agreement, the case of *Alameda Newspapers, Inc. v. City of Oakland*, 146 LRRM 3103 (N.D. Cal. 1994), illustrates the application of this principle. In *Alameda Newspapers,* the Oakland City Council adopted a resolution endorsing a union-inspired boycott of the *Oakland Tribune* because of its "anti-labor conduct:" pulling all city advertising from and canceling subscriptions to the paper; encouraging citizens to cease purchasing advertising and subscriptions; and otherwise seeking to find some other "official newspaper" of the city until the labor dispute was resolved. The publisher of the paper sued the city, claiming that the resolution was preempted by the NLRA.

In deciding the case, the Federal district court squarely faced *Boston Harbor*, concluding that the threshold question was "whether the resolution of the City of Oakland is regulatory or proprietary" (146 LRRM at 3105). Despite the city's argument that it was simply acting as a "consumer" of newspaper services, the court had no trouble concluding that the city's action was regulatory in nature. The city's primary purpose in passing the resolution was to condemn and punish the newspaper for its "anti-labor conduct." Its goal was to affect "labor policy" and not to implement any particular proprietary interest related to the ability of the paper to perform any of its delivery or advertising services for the city. As such, the city was acting in a characteristically governmental role, rather than a private one (146 LRRM at 3106).

Having reached that conclusion, the court then concluded that the resolution was preempted under the principles set forth in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Under *Machinists* preemption, local governments are prevented from regulating those aspects of labor-management relations which Congress intended "to be controlled by the free interplay of economic forces" (427 U.S. at 140). Because the city's resolution was an effort to coerce the newspaper by taking the side of labor in the dispute between the two, the city was attempting to change the economic balance between the parties to the dispute, which it cannot do under *Machinists*.

The court, therefore, enjoined enforcement of the resolution.

Alameda Newspapers demonstrates that the form the project labor agreement takes, including any so-called "hortatory expressions" of support for union vs. nonunion labor or for particular unions that may have disputes with other unions (*e.g.*, Building Trades vs. Steelworkers, or AFL-CIO affiliated vs. non-affiliated, etc.), must be carefully examined. If the state or local entity can be characterized successfully as promulgating labor policy and taking regulatory action of broad application instead of acting merely as a purchaser of services, NLRA preemption is almost a foregone conclusion under both *Machinists* and *San Diego Bldg. Trades Council v. Garmon*, 395 U.S. 236 (1959). *Garmon* preemption forbids localities from regulating activities that are either protected by Section 7 or prohibited by Section 8 of the NLRA. Requiring building trade union-only workers by regulatory action would certainly trample on the Section 7 rights of employees of either non-union contractors or "other union" contractors who would be excluded from working on the project. Compare *Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991) (NLRA preempts city resolutions setting conditions for building permits which include payment of prevailing wages to construction workers and county ordinance requiring payment of prevailing wages on certain private construction projects).

This analysis also may be appropriate where the state agency is not the "owner" of the property at issue. Some governmental agencies provide "public monies" to private projects or provide money for lease build-outs in private buildings where state offices will be located. Does the mere provision of such funding, where there is no accompanying ownership interest, permit the agency to impose a union-only PLA requirement on the project? Does such action reflect a *policy* initiative, or is it still only a *proprietor's* function of determining how public monies will be spent? These questions remain unanswered after *Boston Harbor*.

2. ERISA Preemption: The Federal Employee Retirement Income Security Act ("ERISA") preempts any and all state laws which "relate to" employee benefit plans. Although ERISA preemption was raised in *Boston Harbor* at the lower court level, neither the court of appeals nor the Supreme Court was required to address it. The issue remains open, therefore, as a basis for challenging public project labor agreements.

a. The "State Law" Requirement: ERISA's broad preemptive effect only applies to "state laws" which relate to employee benefit plans. The term "state law," in turn, is broadly defined to include "all laws, decisions, rules, regulations or other State action having the effect of law" (29 U.S.C. 1144(c)). This definition raises the specter that, as in *Boston Harbor*, a state project labor agreement requirement deemed to constitute *proprietary* instead of *regulatory* action will not qualify as a "state law" subject to ERISA preemption.

That is the conclusion reached by at least one court. *Minnesota Chapter of Assoc. Bldrs. v. St. Louis County*, 825 F. Supp. 238, 243 (D. Minn. 1993). In that case, the county issued a bid specification for a specific project requiring any contractor to sign a project labor agreement recognizing the Duluth Building Trades Council as the sole bargaining representative of all labor on the site. The court found that such proprietary action was not preempted under ERISA, concluding that "ERISA does not provide any express or implied indication that a state may not act as a private party would be permitted to with respect to its property" (825 F. Supp. at 243).

Obviously, *St. Louis County* demonstrates that, as with *Boston Harbor* and NLRA preemption, the **form** of the project labor agreement requirement is an important consideration for purposes of ERISA preemption as well. Contractors raising this type of challenge must be prepared to address this issue and convince the court that the challenged requirement in a particular case at least constitutes "state action having the effect of law."

b. Cases Finding Preemption: Assuming the "state law" issue is satisfied, contractors stand a good chance of success in arguing that ERISA preempts public project labor agreement requirements.

Support for this proposition can be found in numerous cases, which preempt, also on ERISA grounds, various state prevailing wage and similar regulations. See, *e.g.*, *General Electric Co. v. New York State Dept. of Labor*, 891 F.2d 25 (2d Cir. 1989) (ERISA preempts portions of New York prevailing wage statute requiring employers to "supplement" benefits to prevailing local levels); *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989) (ERISA preempts administrative regulation requiring employer to participate in apprenticeship programs on public works projects); *National Elevator Indus., Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir. 1992) (ERISA preempts Oklahoma prevailing wage law as interpreted by state agency requiring participation in a specific ERISA plan for purposes of apprentice rates); *Associated Builders & Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991) (ERISA preempts local and county ordinances requiring prevailing wages, including benefits or cash equivalent thereof, on certain private projects); *City of Des Moines v. Master Builders of Iowa*, Case No. 119/92-345 (Iowa, 4/21/93) (Local ordinance requiring prevailing wages, including fringes, on public works preempted by ERISA).

ERISA preemption would seem to be even more direct in the case of project agreements than with prevailing wage laws. While there is some support for the proposition that prevailing wage laws of general application do not sufficiently "relate to" ERISA plans so as to be preempted (*See, Associated Builders & Contractors v. Curry*, 797 F. Supp. 1528, 1536-38 (N.D. Cal. 1992)), the very essence of a project agreement requires contractors to agree to establish and contribute to specific building trade fringe benefit plans. State laws requiring the establishment or provision of specific ERISA benefits to employees are without a doubt preempted by ERISA. *See, District of Columbia v. Greater Washington Board of Trade*, 113 S. Ct. 580 (1992) (District of Columbia law requiring employers to provide equivalent coverage to injured employees eligible for workers' compensation benefits preempted under ERISA).

Another court considered the question of ERISA preemption of a Florida law mandating certain levels of insurance coverage for employees of contractors working on public projects. While not involving a project agreement requirement, the Florida law at issue in *E.I.C. Elkins Contractors, Inc. v. Chiles*, Case No. 94-40247 (N.D. Fla. 7/1/94) had a similar type of impact on public works projects because it required contractors and their subcontractors to have access to hospitalization and medical insurance benefits. A project agreement accomplishes the same objective by requiring contractors to contribute to the building trades' welfare benefit funds. In *Chiles*, the court concluded that the Florida statute was preempted by ERISA; a state law requiring establishment of specific welfare benefit plans under a project agreement would almost certainly meet the same fate.

C. State or Local Competitive Bid Statutes

Recently, the most successful avenue for challenges to public PLA requirements has been through the use of state or local competitive bid statutes. The theory is that by limiting the work to union contractors and building trades labor, the public agency that promulgates this requirement is acting in contravention of applicable state or local laws intended to benefit taxpayers by requiring bids on public projects to be awarded to the lowest responsible bidder. Union status is not a relevant or legitimate criterion for defining "responsible" bidders, and its use, therefore, contravenes the intent of the low bid statutes by unnecessarily limiting the pool of responsible contractors and laborers who can work on the project.

1. Successful Challenges

State law competitive bid statutes have been utilized to invalidate public project labor agreements, or similar requirements in the following cases:

- ***George Harms Construction Co. Inc. v. New Jersey Turnpike Authority*, 137 N.J. 8, 644 A.2d 76 (N.J. 1994)**. In *Harms,* the New Jersey Turnpike Authority ("TPA"), relying on *Boston*

Harbor, issued a directive mandating that only employers who agreed to become signatory to a project agreement with the appropriate Building & Construction Trades Council could work on the turnpike widening project. The directive was issued because the Harms company, which used Steelworkers instead of Operating Engineers to operate heavy machinery, had previously encountered labor problems at its TPA construction sites. The new directive resulted in the rejection of the Harms company's lowest bid on a particular portion of the TPA project. The matter eventually reached the New Jersey Supreme Court, and the court determined that the state public bidding laws forbade the TPA's project labor agreement requirement. Specifically, the court concluded that the term "lowest responsible bidder" does not include a criterion relating to union affiliation. The court determined that the project labor agreement requirement was inconsistent with the low bid laws because it impermissibly limited the field of bidders on TPA projects to union contractors affiliated with the building trades and impermissibly designated a sole source of labor for those projects. As the court noted, while the New Jersey legislature has authorized public entities "to purchase construction services through a comprehensive set of bidding laws," that authority does not include the ability "to specify a sole source of construction services or to denote a specific union affiliation as a characteristic of the lowest-responsible bidder or as a bid specification" (146 LRRM at 3051). Therefore, the TPA's directive was not drafted "in a manner to encourage free, open and competitive bidding" as required by New Jersey law. *Harms* was the first state Supreme Court (highest court) to reach this issue with respect to project labor agreements.

- ***Tormee Constr., Inc. v. Mercer County Improvement Auth.*, 143 N.J. 143, 669 A.2d 1369 (N.J. 1995)**. The Mercer County Improvement Authority solicited bids for library construction and required adherence to a project labor agreement. The Associated Builders and Contractors sought to declare the project labor agreement invalid. The court applied the Harms decision and found the project labor agreement invalid as inconsistent with public-bidding statutes.

- ***Crossing Construction Co., Inc., Neshaminy Constructors, Peter Getchell and Willard Smith v. Southeastern Pennsylvania Transportation Authority,* Case No. 97-7591-16-5 (Bucks Co. Ct. of Common Pleas, 11/97*).*** The Bucks County Court of Common Pleas issued an injunction preventing the Southeastern Pennsylvania Transportation Authority (SEPTA) from imposing a project labor agreement (PLA) on a $7 million train station and viaduct renovation project. The bid package required the successful bidder to execute a PLA with the Philadelphia Building and Construction Trades Council. The contractors that filed suit were signatory to agreements with the United Steelworkers of America and argued that the PLA requirement violated state law requiring SEPTA to solicit and accept bids from "the lowest responsible bidder." The court agreed. Noting that this was a case of first impression with respect to the validity of PLAs under the state competitive bid law, the court found the 1995 and 1994 New Jersey Supreme Court decisions in Tormee Construction, Inc. and Harms Construction Co. to be "the best legal precedent for application of Pennsylvania law to the instant litigation." Like the PLAs in those cases, the SEPTA requirement restricts bidders to contractors with relationships with a limited number of labor organizations. Pennsylvania law does not permit a public entity to specify a sole source of construction services or to denote a specific union affiliation as a valid characteristic of the lowest responsible bidder. Nor was SEPTA able to point out any unique characteristic of the project that would justify a PLA. The only explanation offered was that three welfare recipients would receive apprenticeship training on the project under the terms of the PLA. The court found this to be inadequate, noting that SEPTA offered no explanation "for simply requiring potential bidders to provide . . . a program to remove persons from welfare and put them to work," and that there had "been no labor strife previously in connection with this project or any similar one with which SEPTA has been involved." The court concluded by stating that "SEPTA's conduct violates the bid laws of Pennsylvania."

- ***New York State Chapter, Inc., Associated General Contractors v. New York State Thruway Authority together with General Building Contractors of New York State, Inc. v. Dormitory Authority of the State of New York,* 666 N.E. 2d 185 (N.Y. App. 1996).** The Associated General Contractors of America and the Associated Builders and Contractors filed suit against the New York State Thruway Authority and the Dormitory Authority arguing that New York's competitive bidding laws prohibited the adoption of project labor agreements for public construction projects. In a split decision, the court held that project labor agreements are neither absolutely prohibited nor absolutely permitted in public construction contracts, but will be sustained where the record supporting the determination to enter into the agreement establishes that it was justified by the interests underlying the competitive bidding laws. The court went on to find that this burden was satisfied by the Thruway Authority, but not the Dormitory Authority on the facts before it.

- ***West Coast Contractor v. City of Pinole Redevelopment*, No. C96-02498, Sup. Ct., Contra Costa Cty. (Sept. 1996)**. A California superior court ruled that a city requirement mandating that public works be constructed under PLAs violated state competitive bid laws. The case involved the city of Pinole, in northern California. The city negotiated a PLA with the Contra Costa Building Trades Council for construction of a $3 million city hall. The court relied on the 1994 New Jersey Supreme Court decision in *George Harms Construction,* and concluded that "a public agency may not impose conditions on public works contracts which would have the effect of limiting the pool of contractors from which bids will be accepted."

- ***Empire State Chapter of the Associated Builders & Contractors v. County of Niagara*, 615 N.Y.S. 2d 841 (1994).** The state court invalidated a union-only project labor agreement requirement for a $25 million new jail project. The court concluded that "[b]ecause mandatory compliance with the subject project labor agreement requirement erects a barrier that might eliminate or dissuade from the bidding process a prospective non-union contractor," the agreement failed to comply with the state low bid law. According to the court, reducing competition based on union considerations does not ensure to the public benefit for purposes of the low bid statute.

- ***City of Des Moines v. Master Builders of Iowa*, Case No. 119/92-345 (Iowa, 4/21/93)**. Although involving a local prevailing wage ordinance rather than a project labor agreement requirement, the Iowa Supreme Court, in addition to finding ERISA preemption (see V.B.2.b., above), found the ordinance in conflict with state competitive bid statutes. According to the court, the ordinance requiring payment of prevailing wages on local public construction projects, defined as Davis-Bacon prevailing wages, was inconsistent with the purposes of the competitive bidding statutes. "Cost is an unreliable indicator of quality," said the court. Thus, "[t]he competitive bidding statute is thwarted as much by a scheme that artificially elevates low bids as it is by the elimination or rejection of low bids. Either way the taxpayers are denied the advantage of obtaining the lowest responsible bid."

