

Federal Contractors: Beware Project Labor Agreements

Law360, New York (November 12, 2010) -- Proponents of project labor agreements (PLAs) claim that the agreements avoid cost overruns by eliminating unexpected wage demands or disputes during the life of the project. Opponents of PLAs assert that their requirements unnecessarily drive up the cost of construction projects and discriminate against nonunion contractors and workers.

Although there are several recent examples where local governments have prohibited the use of PLAs in contracting, the federal government has taken a position clearly in favor of their use. As a result, employers considering performing work on a federal project covered by a PLA, especially nonunion employers, must be aware of a number of issues when evaluating a bid on such a project.

A PLA is a pre-hire bargaining agreement, typically between a project owner and a building trades council that governs the terms and conditions of employment for all workers on a construction project. Although pre-hire agreements are not permissible outside of the construction industry, a PLA is a valid pre-hire agreement under sections 8(e) and (f) of the National Labor Relations Act. It is not necessary to establish the majority status of a labor organization before an employer creates a PLA.

PLAs cover workers in multiple crafts who would otherwise be covered by separate bargaining agreements, and imposes wage requirements and work rules. Contractors are required to sign the PLA in order to receive a contract. As a result, both union and nonunion employers must abide by the PLA's terms and use union labor on the project. Typically, PLAs include no-strike and no-lockout agreements.

In February 2009, the president issued Executive Order 13502, announcing the federal government's policy to "encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in federal procurement." The executive order marked a major shift in policy and revoked a previous executive order that prohibited federal agencies from requiring the use of project labor agreements.

The Federal Acquisition Regulatory Council issued proposed regulations in July 2009, implementing the executive order and allowing federal agencies to require the use of project labor agreements. In May 2010, the final rule took effect. (https://www.acquisition.gov/far/current/html/Subpart%2022_5Reserved.html#wp1081619)

Agency heads are encouraged by the rule to consider use of PLAs during the acquisition planning process. The rule relies on the justification usually given by proponents of PLAs and allows an agency to require a PLA if it will "advance the federal government's interest in achieving economy and efficiency in federal procurement, producing labor-management stability, and ensuring compliance with law and regulations governing safety and health, equal employment opportunity, labor and employment standards and other matters."

There are several factors an agency may consider to determine if a PLA is appropriate, such as: whether the project will require multiple construction contractors employing workers in multiple trades, if there is a shortage of skilled labor in the region in which the construction project will be sited or if completion of the project will require an extended period of time.

However, federal agencies will have broad discretion since there are not specific requirements or required factual findings. Additional discretion is provided to agencies to specify the terms and conditions of a PLA and whether to seek the views of prospective bidders and union representatives to identify the appropriate terms and conditions. All agency PLAs must:

- bind all contractors and subcontractors engaged in construction on the construction project to comply with the PLA.
- allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements.
- contain guarantees against strikes, lockouts and similar job disruptions.
- set forth effective, prompt and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement.
- provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety and health.

An agency awarding a contract may include a PLA in the terms and conditions of the bid solicitation and require the successful bidder to become a party to the PLA. Now that the final rule is in place, construction firms are likely to see an increase in the prevalence of PLAs when bidding on large federal projects. Bidding on and entering into a contract that requires a company to become a signatory to a PLA can include a number of separate collective bargaining agreements by reference.

Although PLAs have not been uncommon on large state and local projects, federal contractors may not have addressed the complexities of a PLA or a collective bargaining agreement — the majority of construction firms in the U.S. are nonunion. Identifying the scope of the work a contractor will be performing