PLA requirements have been successfully rescinded or blocked at local levels even without the need for litigation. Thus, several New Jersey localities, following *Harms*, reportedly took the following actions:

- The Camden County Board of Freeholders reversed a previously adopted resolution favoring the use of union-only agreements;

- The Warren County Board of Freeholders retracted a similar policy;

- The Brigantine Board of Education accepted the broad mandate of the *Harms* decision and rejected a building trades attempt to test another variation of a union-only agreement, which was reported to be narrowly crafted to circumvent the decision; and

- In Middlesex County, the Perth Amboy Port Authority rescinded a project agreement on a bulkhead replacement project.

Similarly, in Cincinnati, the City Council repealed an ordinance that would have imposed a project labor agreement on a badly needed downtown development project. Council members cited concern that the controversy surrounding the agreement would derail or delay the project.

2. Unsuccessful Challenges

Courts have rejected state competitive bid laws, as well as other statutory and constitutional grounds, as a basis for invalidating public project labor agreement requirements in the following cases:

- ***Associated Builders & Contractors v. County of St. Louis*, 825 F. Supp. 238 (D. Minn. 1993).** In addition to finding no ERISA preemption (see V.B.2.a., above), the court concluded that the county had some discretion in determining the lowest bidder on factors other than price alone. Moreover, because the cost of the project would be the same due to applicable prevailing wage laws, there was no showing that the county was deprived of "a better bargain" by its imposition of a project labor agreement on the job in order to assure labor peace.

- ***Enertech Electric, Inc. v. Mahoning County Commissioners*, 85 F.3d 257 (6th Cir. 1996)**. Enertech Electric, Inc. sued the county for soliciting bids for the Youngstown Justice Center and requiring contractors to ratify a project labor agreement. The contractor alleged that this constituted deprivation of the constitutional property rights to the contract without due process, abuse of discretion, and violations of the NLRA. The 6th Circuit Court of Appeals ruled that county officials in Ohio could condition a contract award on ratification of a project labor agreement without resulting in favoritism or fraud, and without violating any statutes or constitutional rights.

- ***Albany Specialties, Inc. v. County of Orange*, No. 97-03922 (N.Y. Sup. Ct. App. Div., 6/97)**. The New York Supreme Court Appellate Division court reversed the Orange County trial court and upheld the validity of a project labor agreement imposed on a $90 million courthouse project. The trial court had characterized the PLA as "capitulation to extortion." However, the appellate court found the agreement valid under the 1996 Court of Appeals decision in the New York Thruway Authority Tappan Zee Bridge case. According to the appellate court, an analysis performed for the county demonstrated that union labor was used on 80 to 85 percent of projects in the region, significant delays from labor unrest would be avoided and a PLA would secure otherwise unavailable price advantages.

- ***Associated Builders and Contractors v. Miller*, No. A363857 (Nev. Dist. Ct., 5/97)**. The Nevada District Court upheld the project labor agreement imposed by the Southern Nevada Water Authority on a $1 billion reservoir project south of Las Vegas. The PLA was challenged on the grounds that it violated the state competitive bid and right-to-work laws. The court found that state competitive bid laws "give wide authority to public agencies to include PLAs if they want them." In this case, the Water Authority took 18 months to decide whether to use a PLA. Its decision was not arbitrary or capricious, according to the court. With respect to the PLA's conflict with the state right-to-work law, the court found that it did not exclude open shop contractors from bidding on the project or force successful open shop bidders into a union relationship. Referring to the U.S. Supreme Court decision in *Boston Harbor*, the court said open shop contractors "may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement."

- ***Flex Electrical Constructors v. County of Orange*, No. 4256/97 (N.Y. Sup. Ct., 9/97)**. Flex Electrical Constructors and another open shop contractor filed suit against the county for imposing a PLA on an $89 million jail project. The court concluded that the PLA conformed to the criteria established by the state Court of

Appeals in its 1996 decision on the Thruway and Dormitory Authority PLAs. In those decisions, the court recognized that PLAs have "an anti-competitive impact," and that the state competitive bid laws require specifications that exclude a class of potential bidders to be "rational and essential to the public interest." According to the trial court in the Orange County case, the jail PLA satisfied this test because of overcrowding at the existing jail, cost saving features in the PLA and the history of unionism and labor unrest in the area. The court rejected arguments that the evidence in support of the PLA did not satisfy the criteria of the Thruway and Dormitory Authority decisions, saying that "if every exceptional public construction project were to be delayed due to varying opinions regarding the cost effectiveness of contractual provisions as well as the local history of union activity and labor disputes, public interest in effective implementation of such projects would never be served."

- ***Northern Ohio Chapter of Associated Builders and Contractors, Inc. v. Gateway Economic Dev. Corp.*, 1992 U.S. Dist. LEXIS 7348 (N.D. Ohio 1992).** The Associated Builders and Contractors filed suit to enjoin Gateway from requiring successful bidders to comply with a project labor agreement, claiming that such a requirement violates the NLRA and ERISA. Defendant's motion for summary judgment was granted because Gateway is not a governmental actor.

- ***Associated Builders and Contractors v. Contra Costa Water Dist.*, 1995 Cal. App. LEIS 734, 37 Cal. App. 4th 466, 43 Cal. Rptr. 2d 600 (Cal. App. 1 Dist. 1995).** The county water district solicited bids from contractors who would accept a project labor agreement. The Associated Builders and Contractors sought a declaration that the project labor agreement violated California law (Public Contract Code) requiring the district to accept project bids from the lowest bidder in an open bidding process. The court held that California law was not applicable on these facts, and thus the project labor agreement was valid.

- ***State ex rel. Associated Builders v. Jefferson Cty. Bd. of Commrs.*, 106 Ohio App. 3d 176, 665 N.E.2d 723 (Ohio App. 7th Dist. 1995)**. The county approved a project labor agreement and required adherence to it for construction of a jail. The Associated Builders and Contractors sought to declare the project labor agreement invalid as violating Ohio's competitive bidding statute and the Ohio Constitution. The court found the project labor agreement valid because it did not foreclose anyone from submitting a bid nor did it require anyone to become a union contractor. The project labor agreement merely required adherence to collective bargaining agreements while working on the project.

- ***Associated Builders and Contractors v. San Francisco Airports Commission*, 97 C.D.O.S. 8617 (CA Ct. App, 11/97).** The California Courts of Appeal affirmed a superior court decision upholding the May 1996 project labor agreement on the 3-year $2.4 billion expansion of the San Francisco Airport. The PLA was imposed after two public hearings and the adoption of a resolution by the Airports Commission concluding that it was in the best interests of the city and county of San Francisco to impose a PLA on the project. The PLA was challenged on the grounds that it violated city and state competitive bid laws, as well as the state statutory right of association. The appeals court rejected these arguments. The city ordinance requires public works contracts to be awarded "to the lowest reliable and responsible bidder," and the state law requires awards to the "lowest responsible bidder." Both permit the use of a PLA under the circumstances of this case, according to the appeals court. The Commission documented the effect that delays and disruptions would have. The court found that consideration and elimination of multimillion-dollar causes of delay in establishing bid specifications is a legitimate goal, and fully compatible with competitive bidding principles. No party is rendered ineligible to bid because of their status, and there is no evidence that the PLA requirement will drive away open shop contractors sufficient to materially increase the

cost of the project to the public. The court also rejected the argument that the National Labor Relations Act pre-empts state and local competitive bid laws that prohibit PLAs, and concluded by ruling that the Associated Builders and Contractors lacked standing to challenge the PLA on the grounds that it violated state law on workers' rights of association.

- ***Associated Builders and Contractors v. Metropolitan Water District of Southern California*, No. BS041945, Calif. Super. Ct. (11/96).** In October 1996, a California superior court denied ABC's request to enjoin bidding on part of the $2 billion Domenigoni Valley Reservoir project. The project is subject to a PLA imposed by the Metropolitan Water District of Southern California. In the same ruling, however, the court also ordered the Water District to show cause why it should not be required to reopen the bidding and remove the specification mandating that successful bidders sign the PLA. In November 1996, the court rejected the request to remove the specification, ruling that it "does not conflict or impinge on the lowest 'responsible' bidder law. Nor does it violate the competitive bid statute, the right to free association, equal protection of the laws, or the [state] Labor Code." ABC alleged that the PLA violated the state competitive bid law, as well as the state and U.S. constitutions.

- ***Associated Builders and Contractors v. Metropolitan Water District of Southern California*, 97 C.D.O.S. 9398 (Cal. Ct. App. 12/97).** The California Court of Appeal upheld the PLA imposed on the multi-billion dollar Eastside Reservoir project east of Los Angeles. The PLA was negotiated in 1993 between the construction manager for the Metropolitan Water District of Southern California and the construction union locals in the area of the reservoir. ABC challenged the agreement on the grounds that it violated the state competitive bid law, infringed upon the free association rights of workers and denied open shop contractors equal protection of the laws. The court disagreed, concluding that the award of a competitively bid contract "is within the sound discretion of the contracting authority," and would not be overturned unless it is arbitrary, capricious or entirely without support. The statutory requirement that contracts be awarded to the lowest responsible bidder does not mean the lowest cost bidder, according to the court. A public entity can impose additional requirements on a successful bidder, and a PLA is such a requirement. The court found no statutory prohibition against PLAs. Furthermore, any unwillingness to compete for contracts because of the PLA is a self-imposed exclusion, according to the court, and does not constitute a government infringement on contractor or worker rights.

D. Federal Competitive Bid Statute

At the Federal level, no success has been achieved against project labor agreements based on the federal competitive bidding statute, which is the Competition in Contracting Act of 1984 ("CICA"), 41 U.S.C. 253 *et seq.* This statute generally requires executive agencies engaged in "procurement for property or services to obtain full and open competition" and is implemented through the Federal Acquisition Regulations (FAR). In *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1577 (1993) the court ruled that the CICA and FAR did not apply to a project labor agreement imposed on a Department of Energy ("DOE") nuclear facility project in Oak Ridge, Tennessee. Because DOE had a Management and Operating ("M&O") contract with MK-Ferguson and that entity had solicited the bids of the complaining subcontractors, the CICA was not violated because "the solicitations in question are not solicitations of a federal agency." (966 F.2d at 1526). Since MK was not an agent of DOE, and because the FAR specifically states that CICA does **not** apply to M&O contractors (48 C.F.R. 970.7103(c)(2)), the complaining parties could not state a claim for relief.

This result may differ if the Federal agency itself is issuing the bid solicitations or if the contracting entity is acting as an agent for the Federal agency and not under an M&O contract. Without those facts, however, CICA challenges on Federal jobs are unlikely to succeed.

E. Hot Cargo and Pre-hire Issues

The underlying premise of the *Boston Harbor* opinion is that a public body in its role as purchaser may act in the same manner as a private party could act. Not all private parties, however, are able to enter into this type of restrictive agreement under Sections 8(e) and 8(f) of the National Labor Relations Act (NLRA). Rather, Section 8(f) permits a union to enter into pre-hire agreements only with "an employer engaged primarily in the building and construction industry." Similarly, the construction industry proviso to the Section 8(e) hot cargo clause only permits "an employer in the construction industry" to enter into union-only subcontracting agreements for work to be done at the site of the construction, alteration, painting or repair.

In *Boston Harbor*, the Supreme Court concluded that there was no dispute that the project agreement between Kaiser and BCTC was a valid pre-hire labor agreement with valid subcontracting restrictions under Sections 8(e) and 8(f) of the NLRA (a conclusion with which AGC's brief did not agree). That may not always be the case, however, and may provide a basis for challenging particular agreements. Thus, for example:

- If a state agency **itself** were to enter into the project agreement directly with the building trades, it would arguably be subject to challenge because the state is not "an employer in the construction" industry under 8(e), nor is it "an employer primarily engaged in the building and construction industry" under 8(f). As a general matter, however, as occurred in *Boston Harbor*, the state agency will not be the entity signing the project agreement. Rather, its "construction industry" manager will enter into the project agreement with the building trades.

- Deliveries to and from the site and fabrication work off the site also may present issues ripe for challenge. These off-site activities are generally not subject to restriction under Sections 8(e) and 8(f), except to the extent an applicable agreement contains a valid work preservation clause. Attempts to encompass this type of work within the scope of a public project labor agreement should be carefully scrutinized.

- The major impediment to applying either of these provisions to a public project labor agreement is the NLRA's exclusion of a State from its definition of the term "employer." For this reason, in *Boston Harbor* the Court noted that the prohibition from which Sections 8(e) and 8(f) provide relief "are not made specifically applicable to the State" (113 S. Ct. at 1198). Thus, Section 8(e) and 8(f) challenges to *direct* state action are not actionable under 8(e) and 8(f); conversely, however, agreements with "construction managers" acting as an "employer" on the state's behalf may be actionable.

F. Restraint Of Trade Concerns

In *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616 (1975), the Supreme Court held that restrictive subcontracting agreements between a construction industry union and contractors with whom the union had no collective bargaining relationship and whose employees the union had no intent of representing – *i.e.*, so-called "stranger contractors" – could be challenged both under Section 8(e) of the NLRA and federal antitrust laws. According to the Court, permitting such "direct restraint on the business market has substantial anti-competitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions" (421 U.S. at 625).

In subsequent decisions, however, the courts have endorsed a narrow reading of *Connell*, such that the type of relationship sought by the union in *Connell* would be legal if made in the context of a "collective bargaining relationship" with a general contractor. See *Woelke & Romero Framing v. NLRB*, 456 U.S. 645 (1982); *A.L. Adams Construction Co. v. Georgia Power Co.*, 733 F.2d 853 (11th Cir. 1984), *cert. denied*, 471 U.S. 1075

(1985). One court has applied this so-called non-statutory exemption from antitrust liability to validate a city's requirement that the successful bidder on a power line renovation project enter into a labor agreement with the IBEW, **with which the city itself had an agreement covering the subject work**. *Associated Builders & Contractors v. City of Seward*, 966 F.2d 492 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1577 (1993). Thus, the *Seward* requirement served a valid work preservation purpose within the context of an existing collective bargaining relationship. And, although the city was not an "employer" for NLRA purposes, the Ninth Circuit concluded that the restrictive clause should not be invalidated under antitrust law.

In the absence of a collective bargaining relationship (*i.e.*, neither the state nor its project manager has employees represented by any building trade union) and valid work preservation purposes, however, the *Seward* result might well be different. Those circumstances more closely resemble the *Connell* case and may be subject to challenge as impermissible restraints of trade to which the non-statutory antitrust exemption does not apply.

G. State Constitutional and Local Charters or Ordinance Issues

Contractors faced with public project labor agreement requirements also should examine the constitution of the state or local municipal charters as possible bases for challenging the requirements. In *Harms*, this issue was raised but not decided by the New Jersey Supreme Court, although the state constitution declared that "[p]ersons in private employment shall have the right to organize and bargain collectively." The Harms company asserted that by impinging on the free choice of collective bargaining representatives on a public project, the state was impinging on this constitutional right. The New Jersey court noted that, in fact, "[t]hrough restrictive conditions on the award of public contracts, the State could theoretically limit the freedom of choice that New Jersey construction workers currently exercise in designating unions to bargain for them" (146 LRRM at 3045-46). However, the court also concluded that it did not have to decide this issue to resolve the case. Yet, this avenue may be available and may be decided by courts in other situations involving similar statutory "guarantees."

H. Administrative Rulemaking

Most states have an administrative procedure act intended to guarantee due process to persons affected by administrative action. In most cases, those state acts require that agencies which choose to engage in "rulemaking" must take certain steps, including publishing the proposed rules, providing an opportunity for comment, and preparing a summary of comments with the agency's final regulations. This issue also was raised in *Harms* and went undecided by the majority, although the concurring opinion would have invalidated the project labor agreement requirement on this basis. This theory provides another avenue for possible challenge to state public project labor agreements. If under applicable state precedent, the implementation of such a requirement can be viewed as "rulemaking," then the agency's actions may not have conformed to the required administrative procedure.

I. Union Security (Union Dues) Issues

It is settled law that a union may exact only those fees and dues from dissenting non-members necessary to perform its duties as the exclusive bargaining representative for bargaining unit employees. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *Communications Workers v. Beck*, 487 U.S. 735 (1988). This "financial core" membership, rather than actual "card carrying" membership, is the only form of union membership which can be legally imposed on employees under the NLRA. Where a union security clause is ambiguous as to its membership requirements (*i.e.*, requiring maintenance of "membership in good standing") the National Labor Relations Board (NLRB) has imposed a duty on unions to inform bargaining unit employees that their sole "membership" obligation under *General Motors* is to pay uniform dues and fees related to collective bargaining but not accept full union membership. See *IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993).

Not many construction industry unions face "financial core" membership concerns since their union employees generally undertake full union membership. However, it is possible in a project labor agreement scenario that an over broad or ambiguous union security clause will be agreed to or required by the public entity involved. Contractors with a non-union work force and their employees can challenge those requirements, which will not necessarily invalidate the project agreement requirement but will invalidate the over broad union security clause. Public entities considering project agreement requirements should be made aware that, as a matter of law, they cannot strike a deal that limits the proposed work force to only card-carrying union members. If public agencies, or their agents, are faced with such demands, they would be well advised to counter with the proposed "model" union security clause published by the NLRB several years ago (See Exhibit 8).

J. Union Hiring Halls

In order to provide a preference for their own members, building trade PLAs usually mandate that all employees must be referred through the applicable local union hiring hall. Unions are required to operate hiring halls in a nondiscriminatory fashion and cannot use a hiring hall to unlawfully discriminate against non-members. However, there is little doubt that the process and experience requirements for getting on the "A" list at the referral hall can be sufficiently complex to discourage non-union employees from getting the best of referrals.

Public project owners who blindly agree to exclusive hiring hall provisions must be made aware that they or their contractors are potentially exposed to liability if in fact the hiring halls are operated in a discriminatory fashion. Close examination of the referral procedures utilized by local unions is therefore recommended. An exclusive hiring hall arrangement is unlawful if on its face or in practice it discriminates on the basis of union membership (*e.g.*, refusal to refer non-union or other union applicants or giving preference to union applicants). Likewise, a hiring hall "referral fee" for non-local union members which is not "reasonably" related to each individual's *pro rata* share of the costs attributable to hiring hall services is not permissible. These are just two of the most common ways in which hiring hall practices can run afoul of Federal labor law. Because public PLAs may increase the chance that non-union workers will apply for referral through a hiring hall, a situation which many hiring halls do not face in their normal operations, the chances of a misstep or discrimination occurring are likely to be increased.

K. Jurisdictional Issues

Because unions usually are the source and authors of public PLAs, they sometimes expand their jurisdiction to include work that even private industry has not awarded to them. One recent example in Illinois is the Operating Engineers' efforts to obtain jurisdiction over road surveying work under a PLA with the Tollway Authority; that work is not included within the jurisdictional scope of the local heavy and highway contract. It has, in fact, historically been performed almost exclusively by non-union surveying companies. Only at the last minute, at the urging of both union and non-union contractors, did the Tollway Authority decide **not** to require all survey work to be contracted to an Operating Engineer signatory firm. Had it not done so, even union heavy and highway contractors would have found themselves unable to subcontract to the non-union surveyors that they had long utilized. Public entities are singularly unable to monitor the work jurisdiction demands/claims of building trade unions and may, in fact, grant unions jurisdiction over work they have not previously performed, to the detriment of **both** union and non-union contractors. This, in turn, increases the cost of the project and raises the specter of additional jurisdictional disputes.

L. Derivative Contractor Liability

Public entities also should be made aware that because unions are most often the source of most PLA language, they often build in protections which may not even be present in their local bargaining agreements. Thus, while a local union agreement may not make contractors liable for the nonpayment of wages and fringe benefits by their subcontractors, it is not unusual for unions to unilaterally insert this

type of "guarantor" language into PLAs. This is significant because, unlike Davis-Bacon enforcement, not all state or local wage laws impose such derivative liability on the prime contractors. Indeed, to the extent state wage payment laws are used in an attempt to collect fringe benefit contributions in such a derivative action, ERISA preemption is often found. *See Bricklayers v. America's Marble Source, Inc.*, 950 F.2d 114 (3d Cir. 1991) (ERISA preempts state law requiring owners or prime contractors to withhold monies to contractors/subcontractors who are delinquent in making fringe benefit contributions); *Laborers' Council v. McHugh Const.*, 596 N.E.2d 19, 230 - Ill.App.3d 939 (1992) (ERISA preempts claim against contractor for payment of subcontractor delinquencies under state wage payment law). By granting unions a contractual basis for such liability, the public entity is increasing the exposure of its contractors and, perhaps, of itself if the wording proposed by the union has not been carefully examined.

VI. STATE EXECUTIVE ORDERS ON PLAs

Few public agencies or political jurisdictions have attempted to promulgate and publish objective standards to be used in evaluating the eligibility of projects for PLAs. Likewise, the contractual terms and other features of PLAs that will presumably minimize their legal vulnerability and make them cost-effective procurement alternatives are rarely addressed in advance of a public entity's decision to use a PLA on a particular project. To date four state governors have attempted to address this deficiency through executive orders.

In March 1994, New Jersey Governor Christine Todd Whitman issued Executive Order No. 11. The Order permits the use of PLAs by state agencies and departments if it has been determined that a PLA will promote labor stability and advance the state's interests in cost, efficiency, quality, safety and timeliness. The Order does not require the use of a PLA, or the selection of any particular union or labor organization if a PLA is used. Any decision to use a PLA must be supported by a written, publicly disclosed, finding by the agency or department that explains "the justification for use of the project agreement."

In April 1994, Nevada Governor Bob Miller issued an Executive Order directing all state construction procurement agencies "to provide for the negotiation of mutually acceptable project agreements consistent with all applicable Nevada laws," unless the agency "makes a written determination" that the benefits of proceeding without a PLA "substantially exceed" the benefits of proceeding with a PLA.

In December 1996, Washington State Governor Mike Lowry issued Executive Order 96-08. This Order directs all state agencies to "consider" PLAs on a project-by-project basis for "appropriate public works projects." A PLA can only be used where it will promote the state's interest in cost, efficiency, quality, safety and timeliness, and respect the "important public policies favoring open competitive bidding." This evaluation must be made with reference to five factors that include the potential for labor disruptions, the number of trades and crafts to be employed on the project, the "need and urgency" of the project, its size and complexity, and the benefits to the public relative to cost, efficiency, quality, safety and timeliness. Like PLAs under the New Jersey Order, the decision to use a PLA in Washington must be supported by "written findings which clearly demonstrate how the use of a project labor agreement will benefit the project and the interests of the public."

Both the New Jersey and Washington executive orders prescribe the minimum terms PLAs should contain. In New Jersey, PLAs must guarantee against strikes, lockouts and slowdowns, establish binding procedures to resolve disputes, and the PLA must be binding on all contractors and subcontractors. In Washington, PLAs must contain these terms, as well as designate a contractor or project manager to "oversee the construction of the project," be open to competition to all union and nonunion contractors, subcontractors and material supplies and prohibit discrimination in job referrals.

In February 1997, New York Governor George E. Pataki issued Executive Order No. 49. This Order directs state agencies to establish procedures "to consider" the use of PLAs on individual construction projects "only where the standards established by the Court of Appeals [in the *Thruway Authority* and *Dormitory Authority* cases outlined in Section V.C.1] can reasonably be expected to be met." PLAs must meet the interests of the state competitive bid laws. Specifically, PLAs must obtain the best work at the lowest price and prevent "favoritism, improvidence, fraud and corruption" in the award of public contracts. The order warns agencies that state courts have "struck down any such agreement wherein a contracting entity was unable to show a proper business purpose for entering into such agreement." Unlike the New Jersey and Washington orders, the New York Order does not prescribe any minimum or standard terms for PLAs.

VII. THE PRESIDENTIAL MEMORANDUM ON PLAs FOR FEDERAL CONSTRUCTION

The most recent development on PLAs impacts federal construction. The President issued a memorandum on project labor agreements to the heads of executive departments and agencies on June 5, 1997 (see Exhibit 9). Similar to the executive orders outlined in Section VI, the Presidential memorandum attempts to establish standard criteria to be used in evaluating the utility and application of PLAs. While the memorandum is widely thought to encourage such agreements, its ironic effect is to discourage, if not prohibit, their casual use. The memorandum neither authorizes nor requires a contracting officer to conduct direct negotiations with labor organizations. Furthermore, the memorandum forbids a contracting officer to require any contractor, or any other third party, to initiate such negotiations unless or until the contracting officer has carefully assessed the potential impact of doing so and determined that the results would meet certain minimum standards and still advance each of several government interests.

The memorandum states that departments and agencies may require "every contractor or subcontractor . . . to negotiate or become a party to a [PLA]."[17] It does not, in the process, authorize or direct federal departments or agencies to go any further. In fact, the brief history of the PLA issue in federal construction procurement indicates that the President made a conscious decision in the final version of the memorandum *not* to inject contracting officers directly into labor negotiations. A draft of an executive order that the President circulated in early April 1997, but withdrew later that month, expressly authorized departments and agencies to "enter directly into such an agreement [a PLA] with one or more appropriate labor organizations."[18] The deliberate omission of similar language in the memorandum indicates that departments and agencies are not authorized to negotiate PLAs.[19]

Contrary to public perception, the memorandum does not require or even encourage an increase in the number of PLAs that federal departments and agencies mandate. The memorandum "does not require an executive department or agency to use a project labor agreement on any project." The memorandum directs departments and agencies to make all the key determinations "on a project-by-project basis." It compels them to "establish . . . appropriate written procedures and criteria" for making the necessary determinations but leaves contracting officers free to decide, in the first instance, whether a PLA would be appropriate to consider for a specific project.

In the infrequent instances in which a contracting officer may want to consider a contractual requirement for a PLA, the contracting officer must (1) anticipate the substantive terms and conditions of the PLA likely to result from negotiations between the potential bidders and the appropriate labor organizations, (2) determine whether the PLA would meet the minimum standards found in the President's memorandum and (3) assess whether the PLA would still advance each of the identified government interests *better than* the procurement procedures that the contracting officer would normally follow. The contracting officer must also consider the possibility that he or she will have to reject all bids and re-advertise the project if the negotiations between the potential bidders and the appropriate labor organizations do not advance the interests identified in the memorandum.

The memorandum was effective when issued, on June 5. It did not, however, have any immediate impact on federal construction contracting. The reasons are found in sections 5 and 8. Before departments and agencies do anything else, they must, under section 5, establish "appropriate written procedures and criteria" for making the key determinations. Departments and agencies must establish these procedures and criteria within 120 days of June 5, but until they do so, section 8 prevents the memorandum from being used to support any contractual requirement for a PLA.

Sections 1 and 7(d) further limit the scope of the memorandum. Section 1 permits federal departments and agencies to consider the feasibility and merits of a PLA "during this Administration" for any "large and significant project . . . to be owned by a federal department or agency." Section 7(d) defines a "large and significant project" as one with a total cost of "more than $5 million." Thus, on its face, the memorandum limits the projects eligible for consideration to projects (1) bid during the current Administration, (2) expected to cost the federal government more than $5 million and (3) that the federal government will own.[20]

A. The Minimum Standards for Negotiating PLAs

Section 4 of the President's memorandum establishes minimum standards for the collective bargaining that could produce a PLA. Section 2 authorizes a department or agency to require a contractor or subcontractor to negotiate or execute a PLA "with one or more appropriate labor organizations." However, section 4 states that the contracting officer cannot require contractors to enter into a project labor agreement with "any particular labor organization." In practice, this means that the contracting officer must find that at least two appropriate labor organizations would be willing and able to enter into a PLA for each craft that the contractors and subcontractors will need to construct the project.[21]

Until the contracting officer determines that at least one appropriate labor organization would sign a PLA, he or she cannot know whether a PLA is an option. Until the contracting officer determines that at least two appropriate labor organizations would sign a PLA, he or she cannot, as a practical matter, require such an agreement and still avoid an unlawful mandate that contractors and subcontractors enter into a PLA with a particular labor organization.[22]

Without crossing the line and entering into the direct negotiations that the memorandum neither authorizes nor directs, the contracting officer must determine the number and jurisdiction of the labor organizations willing and able to execute a PLA with the contractors and subcontractors likely to perform the work. Neither the memorandum nor any other federal authority requires any labor organization to do so. Nor can contracting officers otherwise require labor organizations to cooperate.

The decisions of federal departments and agencies will affect the course and results of any negotiations in the same way, and for the same reasons, as discussed in Section IV, Item C. Requiring a PLA will put the contractors and subcontractors at a severe disadvantage. It will pressure them but not their labor-side counterparts to reach an agreement. Knowing that a deal must be struck as a condition of award, the labor organizations will be free to demand and hold out for costly wages, hours, and other terms and conditions. This is particularly true for contractors and subcontractors that have already entered into collective bargaining agreements with construction craft unions that have been recognized by the contractor or subcontractor as representing a majority of its employees. There is no incentive for these unions to negotiate a more cost-effective or flexible agreement for an individual project. Indeed, the primary effect of requiring all of the contractors to negotiate and enter into a PLA is to insulate the appropriate labor organizations from the competitive pressures that might otherwise lead those organizations, on their own initiative, to negotiate a PLA for the project.[23] In addition, the Davis-Bacon Act is applicable to almost all federal construction and may further impede the negotiation of flexible agreements. See the discussion of the Davis-Bacon Act in Section IV, Item C.

At the outset, the contracting officer must determine that at least two labor organizations would

be willing to enter into a PLA for each craft. When dealing with affiliates of the AFL-CIO, the contracting officer will also have to contend with procedures imposed by the AFL-CIO Building and Construction Trades Department (BCTD). The BCTD requires all affiliated labor organizations to obtain its approval before they may even begin negotiations for a PLA. If permission is granted to negotiate, the labor organizations must again obtain the BCTD's approval before executing the PLA. They are not free to make final decisions on the terms and conditions.

B. The Minimum Standards for Any PLA

Throughout the entire process, the department or agency must remain mindful of the minimum standards that the President's memorandum has established. Section 3 of the memorandum outlines these standards. Every PLA shall:

1. Bind all contractors and subcontractors on the project;

2. Allow all contractors, subcontractors and employees to compete for contracts on the project "without discrimination based on union or non-union status;"

3. Contain guarantees against strikes, lockouts and other work disruptions;

4. Establish procedures for resolving labor disputes;

5. Provide other mechanisms for labor-management cooperation on matters of mutual interest, including productivity, quality of work, safety and health; and

6. Fully conform to all applicable laws, regulations and executive orders.

C. When a Contractual Requirement for a PLA Would be Appropriate

Section 1 of the memorandum states that departments and agencies may require a PLA "where a project labor agreement will advance the Government's procurement interest in cost, efficiency and quality and in promoting labor-management stability as well as compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and . . . where no laws applicable to the specific construction project preclude the use of the proposed project labor agreement."

Section 1 also requires departments and agencies to make these determinations on a "project-by-project" basis. Departments and agencies are not permitted to make broad determinations for categories of work, much less an entire construction program.

The memorandum gives departments and agencies the discretion to identify and implement the methods and more specific factors that they will use to make the necessary determinations, but they must exercise that discretion within 120 days. Departments and agencies must act "in consultation" with the Federal Acquisition Regulatory Council but are otherwise free to exercise their own discretion.

Section 1 requires at least six determinations. To justify a decision to mandate a PLA, the contracting officer must make an affirmative finding on all six. A PLA must produce the following qualities, features or outcomes:

1. The government must save money that it could not save without requiring a PLA;

2. The government must realize efficiencies that it would not realize without requiring a PLA;

3. The government must enhance the quality of the project in ways and/or to a degree that it could not achieve without requiring a PLA;

4. The government must improve labor-management stability in ways and/or to a degree that it could not achieve without requiring a PLA;

5. The government must realize improvements in compliance with safety and health standards, equal employment opportunity standards, other labor and

employment standards, and "other matters" in ways and/or to a degree it could not achieve without requiring a PLA; and

6. The government must avoid violating any applicable laws that preclude the use of a PLA.

Contracting officers cannot simply assume that a PLA would produce these results. To the contrary, they must make objective determinations, based on empirical evidence, "on a project-by-project basis." That evidence must support the conclusion that requiring a PLA would advance each of the government's interests *better than* competition unrestricted by such a requirement.

Under the vast majority of circumstances, unrestricted competition would draw contractors that are not signatory to union agreements (open shop) into the bidding (or negotiation) for the work. Unless the contracting officer can be certain that the competition will be limited exclusively to either the union or open shop sector of the industry, the contracting officer must assess the costs and practices of both union and open shop contractors to determine the baseline before it can be determined whether a PLA will both improve that baseline and advance the government interests identified in the memorandum. The question is not whether requiring a PLA will improve the performance of any subset of competitors (union or open shop). The question is whether the requirement will produce an across-the-board improvement in the performance of everyone required to meet it and achieve the objectives of the memorandum. The memorandum neither authorizes nor directs departments and agencies to deprive the federal government of the potentially greater benefits of an alternative set of employment practices, not found in a PLA.

Quite apart from any federal determinations, both union and open shop contractors are and will remain free to seek a project labor agreement on their own initiative whenever they conclude that such an agreement would make them more competitive. Whether or not the contracting officer requires a PLA, he or she can therefore expect the department or agency to reap the benefits of any voluntarily negotiated PLA that would advance at least several of the interests identified in the memorandum. For this reason, the contracting officer should take a cautious, if not skeptical, approach to any requirement for a PLA.

D. GSA Standards for PLAs

On October 6, 1997, the General Services Administration (GSA) issued an Acquisition Letter prescribing the procedures it will use to implement the President's memorandum (Exhibit 9). To date, the GSA is the only agency to issue the required procedures.

The Acquisition Letter parallels the President's memorandum. It applies to all solicitations issued after October 5, 1997, and expires on January 20, 2001. Contracting officers are not required to use a PLA on any project. Instead, they "may, on a project-by-project basis, use a PLA on large and significant project[s]" where a PLA would advance the government's interest in "cost, efficiency and quality" and no law precludes the use of a PLA.

Although one section of the Acquisition Letter limits it to "contracts for the construction of facilities to be owned by a Federal department or agency," another section states that contracting officers are not "precluded from using a PLA in circumstances not covered herein, including leasehold arrangements and Federally funded projects."

The contracting officer "should consider" eight factors before imposing a PLA on a project. These factors are:

- Whether past experience with projects in the same location indicate a history of labor disputes, safety and health violations, or other problems that delayed, disrupted of adversely impacted the quality of work;

- Whether there are appropriate labor organizations representing the crafts that will be needed to perform the work;

- Whether relevant collective bargaining agreements will be expiring during the life of the project;

- The availability of qualified workers in the relevant labor market, considering other

projects that will be under construction at the same time;

- The impact on the government if the project is delayed;
- A PLA's probable impact on competition;
- Any state or local laws that could impact the use of a PLA, such as right to work laws; and
- Any other factors that may be relevant.

After considering these factors, the contracting officer "should document the rationale supporting the decision." If the contracting officer decides to use a PLA, an explanation must be forwarded to the GSA Acquisition Policy Division. The explanation must include: (1) a brief description of the project, (2) the estimated cost, (3) an explanation of how the PLA would advance the government's interests and (4) a copy of the solicitation.

Like the President's memorandum, the GSA guidance does not require a contracting officer to use (or even consider) a PLA on any particular project. In addition, the Acquisition Letter is equally ambiguous with respect to federally assisted work.

Unlike the President's memorandum, however, the Acquisition Letter indicates that contractors are intended to be the parties that initiate and conduct negotiations. The Acquisition Letter defines a PLA as "an agreement between the contractor, subcontractors, and the union(s) representing workers." The required contract clause directs the contractor to "enter into a PLA for the construction of [the project]."

The Acquisition Letter enumerates eight factors to be considered in evaluating the utility of a PLA, but it makes any consideration of these factors discretionary, and suggests no other factors or methodology for PLA evaluation.

Regardless of the approach used, once "consideration" of a PLA is initiated, the contracting officer is required to document the reasons for the end result. GSA suggests that no documentation is needed to support a negative decision, or at least that it need not be as thorough as the documentation required to support an affirmative decision. If the result is a decision to impose a PLA, the documentation must include four different elements, including "an explanation of the analysis used to determine how the PLA will advance the Government's interest in cost, efficiency, and quality."

VIII. CONCLUSION

The AGC of America opposes public project labor agreements because of their exclusionary effect, their negative economic impact and their equally negative effect on local collective bargaining.

AGC believes that the real issue in the debate over public PLAs is not whether a PLA can be used. It is, instead, whether a PLA should be used. It's not about union versus open shop contractors. It's about competitive bidding and fairness.

The competitive bidding process was established to prevent the very kind of favoritism and one-sided dealing that project labor agreements permit, if not encourage.

The practical effect of PLAs is that compliance with their terms requires that both union and open shop contractors change the way they do business and perform work on the project. These changes can be, and frequently are, significant with respect to both their financial impact and their effect upon who works on the project.

It defies logic to conclude that by forcing everyone to do the same thing the same way, with the same people, that competition will even be maintained, much less enhanced. It is even less logical to believe that the public interest is advanced by imposing terms through a project labor agreement that are so different or onerous that most, if not all, of an entire segment of the industry concludes that it is in their best interest not to participate.

When a union contractor is told, in effect, that the contracts that the company and its local unions are signatory to cannot be used on a project, and that the company must now comply with a different

contract, with different terms, possibly with different unions, this does not somehow encourage more competitive bidding, enhance project performance or labor relations for that contractor.

Likewise, when an open shop contractor is told that, yes, the company is free to compete for and perform work on a PLA project but that a majority of its work force must be referred through a union hiring hall, that the company will either have to abandon its existing benefit funds to make contributions to union funds or incur the expense of contributing to both, and that the few members of its regular work force that may secure jobs on the project must join a union and pay dues, it does not help broaden competition or produce more cost-effective performance. This is particularly true when the contractor knows that it will be working with a largely unfamiliar work force, under work rules that it did not negotiate and may have little or no experience with.

AGC is not aware of <u>any</u> public construction project that benefited more from a PLA than it would have from open competitive bidding. All the examples discussed in this publication demonstrate that PLAs accomplish little or nothing to improve cost-effectiveness, efficiency or quality. Assurances of timely completion and proper quality are already incorporated, expressed or implied, into every construction contract. A mandatory PLA is not merely ineffective, but can be detrimental to the interests of cost-effectiveness and efficiency.

The difference results largely from how the work force is deployed and managed -- not only between union and open shop contractors, but also between union contractors operating under local agreements versus the terms of a PLA. Put simply, when contractors have little or no control over the terms and conditions of employment -- hiring, crew composition or work assignments -- it increases costs and does little for productivity.

It was precisely these differences that competitive bidding procedures were designed to take advantage of. These laws recognize that there is no reason why construction procurement in the public sector should not benefit from the same cost effective practices that prevail in the private sector. Equally important, they recognize that no class or sector of the market should be excluded from competing for public works through the imposition of terms and conditions that are so unique that they have the effect of creating barriers to the practical participation of that sector, and deprive the public of the most cost-effective use of taxpayer funds.

It is for the public benefit that these laws exist, not for the benefit of contractors, unions or even the institutional interests of the public agencies responsible for applying and enforcing them.

Even if project labor agreements may be permitted by result-oriented interpretations of applicable laws or regulations, they are not necessary to advance the public interest in cost-effective, quality, on-schedule construction.

Every objective that project labor agreements are supposedly designed to achieve can be accomplished through bid or contract specifications. No-strike, no-lockout clauses are already common in local collective bargaining agreements. If "labor peace" is a concern on a public project, compliance with such a requirement can be incorporated into the bid specification or contract.

Likewise, standard starting times, holidays, overtime, make-up days and grievance procedures can all be accommodated in the contract specifications. Requiring the other terms and conditions typical in a project labor agreement, such as union hiring halls, union work rules, membership and benefit fund contributions is unnecessary.

If a public authority believes a PLA is absolutely necessary, it can be structured in the same way. The Denver Airport project was performed under the terms of a PLA structured in this manner. Signatory contractors were generally permitted to work consistent with the terms of their local agreements. Open shop contractors were permitted to use their work force and work practices, consistent with prevailing wage requirements.

AGC does not believe that the case for public project labor agreements has been made by their proponents. There is no evidence that public resources are used in a more productive fashion by

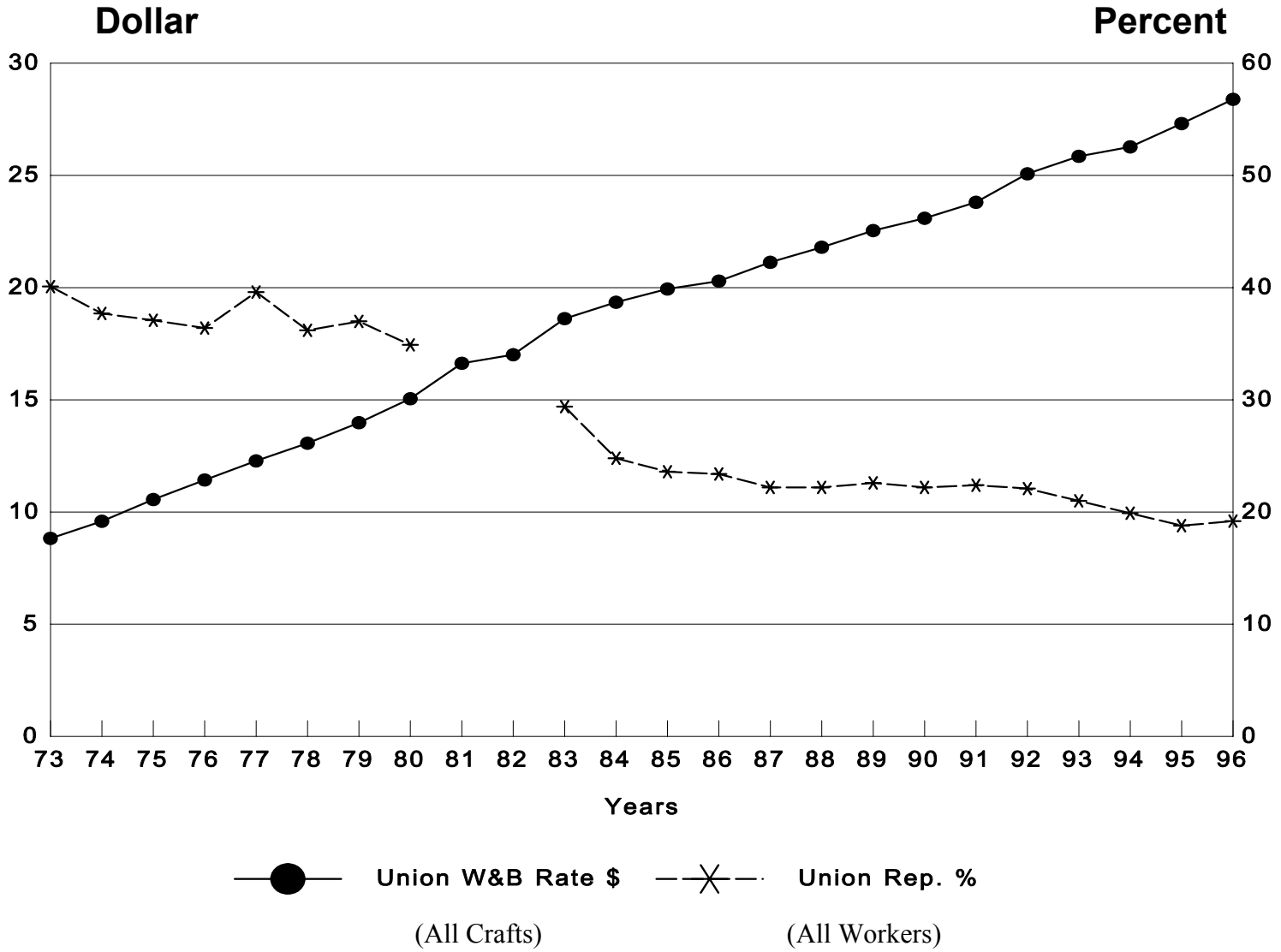
imposing the same one-size-fits-all agreement on all competitors for public works. To the extent that PLAs remove the free market economic forces that underlie both the competitive bidding laws and the collective bargaining process, they subvert the objectives of those laws and that process and make it difficult if not impossible for the public to benefit from the full competition that it, as well as all the businesses that compose the market, are entitled to expect. The dissent in the New York *Thruway Authority* case (See Section V.C.1) identified and articulated the central flaw in all public owner PLAs in its analysis:

> [T]he majority accepts that PLAs protect the public fisc [interest] and that a public authority -- in support of its decision to utilize a PLA -- need only point to an anticipated cost savings and experience with labor unrest, as the Thruway Authority has done. However, this ignores the fact that non-union contractors may be able to submit substantially lower bids if they are not required to comply with a PLA. Moreover, the anticipated savings to the public project are directly attributable to the elimination of the costs of organized labor and labor unrest, or, as the majority notes, "concessions won from local unions." Viewed another way, organized labor drives the cost of the project up; PLAs bring it back down. Thus, the savings from the PLA are, in essence, artificial and illusory. Viewed in such a light, it cannot be seriously argued that public authorities' endorsement or utilization of PLAs to appease labor unions is not fundamentally a matter of social policy.[24]

Just as it is illegal and wrong to deny any company a chance to compete for and perform public works because of race, gender or political affiliation, it is equally wrong to deny a company the same opportunity because of its labor relations policies and the labor choices of its employees. AGC does not believe that this is a proper role for public procurement authorities, or a proper use of public funds.

EXHIBITS

CONSTRUCTION INDUSTRY
UNION WAGE AND BENEFIT RATE IN DOLLARS
UNION REPRESENTATION RATE IN PERCENTAGE



X Data	Union W&B Rate	Union Rep. %
1973	8.83	40.1
1974	9.59	37.7
1975	10.56	37.1
1976	11.43	36.4
1977	12.28	39.6
1978	13.07	36.2
1979	13.98	37
1980	15.05	34.9
1981	16.63	
1982	17.01	
1983	18.62	29.4
1984	19.35	24.8
1985	19.94	23.6
1986	20.29	23.4
1987	21.13	22.2
1988	21.8	22.2
1989	22.54	22.6
1990	23.09	22.2
1991	23.8	22.4
1992	25.07	21.1
1993	25.85	21
1994	26.27	19.9
1995	27.31	18.8
1996	28.39	19.2

EXHIBIT 1

EXHIBIT 2

UNION REPRESENTATION

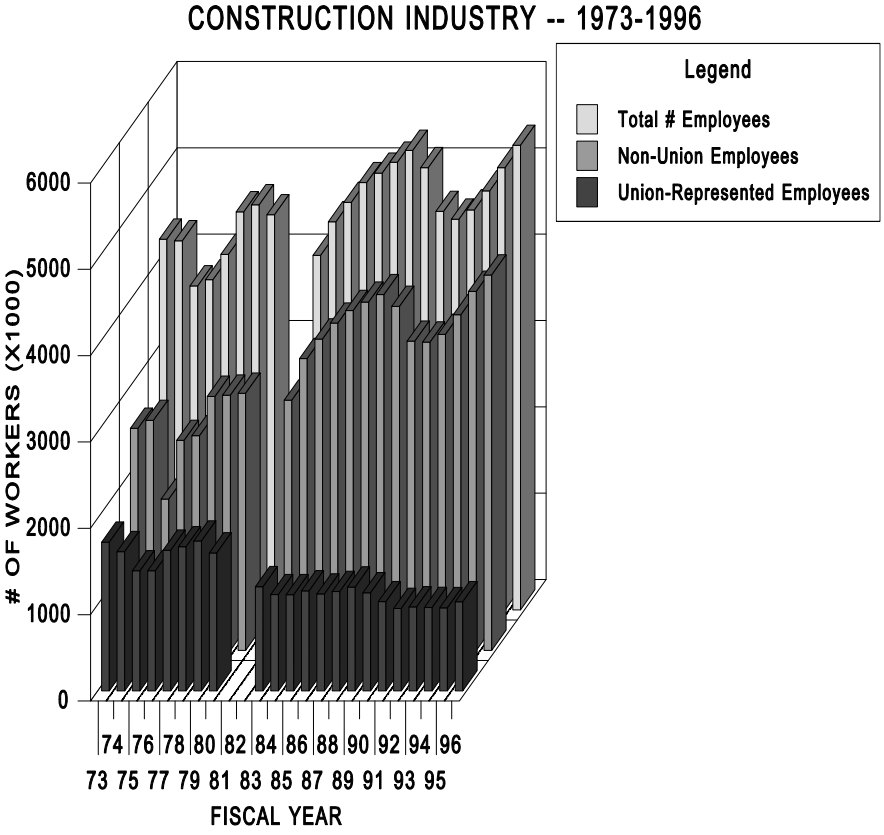


EXHIBIT 3

NATIONAL INSTITUTE OF GOVERNMENTAL PURCHASING, INC.

115 HILLWOOD AVENUE • FALLS CHURCH VIRGINIA 22046 • (703) 533-7100 • Fax (703) 532-0915

RESOLUTION

PREFERENCE, IN-STATE OR LOCAL

Whereas, *the National Institute of Governmental Purchasing consistently supports the competitive bidding process as the most effective vehicle for obtaining products and services at the lowest evaluated costs; and*

Whereas, *the National Institute of Governmental Purchasing encourages an opportunity for all suppliers to compete for Federal, State and Local Government business on an equal basis; and*

Whereas, *the application of preferences in awarding public contracts restricts suppliers from bidding on an equal basis and thereby increases costs and inhibits competition;*

Now Therefore, *BE IT RESOLVED, that the National Institute of Governmental Purchasing continues to oppose the use of in-state and local bidding preferences in awarding public contracts.*

I certify that the above resolution was adopted by the Board of Directors of the National Institute of Governmental Purchasing at its official meeting on the 7th day of October, 1981.

ROBIN J. ZEE, CPPO
Executive Vice President
and Secretary

NATIONAL INSTITUTE OF GOVERNMENTAL PURCHASING INCORPORATED N.I.G.P. 1944

NATIONAL INSTITUTE OF GOVERNMENTAL PURCHASING, INC.

11800 SUNRISE VALLEY DRIVE • RESTON, VIRGINIA 22091 • (703) 715-9400 • Fax: (703) 715-9897

RESOLUTION

PREFERENCE

Whereas, *the National Institute of Governmental Purchasing, Inc. advocates the use of the free, open competive process for public procurement, and*

Whereas, *the National Institute of Governmental Purchasing, Inc. supports all efforts to include everyone to participate on an equal basis in this process, and*

Whereas, *the practice of preference laws or regulations results in reduced competition and increased prices;*

Now Therefore, *BE IT RESOLVED that the National Institute of Governmental Purchasing, Inc. is opposed to all types of preference law and practice and views it as an impediment to cost effective procurement of goods, services and construction in a free enterprise system.*

I certify that the above resolution was adopted by the Board of Directors of the National Institute of Governmental Purchasing at its official meeting on the 7th day of March, 1987.

ROBIN J. ZEE, CPPO
Executive Vice President
and Secretary

NATIONAL INSTITUTE OF GOVERNMENTAL PURCHASING * INCORPORATED N.I.G.P. 1944

EXHIBIT 5

OFFICE, CHIEF OF
LEGISLATIVE LIAISON

DEPARTMENT OF THE ARMY
OFFICE OF THE SECRETARY OF THE ARMY
WASHINGTON, DC 20310-1600

July 8, 1993

Honorable Tom DeLay
House of Representatives
Washington, D. C. 20515

Dear Congressman DeLay:

This replies to your letter to Acting Secretary Shannon, concerning a proposed site stabilization agreement for the United States Military Academy, West Point, New York.

The Department of the Army has reviewed a proposed site stabilization agreement for West Point. The implementation of such an agreement would be predicated upon a determination by the Secretary of the Army, under the authority of Public Law 85-804 (title 50, United States Code, section 1431), that incorporating the provisions of the agreement would "facilitate the national defense." Given the nature of work performed at West Point and the current contracting environment which exists at the Academy, there does not appear to be any basis to make such a determination. Therefore, this agreement will not be considered further.

Thank you for your interest in this matter.

Sincerely,

D. William Atwood
Lieutenant Colonel, U. S. Army
Chief, Special Actions Branch
Congressional Inquiry Division

CONSTRUCTION LABOR RESEARCH COUNCIL
1730 M Street, N.W., Suite 900B, Washington, D.C. 20036, (202) 223-8045

July 29, 1994

Mr. John McNerney
AGC of America
1957 E Street, NW
Washington, DC 20006

Dear John:

Construction Labor Research Council has reviewed the language found in selected proposed project agreements recently developed on behalf of public sector owners. Their language and cost have been compared to the existing local agreements and the national heavy and highway project agreement. The results of these comparisons are shown on the attached sheets.

Most of the reviewed project agreements incorporate the terms and conditions of the local agreements. They, therefore, result in no reduction in labor costs when compared to local agreements. The Tappen Zee agreement is more detailed. It results in inter-craft standardization of some language and limited cost savings.

When appropriate, cost comparisons have also been made between the local agreements and the national heavy and highway project agreement. This has been done to document the comparative cost of proposed public authority agreements and those typical of national agreements already available and successfully implemented elsewhere. No presumption is made as to whether this particular project agreement could or should have been utilized in these situations.

It should be noted that in the last decade project agreements have become more widespread in the private sector. They have resulted in reducing the cost of union construction and thereby assuring that union contractors are successful in securing work. Furthermore, these agreements have served as a catalyst to obtain more cost effective local agreements.

The savings tabulated are likely to be conservative. They exclude the favorable impact upon taxes, insurance and workers compensation which result from beneficial agreements. Other sources of savings in the heavy and highway agreement , not quantified, are the freezing or capping of wages and benefits for the duration of a project and more flexible sub-contracting language.

The agreements that have been reviewed are all in the public sector. They represent a new direction in project agreements in which economic gains are minimal or non-existent. While assuring that the projects are performed union, they offer little, if any, savings to the owner. In addition, they provide little, if any, increase in competitiveness of the union contractor and may be disruptive to other owners and contractors involved in the local construction market.

I would be happy to further discuss this material with you.

Sincerely,

Robert M. Gasperow
Executive Director

cc: G. Govan

Boston Harbor

Coverage: Wastewater treatment facilities and related facilities to reduce pollution in Boston Harbor for the Massachusetts Water Resources Authority.

	Hourly Cost Savings over Local Agreement:		
Craft	Project Agreement	H/H Agreement	Source of Savings
Bricklayers	No savings	$1.42	1.5OT, No clean-up
Carpenters	No savings	.23	Sat. Make-up
Cement Masons	No savings	1.92	1.5OT, Shifts, Sat. Make-up
Crane Operators	No savings	2.64	1.5OT, Pd. Hol., Sat. Make-up, Crew Flex.
Ironworkers	No savings	1.99	1.5OT, Break, Sat. Make-up, Crew Flex.
Laborers	No savings	.18	Sat. Make-up

Project agreement provides for some travel payments and increased apprentice utilization for carpenters. These have not been quantified.

Conclusion: The language in the project agreement results in no cost savings over the local agreements while the heavy and highway agreement would have resulted in significant savings for some crafts.

Tappen Zee

Coverage: Certain construction and repair work for the New York State Thruway Authority.

Craft	Hourly Cost Savings over Local Agreement: Project Agreement	H/H Agreement	Source of Savings fr H/H
Carpenters	$.96	$3.38	Shifts, 1.5OT, Show-up, Clean-up/Pick-up, Sat. Make-up
Laborers	.19	.87	4-10's, 1.5OT, Sat. Make-up

4-10-s scheduling option is in the project agreement and has been identified as a savings, although it is understood that, under New York law, it cannot currently be implemented on this project. The project agreement has more cost effective shift language than the local carpenter agreement.

Conclusion: The language in the project agreement results in limited cost savings over the local agreements while the heavy and highway agreement would have resulted in significant savings for some crafts.

Illinois Toll Roads

Coverage: Construction work performed for the Illinois State Toll Highway Authority.

Craft	Hourly Cost Savings over Local Agreement: Project Agreement	H/H Agreement	Source of Savings
Bricklayers	No savings	$ .23	Sat. Make-up
Carpenters	No savings	.59	1.5OT, Sat. Make-up
Cement Masons	No savings	1.49	1.5OT, Shifts, Sat. Make-up
Crane Operators	No savings	.99	Sat. make-up, Crew Flex.
Laborers	No savings	.01	1.5OT, Show-up(added cost)
Teamster	No savings	.75	Holidays, Sat. Make up

Conclusion: The project agreement affirms the language found in the local collective bargaining agreements.

Port of Seattle Central Waterfront Project

Coverage: Central waterfront project, including convention center and related facilities, for the Port of Seattle.

Conclusion: This project agreement affirms the language found in the local collective bargaining agreements. The contract has not been compared to the national heavy and highway agreement, since it covers a building project.

Building and Construction Trades Department

AMERICAN FEDERATION OF LABOR — CONGRESS OF INDUSTRIAL ORGANIZATIONS
1155 FIFTEENTH ST., N.W., 4TH FLOOR • WASHINGTON, D. C. 20005-2707
(202) 347-1461 FAX (202) 628-0724

May 14, 1997

Secretaries
State and Local Building and Construction
Trades Councils Affiliated with the
Building and Construction Trades
Department, AFL-CIO

Re: BCTD Policy on Project Labor Agreements

Dear Sir and Brother:

On numerous occasions, from 1976 to the mid-1990's, State and Local Building and Construction Trades Councils have been advised of the procedures and policies of the Building and Construction Trades Department pertaining to the negotiation of project labor agreements. Unfortunately, these announcements and reminders, all approved by the General Presidents of the National and International Unions affiliated with the Department, have frequently been ignored by Councils, often to the detriment of the interests of construction workers in the particular area and of the Department and its affiliates nationally.

Accordingly, the purpose of this letter is to provide you with a copy of the standard project labor agreement that must be utilized in the negotiation of all project labor agreements. In addition, this bulletin reiterates the procedure that must be followed by Councils before an agreement is negotiated and executed. These policies and procedures concerning the negotiation of project labor agreements are as follows:

1. This office is to be notified each time that a State or Local Council wishes to enter into negotiations for a project labor agreement. No Council may begin negotiations for any project agreement without the express written approval of this Department. The Department and the General Presidents have established a procedure for requests to negotiate project agreements, which must be used in every instance. This procedure includes the following steps:

a. The attached form (Attachment A) must be filled out and submitted to the Building and Construction Trades Department. The form may be faxed, but a hard copy should be mailed as well.

b. Upon receipt of this form, it will be faxed to the respective International Unions within 48 hours. The International Unions will be requested to submit any objections to the Department within an additional 48 hours.

c. If we receive no objections from the respective International Unions, the Council will be notified within an additional 24 hours of that fact. A mutual time, date and location will then be established by the owner and/or contractor, along with the appropriate Building and Construction Trades Council and International and Local Representatives to meet and commence negotiations.

d. If objections are received from any of the respective International Unions within the required 48 hours, a meeting of the Representatives of the International Unions will be called within 5 working days to consider the request of the Council and the objections. At the conclusion of the meeting, a decision will be made whether to permit negotiations to commence. The Council will be notified by fax within 24 hours of the meeting. If permission is granted, the procedure outlined in Step (c) will be used. If permission is denied, neither the Council nor the Local Unions or International Unions affiliated with the Department may negotiate the project agreement in question.

2. If permission to negotiate a project labor agreement is given by the Department, the Council may not execute such an agreement without first submitting it to the Department and receiving written approval. In light of this requirement, the Council must advise the owner and/or contractor with which it is negotiating at the outset that, as a condition of its becoming effective, the agreement must be approved by the General Presidents.

3. Any State or Local Council acting contrary to these requirements shall be deemed to have violated the BCTD Constitution and shall be subject to sanctions to be determined by the Department.

4. If representatives of any trade are aware of actions of a State or Local Council that are contrary to these directions, they should notify their General President and this office of such actions at the earliest

opportunity. Similarly, if they become aware that one or more trades have signed such an agreement, they should also notify their General President and this office.

5. In order to assist all Councils, you will see that certain Articles in one standard agreement are to be negotiated on a project-by-project basis.

These procedures and requirements must be observed and the standard agreement utilized – without exception – in every negotiation for a project labor agreement. Any questions about these procedures and requirements must be addressed to and resolved by this office.

Sincerely and fraternally,

Robert A. Georgine
President

RAG/plj
opeiu #2
afl-cio

cc: All General Presidents

TEXT OF BCTD'S STANDARD PROJECT LABOR AGREEMENT

STANDARD PROJECT LABOR AGREEMENT INDEX

PROJECT LABOR AGREEMENT

This Agreement is entered into this _____day of _____, 19____, by and between , its successors or assigns ("Project Contractor") and the [insert names of unions], acting on their own behalf and on behalf of their respective affiliates and members whose names are subscribed hereto and who have, through their duly authorized officers, executed this Agreement, hereinafter collectively called the "Union or Unions," with respect to the construction of the [name of Project], hereinafter "Project."

The term "Contractor" shall include all construction contractors and subcontractors of whatever tier engaged in onsite construction work within the scope of this Agreement, including the Project Contractor when it performs construction work within the scope of this Agreement. Where specific reference to [name of Project Contractor] alone is intended, the term "Project Contractor" is used.

The Unions, the Project Contractor and all signatory Contractors agree to abide by the terms and conditions contained in this Agreement. This Agreement is a stand-alone Agreement which represents the complete understanding of the parties.

ARTICLE I
PURPOSE

The Parties to this Project Labor Agreement acknowledge that the construction of the [Project] is important to the development of [description of Project and the specific needs it will serve]. The Parties recognize the need for the timely completion of the Project without interruption or delay. This Agreement is intended to enhance this cooperative effort through the establishment of a framework for labor-management cooperation and stability.

The Contractor(s) and the Unions agree that the timely construction of this Project will require substantial numbers of employees from construction and supporting crafts possessing skills and qualifications that are vital to its completion. They will work together to furnish skilled, efficient craftworkers for the construction of the Project.

Further, the parties desire to mutually establish and stabilize wages, hours and working conditions for the craftworkers on this construction project, to encourage close cooperation between the Contractor(s) and the Unions to the end that a satisfactory, continuous and harmonious relationship will exist between the parties to this Agreement.

Therefore, in recognition of the special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the term of this Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Further, the Contractor(s) and all contractors of whatever tier, agree not to engage in any lockout, and the Unions agree not to engage in any strike, slow-down, or interruption or other disruption of or interference with the work covered by this Agreement.

ARTICLE II
SCOPE OF AGREEMENT

Section 1. This Project Agreement shall apply and is limited to the recognized and accepted historical definition of new construction work under the direction of and performed by the Contractor(s), of whatever tier, which may include the Project Contractor, who have contracts awarded for such work on the Project. Such work shall include site preparation work and dedicated off-site work.

The Project is defined as [list all aspects of the construction work involved.]

It is agreed that the Project Contractor shall require all Contractors of whatever tier who have been awarded contracts for work covered by this Agreement, to accept and be bound by the terms and conditions of this Project Agreement by executing the Letter of Assent (Attachment A) prior to commencing work. The Project Contractor shall assure compliance with this Agreement by the Contractors. It is further agreed that the terms and conditions of this Project Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements. It is understood that this is a self-contained, stand alone, Agreement and that by virtue of having become bound to this Project Agreement, neither the Project Contractor nor the Contractors will be obligated to sign any other local, area, or national agreement.

Section 2. Nothing contained herein shall be construed to prohibit, restrict or interfere with the performance of any other operation, work, or function which may occur at the Project site or be associated with the development of the Project.

Section 3. This Agreement shall only be binding on the signatory parties hereto and shall not apply to their parents, affiliates or subsidiaries.

Section 4. The Owner and/or the Project Contractor have the absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or non-existence of any agreements between such bidder and any party to this Agreement; provided, however, only that such bidder is willing, ready and able to become a party to and comply with this Project Agreement, should it be designated the successful bidder.

Section 5. Items specifically excluded from the scope of this Agreement include but are not limited to the following: [list all items to be excluded].

Section 6. The provisions of this Project Agreement shall not apply to (Owner), and nothing contained herein shall be construed to prohibit or restrict (Owner) or its employees from performing work not covered by this Project Agreement on the Project site. As areas and systems of the Project are inspected and construction tested by the Project Contractor or Contractors and accepted by the Owner, the Project Agreement will not have further force or effect on such items or areas, except when the Project Contractor or Contractors are directed by the Owner to engage in repairs, modifications, check-out, and warranty functions required by its contract with the Owner during the term of this Agreement.

Section 7. It is understood that the Owner, at its sole option, may terminate, delay and/or suspend any or all portions of the Project at any time.

Section 8. It is understood that the liability of any employer and the liability of the separate unions under this Agreement shall be several and not joint. The unions agree that this Agreement does not have the effect of creating any joint employer status between or among the Owner, Contractor(s) or any employer.

ARTICLE III
UNION RECOGNITION

Section 1. The Contractors recognize the Unions as the sole and exclusive bargaining representatives of all craft employees within their respective jurisdictions working on the Project within the scope of this Agreement.

ARTICLE IV
MANAGEMENT'S RIGHTS

The Project Contractor and Contractors of whatever tier retain full and exclusive authority for the management of their operations. Except as otherwise limited by the terms of this Agreement, the Contractors shall direct their working forces at their prerogative, including, but not limited to hiring, promotion, transfer, lay-off or discharge for just cause. No rules, customs, or practices shall be permitted or observed which limit or restrict production, or limit or restrict the working efforts of employees. The Contractors shall utilize the most efficient method or techniques of construction, tools, or other labor saving devices. There shall be no limitations upon the choice of materials or design, nor shall there be any limit on production by workers or restrictions on the full use of tools or equipment. There shall be no restriction, other than may be required by safety regulations, on the number of employees assigned to any crew or to any service.

ARTICLE V
REFERRAL OF EMPLOYEES

Section 1. The Contractors agree to recognize and be bound by the legal referral facilities maintained by the Union(s) and shall notify the appropriate Union either in writing or by telephone when workers are required.

Section 2. Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements. There shall be no discrimination against any employee or applicant for employment because of his or her membership or non-membership in the union or based upon race, creed, color, sex, age or national origin of such employee or applicant.

Section 3. In the event the referral facilities maintained by the unions are unable to fill the requisition of the Contractors for employees within a forty-eight (48) hour period after such requisition is made, (Saturdays, Sundays, and holidays excluded) applicants for such requisition may be employed from any source.

Section 4. The selection and number of Foremen and/or General Foremen shall be the responsibility of the Contractor, it being understood that in the selection of such employees the Contractor will give first consideration to the qualified workers available in the local area. Foremen and/or General Foremen shall take orders from supervisors designated by the Contractor. Foremen and/or General Foremen will not absent themselves from the area where their crews are working unless their presence is required elsewhere, and shall be held responsible for all work performed by employees under their supervision. The Contractor may require Foremen to be working employees.

Section 5. In cases of employment positions requiring special skills or qualifications, the Contractor will notify the Union of the qualification tests or skills required, and the Union may refer any qualified applicant. The Contractors shall be the sole judge of all applicants' qualifications.

Section 6. [Provision for key, or core, employees will be written as negotiated on a project-by-project basis.]

Section 7. The Union shall not refer employees employed at the Project site by an Contractor to other employment, nor shall the Union engage in other activities which encourage work force turnover or absenteeism.

Section 8. Employees who voluntarily quit or who are terminated for cause may be eligible for reemployment at the Project, and the referral facility may refer such former employees to The Project for rehire, but not sooner than ___days after such termination.

Section 9. An employee or applicant required to satisfactorily demonstrate his or her ability to perform certain tasks through an examination or test (e.g., welding tests), shall be paid for that time required to take the exam or test, provided the employee or applicant successfully passes the exam or test.

Section 10. In the event that a signatory Local Union does not have a job referral system as set forth in this Article, the Contractor shall give the Union equal opportunity to refer applicants. The Contractor shall notify the Union of employees hired form any source other than referral by the Union.

ARTICLE VI
APPRENTICES/TRAINEES/HELPERS/SUBJOURNEYMEN

To be inserted for each project.

Includes provisions such as:

Employment of Apprentices

Employment of other non-Journeymen classifications, where applicable

Percentages for use of Apprentices and non-Journeymen classifications

ARTICLE VII
WAGES AND BENEFITS

To be inserted for each project.

Includes provisions such as:

Hourly rates -- per local agreements

Employee benefit contributions; exclusion of industrial promotion or administrative funds

ARTICLE VIII
WORK RULES

To be inserted for each project.

Includes provisions such as:

Working conditions not specified elsewhere in standard agreement

ARTICLE IX
WORK STOPPAGES AND LOCKOUTS

Section 1. During the term of this Agreement there shall be no strikes, picketing, work stoppages, slow downs or other disruptive activity for any reason by the Union, its applicable Local Union or by any employee, and there shall be no lockout by the Contractor. Failure of any Union, Local Union or employee to cross any picket line established at the Project site is a violation of this Article.

Section 2. The Union and its applicable Local Union shall not sanction, aid or abet, encourage or continue any work stoppage, strike, picketing or other disruptive activity at the Contractor's project site and shall undertake all reasonable means to prevent or to terminate any such activity. No employee shall engage in activities which violate this Article. Any employee who participates in or encourages any activities which interfere with the normal operation of the Project shall be subject to disciplinary action, including discharge, and if justifiably discharged for the above reasons, shall not be eligible for rehire on the Project for a period of not less than ninety (90) days.

Section 3. Neither the Union nor its applicable Local Union shall be liable for acts of employees for it has no responsibility. The International Union General President or Presidents will immediately instruct, order and use the best efforts of his office to cause the Local Union or Unions to cease any violations of this Article. An International Union complying with this obligation shall not be liable for unauthorized acts of its Local Union. The principal officer or officers of a Local Union will immediately instruct, order and use the best efforts of his office to cause the employees the Local Union represents to cease any violations of the Article. A Local Union complying with this obligation shall not be liable for unauthorized acts of employees it represents. The failure of the Contractor to exercise its right in any instances shall not be deemed a waiver of its right in any other instance.

Section 4. In the event of any work stoppage, strike, picketing or other disruptive activity in violation of this Article, the Contractor may suspend all or any portion of the Project work affected by such activity at the Contractor's discretion and without penalty.

Section 5. There shall be no strikes, picketing, work stoppages, slowdowns or other disruptive activity affecting the Project site during the term of this Agreement. Any Union or Local Union which initiates or participates in a work stoppage in violation of this Article, or which recognizes or supports the work stoppage of another Union or local union which is in violation of this Article, agrees as a remedy for said violation, to pay liquidated damages in accordance with Section 6.

Section 6. In lieu of, or in addition to, any other action at law or equity, any party may institute the following procedure when a breach of this Article or of Article XII is alleged, after the Union(s) and/or Local Union(s) has been notified of the fact.

(a) The party invoking this procedure shall notify , who the parties agree shall be the permanent Arbitrator under this procedure. In the event that the permanent Arbitrator is unavailable at any time, he shall appoint his alternate. Notice to the Arbitrator shall be by the most expeditious means available, with notice by facsimile, telegram or any other effective written means, to the party alleged to be in violation and the involved International Union President and/or Local Union.

(b) Upon receipt of said notice, the Arbitrator named above shall set and hold a hearing within twenty-four (24) hours if it is contended that the violation still exists.

(c) The Arbitrator shall notify the parties by facsimile, telegram or any other effective written means, of the place and time he has chosen for this hearing. Said hearing shall be

completed in one session. A failure of any party or parties to attend said hearing shall not delayed the hearing of evidence or issuance of an Award by the Arbitrator.

(d) The sole issue at the hearing shall be whether or not a violation of this Article or Article XII has in fact occurred. The Award shall be issued in writing within three (3) hours after the close of the hearing, and may be issued without an Opinion. If any party desires an Opinion, one shall be issued within fifteen (15) days, but its issuance shall not delay compliance with, or enforcement of, the Award. The Arbitrator may order cessation of the violation of this Article, and such Award shall be served on all parties by hand or registered mail upon issuance.

(e) Such Award may be enforced by any court of competent jurisdiction upon the filing of this Agreement and all other relevant documents referred to hereinabove in the following manner. Facsimile or expedited mail or personal service of the filing of such enforcement proceedings shall be given to the other party. In the proceeding to obtain a temporary order enforcing the Arbitrator's Award as issued under Section 6 of this Article, all parties waive the right to a hearing and agree that such proceedings may be ex parte. Such agreement does not waive any party's right to participate in a hearing for a final order of enforcement. The Court's order or orders enforcing the Arbitrator's Award shall be served on all parties by hand or by delivery to their last known address or by registered mail.

(f) Any rights created by statute or law governing arbitration proceedings inconsistent with the above procedure, or which interfere with compliance therewith, are hereby waived by parties to whom they accrue.

(g) The fees and expenses of the Arbitrator shall be borne by the party or parties found in violation, or in the event no violation is found, such fees and expenses shall be borne by the moving party.

(h) If the Arbitrator determines that a work stoppage has occurred in accordance with Section 6(d) above, the Union(s) and its applicable Local Union shall, within eight (8) hours of receipt of the Award, direct all of the employees they represent on the Project to immediately return to work. If the trade involved does not return to work by the beginning of the next regularly scheduled shift following receipt of the Arbitrator's Award, and the Union(s) and/or its applicable Local Union have not complied with Section 3 of this Article, then the Union and/or the Local Union shall pay the sum of ten thousand dollars ($10,000.00) as liquidated damages to the affected owner, and shall pay an additional ten thousand dollars ($10,000.00) per shift for each shift thereafter on which the trade has not returned to work. The Arbitrator shall retain jurisdiction to determine compliance with this section and Section 3 of this Article.

Section 7. The procedures contained in Sections 6 through 6(h) shall be applicable to alleged violations of this Article and Article XI, (Section 3). Disputes alleging violation of any other provision of this Agreement, including any underlying disputes alleged to be in justification, explanation or mitigation of any violation of this Article, shall be resolved under the grievance adjudication procedures of Article X.

ARTICLE X
DISPUTES AND GRIEVANCES

Section 1. This Agreement is intended to provide close cooperation between management and labor. Each of the Unions will assign a representative to this Project for the purpose of completing the construction of the Project economically, efficiently, continuously, and without interruptions, delays, or work stoppages.

Section 2. The Contractors, Unions, and the employees, collectively and individually, realize the importance to all parties to maintain continuous and uninterrupted performance of the work of the Project, and agree to resolve disputes in accordance with the grievance-arbitration provisions set forth in this Article.

Section 3. Any question or dispute arising out of and during the term of this Project Agreement (other than trade jurisdictional disputes) shall be considered a grievance and subject to resolution under the following procedures:

Step 1. (a) When any employee subject to the provisions of this Agreement feels he or she is aggrieved by a violation of this Agreement, he or she, through his or her local union business representative or job steward, shall, within five (5) working days after the occurrence of the violation, give notice to the work-site representative of the involved Contractor stating the provision(s) alleged to have been violated. The business representative of the local union or the job steward and the work-site representative of the involved Contractor and the Project Contractor shall meet and endeavor to adjust the matter within three (3) working days after timely notice has been given. The representative of the Contractor shall keep the meeting minutes and shall respond to the Union representative in writing (copying the Project Contractor) at the conclusion of the meeting but not later than twenty-four (24) hours thereafter. If they fail to resolve the matter within the prescribed period, the grieving party may, within forty-eight (48) hours thereafter, pursue Step 2 of the Grievance Procedure, provided the grievance is reduced to writing, setting forth the relevant information concerning the alleged grievance, including a short description thereof, the date on which the grievance occurred, and the provision(s) of the Agreement alleged to have been violated.

(b) Should the Local Union(s) or the Project Contractor or any Contractor have a dispute with the other party and, if after conferring, a settlement is not reached within three (3) working days, the dispute may be reduced to writing and proceed to Step 2 in the same manner as outlined herein for the adjustment of an employee complaint.

Step 2. The International Union Representative and the involved Contractor shall meet within seven (7) working days of the referral of a dispute to this second step to arrive at a satisfactory settlement thereof. Meeting minutes shall be kept by the Contractor. If the parties fail to reach an agreement, the dispute may be appealed in writing in accordance with the provisions of Step 3 within seven (7) calendar days thereafter.

Step 3. (a) If the grievance has been submitted but not adjusted under Step 2, either party may request in writing, within seven (7) calendar days thereafter, that the grievance be submitted to an Arbitrator mutually agreed upon by them. The Contractor and the involved Union shall attempt mutually to

select an arbitrator, but if they are unable to do so, they shall request the American Arbitration Association to provide them with a list of arbitrators from which the Arbitrator shall be selected. The rules of the American Arbitration Association shall govern the conduct of the arbitration hearing. The decision of the Arbitrator shall be final and binding on all parties. The fee and expenses of such Arbitration shall be borne equally be the Contractor and the involved Local Union(s).

(b) Failure of the grieving party to adhere to the time limits established herein shall render the grievance null and void. The time limits established herein may be extended only by written consent of the parties involved at the particular step where the extension is agreed upon. The Arbitrator shall have the authority to make decisions only on issues presented to him or her, and he or she shall not have authority to change, amend, add to or detract from any of the provisions of this Agreement.

Section 4. The Project Contractor and Owner shall be notified of all action at Steps 2 and 3 and shall, upon their request, be permitted to participate in all proceedings at these steps.

ARTICLE XI
JURISDICTIONAL DISPUTES

Section 1. The assignment of work will be solely the responsibility of the Contractor performing the work involved; and such work assignments will be in accordance with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan") or any successor Plan.

Section 2. All jurisdictional disputes between or among Building and Construction Trades Unions and employees, parties to this Agreement, shall be settled and adjusted according to the present Plan established by the Building and Construction Trades Department or any other plan or method of procedure that may be adopted in the future by the Building and Construction Trades Department. Decisions rendered shall be final, binding and conclusive on the Contractors and Unions parties to this Agreement.

Section 3. All jurisdictional disputes shall be resolved without the occurrence of any strike, work stoppage, or slow-down of any nature, and the Contractor's assignment shall be adhered to until the dispute is resolved. Individuals violating this section shall be subject to immediate discharge.

Section 4. Each Contractor will conduct a pre-job conference with the appropriate Building and Construction Trades Council prior to commencing work. The Project Contractor and the Owner will be advised in advance of all such conferences and may participate if they wish.

ARTICLE XII
UNION SECURITY

Section 1. All employees covered by this Agreement now in the employ of the Contractors shall remain members in the Union during the term of this Agreement, and all workers hereinafter employed by the Contractors shall become members of the Union seven (7) days after the date of their employment and shall remain members of the Union during the term of this Agreement. (This clause shall be applied to the extent permitted by law.)

Section 2. A Contractor shall not discharge any employee for non-membership in the Union: (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership.

ARTICLE XIII
UNION REPRESENTATION

Section 1. Authorized representatives of the Unions and their Local Unions shall have access to the Project, provided they do not interfere with the work of the employees and, further provided, that such representatives fully comply with the visitor and security rules established for the Project.

Section 2. Each Union which is a party to this Agreement, or its applicable Local Union, shall have the right to designate a working journeyman as a Steward. Such designated Steward shall be a qualified worker performing the work of that craft and shall not exercise any supervisory functions. Each Steward shall be concerned with the employees of his or her own employer and not with the employees of any other employer.

Section 3. Where the Owner's personnel may be working on the Project in close proximity to the construction activities, the Unions agree that Union representatives, stewards, and individual workmen will not interfere in any manner with the Owner's personnel or with the work which is being performed by the Owner's personnel.

ARTICLE XIV
HOURS OF WORK. ETC.

Includes provisions such as:

Standard workday and workweek
Reporting provisions
Overtime Provisions
Shift Provisions
Holidays

To be inserted for each project.

ARTICLE XV
SUBCONTRACTING

The Project Contractor agrees that neither it nor any of its contractors or subcontractors will subcontract any work to be done on the Project except to a person, firm or corporation who

is or agrees to become party to this Agreement. Any contractor or subcontractor working on the Project shall, as a condition to working on said Project, become signatory to and perform all work under the terms of this Agreement.

ARTICLE XVI
SAFETY AND HEALTH

Section 1. Employees must use diligent care to perform their work in a safe manner and to protect themselves and the property of their employer. Failure to do so may result in immediate dismissal.

Section 2. In order to protect the safety and health of employees, all parties agree to comply with the applicable provisions of state and federal laws and regulations relating to job safety, health and safe work practices, as well as those specific Project safety rules published by the Project Contractor.

Section 3. At the discretion of the Owner, the Contractor may institute a reasonable substance abuse policy which may include pre-hire, reasonable cause, and post-accident testing.

Section 4. It shall be the exclusive responsibility of each Contractor to assure safe working conditions for its employees and compliance by them with any safety rules contained herein or established by the Contractor. Nothing in this Agreement will make the Union or any of its Local Unions liable to any employees or to other persons in the event that injury or accident occurs.

ARTICLE XVII
GENERAL SAVINGS CLAUSE

If any Article or provision of this Agreement shall be declared invalid, inoperative or unenforceable by any competent authority of the executive, legislative, judicial or administrative branch of the Federal or any State government, the Project Contractor and the Union shall suspend the operation of such Article or provision during the period of its invalidity and shall substitute by mutual consent, in its place and stead, an Article or provision which will meet the objections to its validity and which will be in accord with the intent and purpose of the Article or provision in question. Any final determination that any provision of this Agreement violates any law or is otherwise not binding and enforceable, shall have no effect on the validity of the remaining provisions of this agreement.

ARTICLE XVIII
TERM OF AGREEMENT

This Agreement shall be effective as of the day of , 19 , and shall remain in full force and effect during the entire period of the Project construction described in Article___ , Section___ , hereof or until___ ,___ , which ever occurs later.

This Agreement may be amended or supplemented only by the mutual consent of the parties hereto, reduced to writing and duly signed by each.

In witness whereof, the parties have executed this Agreement this___ day of ___, 19___ .

. . .

§ 103.42 Model union security clause.

Purpose. The Board determines, in accordance with § 103.40(a), that the promulgation of a model union security clause would facilitate the ability of a labor organization to fulfill its duty of fair representation to employees by clarifying for such employees the requirements of the Act as interpreted by the Supreme Court in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), *CWA* v. *Beck*, 487 U.S. 735 (1988), and related cases. The model union security clause set forth in the Appendix to this section supersedes all previous such model clauses announced by the Board, including that promulgated in Keystone Coat, Apron, and Towel Supply Co., 121 NLRB 880 (1958). This announcement does not affect Paragon Products Corp., 134 NLRB 662 (1961).

Appendix to § 103.42

Model Union Security Clause

Union security and financial obligations of employees to the bargaining representative.

[EMPLOYER] and [UNION] herein exercise their right, under Section 8(a)(3) [or 8(f)] of the National Labor Relations Act and the laws of [STATE], to agree to the following union security provision:

(1) Every employee covered by this Agreement must, for the life of this Agreement after the grace period described in Section 2 below, satisfy an obligation to the Union as the unit's exclusive bargaining representative. Under this Agreement, employees must choose one of the three ways of satisfying this obligation, as described below. Every employee has the right to make this choice free of interference, restraint or coercion:

(a) Full union membership: The employee chooses to join the Union as a full member, is subject to all rights and duties accorded members, and, as a condition of employment, must pay the full initiation fee (if applicable) and uniform periodic dues charged by the Union;

(b) Financial core employee: The employee does not become a member of the Union; thus, he/she is not entitled to the full range of rights and duties of membership. This employee does not object to the Union's spending part of the dues and fees collected under this Agreement for activities not germane to its role as the unit's exclusive bargaining representative. This employee must pay, as a condition of employment, the full initiation fee (if applicable) and the uniform periodic dues charged by the Union. The Union must provide this employee with information to enable him/her to decide whether to object to the use of his/her dues for nonrepresentation expenditures.

(c) Proportionate share payer: The employee does not become a full member of the Union, and thus is not entitled to the full range of rights and duties of union membership; further, the employee informs the Union that he/she objects to the Union's spending part of the dues and fees collected under this Agreement for activities not germane to its role as the exclusive bargaining representative; this employee must, as a condition of continued employment, pay the percentage of fees and uniform, periodic dues used for activities germane to the Union's status as the unit's exclusive bargaining representative. The Union must provide this employee with information about its expenditures and this employee may challenge the Union's information.

(2) Each employee covered by this Agreement who is not a full member of the Union on the effective date of this Agreement (or hire date, if applicable), has the right to a "grace period" of twenty-nine [or seven, if 8(f)] days in which to choose his/her status. Thus:

(a) For all employees who are in the unit and are not full Union members on the effective date of this Agreement [or the Agreement's date of execution, whichever is later], their chosen status, and their obligation to pay dues and fees, shall begin on the thirtieth [eighth, if 8(f)] day after the effective date of this Agreement [or the Agreement's date of execution, whichever is later].

(b) For all new employees who are hired into the unit during this Agreement's life and are not full Union members on the date of hire, their chosen status, and their obligation to pay dues and fees, shall also begin on the thirtieth day [eighth, if 8(f)] after their date of hire [or the Agreement's date of execution, whichever is later].

(3) Employees in the unit who are full Union members on this Agreement's effective date or, if hired during this agreement's life, on their date of hire, do not receive the grace period. For these full Union members, their obligation to the Union is continuous and is not affected by this Agreement, although they are free to change their status.

(4) Employees may elect to change their chosen status upon appropriate written notice to the Union.

THE WHITE HOUSE

WASHINGTON

Office of the Press Secretary

For Immediate Release June 6, 1997

June 5, 1997

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Use of Project Labor Agreements for Federal Construction Projects

The National Performance Review and other executive branch initiatives have sought to implement rigorous performance standards, minimize costs, and eliminate wasteful and burden-some requirements. This Presidential memorandum continues those efforts, by encouraging departments and agencies in this Administration to consider project labor agreements as another tool, one with a long history in governmental contracting, to achieve economy and efficiency in Federal construction projects. Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America and to ensure the economical and efficient administration and completion of Federal Government construction projects, it is hereby directed as follows:

Section 1. Executive departments or agencies during this Administration authorized to award a contract for the construction of a facility to be owned by a Federal department or agency may, on a project-by-project basis, use a project labor agreement on a large and significant project, (a) where a project labor agreement will advance the Government's procurement interest in cost, efficiency, and quality and in promoting labor-management stability as well as compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (b) where no laws applicable to the specific construction project preclude the use of the proposed project labor agreement.

Section 2. If an executive department or agency during this Administration determines that use of a project labor agreement will serve the goals set forth in section 1(a) of this memorandum on a large and significant project, and that no law precludes the use of a project labor agreement on the project, the executive department or agency may require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations. The executive department or agency has discretion whether to include such a requirement.

Section 3. Any project labor agreement reached pursuant to this memorandum:

(a) shall bind all contractors and subcontractors on the construction project through the inclusion of appropriate clauses in all relevant solicitation provisions and contract documents;

(b) shall allow all contractors and subcontractors wishing to compete for contracts and subcontracts on the project to do so, without discrimination against contractors, subcontractors, or employees based on union or nonunion status;

(c) shall contain guarantees against strikes, lockouts, and similar work disruptions;

(d) shall set forth effective, prompt and mutually binding procedures for resolving labor disputes arising during the project;

(e) shall provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) shall fully conform to all applicable statutes, regulations, and Executive orders.

Section 4. This memorandum does not require an executive department or agency to use a project labor agreement on any project, nor does it preclude use of a project labor agreement in circumstances not covered here, including leasehold arrangements and federally funded projects. This memorandum also does not require contractors to enter into a project labor agreement with any particular labor organization.

Section 5. The heads of executive departments or agencies covered by this memorandum, in consultation with the Federal Acquisition Regulatory Council, shall establish, within 120 days of the date of this memorandum, appropriate written procedures and criteria for the determinations set forth in section 1.

Section 6. This memorandum is not intended to create any right or benefit, substantive or procedural, enforceable by a nonfederal party against the United States, its departments, agencies or instrumentalities, its officers or employees, or any other person.

Section 7. (a) "Construction" as used in this memorandum shall have the same meaning it has in section 36.102 of the Federal Acquisition Regulation.

(b) "Executive department or agency" as used in this memorandum means any Federal entity within the meaning of 40 U.S.C. 472(a).

(c) "Labor organization" as used in this memorandum shall have the same meaning it has in 42 U.S.C. 2000e(d).

(d) "Large and significant project" as used in this memorandum shall mean a Federal construction project with a total cost to the Federal Government of more than $5 million.

Section 8. This memorandum shall be effective immediately, and shall apply to all solicitations issued after notice of establishment of the procedures and criteria required under section 5 of this memorandum.

WILLIAM J. CLINTON

U.S. GENERAL SERVICES ADMINISTRATION
Office of Governmentwide Policy

GSA Acquisition Letter MV-97-3

OCT 6 1997

MEMORANDUMA FOR ALL GSA CONTRACTING ACTIVITIES
(MV DISTRIBUTION LIST)

FROM: Edward I Loe for IDA M. USTAD
DEPUTY ASSOCIATE ADMINISTRATOR
FOR ACQUISITION POLICY (MV)

SUBJECT: GSA Procedures for Use of Project Labor Agreements on Federal Construction Projects

1. Purpose. This Acquisition Letter establishes General Services Administration (GSA) procedures for use of Project Labor Agreements (PLAs) on Federal construction projects.

2. Background.

a. The Presidential memorandum dated June 5, 1997, regarding the use of PLAs on Federal construction projects requires the heads of executive departments or agencies covered by the memorandum, in consultation with the Federal Acquisition Regulatory Council, to establish written procedures and criteria to guide the use of PLAs.

b. This Acquisition Letter establishes GSA's procedures for using PLAs to meet the goals of the Presidential memorandum. These procedures pertain to Federal construction projects.

3. Effective Date: This Acquisition Letter applies to all solicitations issued after October 5, 1997.

4. Termination Date: This Acquisition Letter expires on January 20, 2001.

5. Applicability: This Acquisition Letter applies to GSA activities authorized to award contracts for the construction of facilities to be owned by a Federal department or agency.

6. Definitions.

a. A Project Labor Agreement (PLA) is an agreement between the contractor, subcontractors, and the union(s) representing workers. Under a PLA, the contractor and subcontractors on a project and the union(s) agree on terms and conditions of employment for the project, establishing a framework for labor-management cooperation to advance the Government's procurement interest in cost, efficiency, and quality.

b. Construction means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. The terms buildings, structures, or other real property are defined further in Federal Acquisition Regulation (FAR) 36.102.

c. Labor Organization means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization (42 U.S.C. 2000e (d)).

d. Large and significant project means a Federal construction project with a total cost to the Federal Government of more than $5 million.

7. Policy.

a. The Contracting Officers (CO), authorized to award a contract for the construction of a facility to be owned by a Federal department or agency, may, on a project-by-project basis, use a PLA on large and significant project (1) where a PLA will advance the Government's procurement interest in cost, efficiency, and quality and in promoting labor-management stability as well as compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (2) where no laws applicable to the specific construction project preclude the use of the proposed PLA.

b. The CO is not required to use a PLA on any project, nor is the CO precluded from using a PLA in circumstances not covered herein, including leasehold arrangements and Federally funded projects. Contractors shall not be required to enter into a PLA with any particular labor organization.

c. The use of a PLA is not intended to create any right or benefit, substantive or procedural, enforceable by a nonfederal party against the United States, its departments, and agencies, its officers or employees, or any other person.

8. Procedures.

a. As a part of the procurement planning process for construction projects with a total estimated cost to the Federal Government of more than $5 million, the CO may consider including a contract clause requiring a PLA. When deciding whether a PLA will advance the Government's procurement interests in cost, efficiency, quality and in promoting labor-management stability as well as compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor and employment standards, and other matters, the CO should consider:

(1) whether past experience with construction projects in the location where the project will be performed reveals a history of labor disputes, work stoppages, safety and health standards violations, or other similar problems which delayed, disrupted, or otherwise adversely impacted the cost or quality of the work.

(2) whether there are appropriate labor organizations representing the crafts that the prime contractor and major subcontractors will require to perform the work involved in the construction project.

(3) whether collective bargaining agreements of crafts that will be involved in performing the work will be expiring during the life of the construction project.

(4) the availability of qualified crafts in the labor market, considering other construction projects that will be ongoing at the same time as the GSA project.

(5) the impact on the Government if the construction project is delayed, in terms of cost, disruption of customer agencies, the ripple effects on other contractors, etc.

(6) the probable impact on competition if a PLA is required.

(7) state or local laws that contractors and subcontractors must comply with that could impact the use of a PLA such as right to work laws.

(8) any other factors that may be relevant.

(b) The CO should document the rationale supporting the decision.

(c) If a PLA will be required, the CO must include a contract clause that reads substantially as follows:

REQUIREMENT FOR A PROJECT LABOR AGREEMENT (PLA)

(a) Definition. A Project Labor Agreement (PLA) is an agreement between the Contractor, subcontractors, and the union(s) representing workers. The PLA sets forth terms and conditions of employment for this project, establishing a framework for labor-management cooperation and stability to ensure timely completion of the project.

(b) The Contractor shall recognize the need for the timely completion of the project without interruption or delay. The Contractor shall, after contract award, enter into a PLA for the construction of (*insert project name*). The PLA shall bind the Contractors and subcontractors of whatever tier engaged in onsite construction work. The PLA shall --

(1) contain guarantees against strikes, lockouts, and similar work disruptions,

(2) set forth effective, prompt and mutually binding procedures for resolving labor disputes arising during the project,

(3) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health,

(4) fully conform to all applicable statutes, regulations, and Executive Orders, and;

(5) expire on completion of construction of the project.

(c) Nothing herein shall preclude contractors and subcontractors from competing for contracts and subcontracts on this project without discrimination based on union or non-union status.

(End of Clause)

d. The CO is encouraged to seek the advice and assistance of assigned legal counsel and the Project Manager in making decisions regarding the use of PLAs.

e. If the requirement for a PLA is incorporated in a solicitation, the Contracting Officer must provide the following information to the Agency Labor Advisor, GSA Acquisition Policy Division (MVP), for transmittal to the House Subcommittee on Oversight and Investigation:

(1) A brief description of the project;

(2) The estimated cost;

(3) An explanation of the analysis used to determine how the PLA will advance the Government's interest in cost, efficiency, and quality; and;

(4) A copy of the solicitation.

ENDNOTES

1 *1991 AGC Collective Bargaining Survey Report* (Washington, D.C.: Associated General Contractors of America, March 1992).

2 *The Growing Threat to Competitiveness: Union Pressure Tactics Target U.S. Construction Owners* (Washington, D.C.: The Business Roundtable, January 1993).

3 "Construction Organizing Membership Education Training," *Painters & Allied Trades Journal*, July/August 1993, p. 16.

4 "On the *COMET* Trail," *IBEW Journal,* May 1993, p. 15.

5 "Blueprint for Battle," *Carpenter,* May/June 1993, p. 6.

6 "A Dash of Salt . . ." *Painters & Allied Trades Journal*, July/August 1993, p. 19.

7 "Getting in the Face of the Employer," *Painters & Allied Trades Journal*, September/October 1993, p. 9.

8 *Report on the AGC Survey of Union Salting Tactics* (Washington, D.C.: Associated General Contractors of America, Inc., December 1996)

9 See, Northrup, Herbert R., "Salting the Contractor's Labor Force: Construction Unions Organizing with NLRB Assistance," *Journal of Labor Research* (Philadelphia: The Wharton School, University of Pennsylvania, Fall 1993).

10 1992-1993 Research Committee, *State and Local Government Purchasing* (Lexington, KY: National Association of State Purchasing Officials, 1993) 4th Ed., pp. 20-21.

11 Mills, D.Q., *Industrial Relations and Manpower in Construction* (Cambridge: The MIT Press, 1972) pp. 272-273.

12 *Labor-Management Relations: Construction Agreement at DOE's Idaho Laboratory Needs Reassessing*, United States General Accounting Office, Report No. GAO/GGD-91-80BR, May 1991. The Site Stabilization Agreement in use at the Idaho facility was also the subject of litigation. In *Arco Electric v. Watkins*, Case No. CV-90-0075-E-EJL (5/14/91, D. Idaho), reported at Vol. 37 Construction Labor Report 321 (5/22/91) the court upheld the agreement as a valid exercise of the Secretary of Energy authority under the War Powers Act (50 U.S.C.§1431 *et seq.*) and rejected claims that the agreement was preempted by or unlawful under the NLRA.

13 *"Boston Harbor" -- Type Project Labor Agreement in Construction: Nature, Rationale and Legal Challenges*, Herbert R. Northrup and Linda E. Alario, Journal of Labor Research, Vol. XIX, No. 1 (Winter 1998).

14 *Cost Review for Contracting Alternatives for Transmission Facilities in Alaska*, Herbert R. Northrup and Armand J. Thiebot (January 1996)

15 *"Boston Harbor" -- Type Project Labor Agreements in Construction: Nature, Rationale and Legal Challenges*, Herbert R. Northrup and Linda E. Alario, Journal of Labor Research, Vol. XIX, No. 1 (Winter 1998).

16 Brief of Appellant George Harms Construction Co., Inc., In Answer to Briefs of *Amici Curiae, George Harms Construction Co., Inc. v. New Jersey Turnpike Authority*, Supreme Court of New Jersey, Docket No. 37,561, p. 32.

17 Section 2 adds that the "executive department or agency has discretion whether to include such a requirement."

18 *Administration Circulates Draft Project Agreement Executive Order*, 43 Construction Lab. Rep. (BNA) 161 (April 16, 1997).

19 Another possible explanation is that the memorandum recognizes that direct negotiations between a government agency and a labor organization could violate the limited exception in the National Labor Relations Act that authorizes the execution of pre-hire agreements only between labor organizations and "an employer engaged primarily in the building and construction industry" [29 U.S.C. 158(f)]. Such negotiations would also raise serious legal questions about the "secondary" nature of the government's undertaking, and whether the resulting PLA would constitute an illegal "hot cargo" agreement [29 U.S.C. 158 (b)(4)(i)]. See the discussion of these issues in Section V, Item E.

20 Section 4 provides that the memorandum does not "preclude the use of a PLA in circumstances not covered here, including leasehold arrangements and federally funded projects." Section 4 does not, however, require that the "written procedures and criteria" address leasehold arrangements or federally funded projects. Nevertheless, the wording and history of this section cannot be reconciled with any presidential intention to encourage PLAs in such situations. The draft executive order applied its key provisions to federal and federally funded projects, as well as leasehold arrangements, as if they were all one and the same. The memorandum, in contrast, is careful to make a sharp distinction.

21 The possible illegality of a contract specification that has the practical effect of forcing a contractor to bargain with only one labor organization has been addressed by at least one state court. See *Utility and Transportation Contractors Association of New Jersey v. County of Middlesex*, A.3002-94 T1, *slip op*. at 4-5 (N.J. Super. Ct. App. Div. February 24, 1995) (finding that county's failure to identify appropriate unions could have the unlawful effect of mandating that all bidders obtain their labor from a sole source).

22 Section 2 of the memorandum seems to contemplate this situation. It permits but not does require a contracting officer to impose a PLA even where such an agreement would "serve the goals" of section 1(a). One example could well be the case in which only one appropriate labor organization is willing to enter into an advantageous PLA, but mandating a PLA would effectively require all of the contractors to deal with that one organization.

23 In the end, the question is not whether *any* PLA would meet the minimum standards and still advance the government's interests. The question is whether a contractual requirement for a PLA will produce a PLA that achieves both objectives.

24 *New York State Chapter, Inc. Associated General Contractors of America v. New York State Thruway Authority*, 207 A.D. 2d 26 (3d Dept. 1996).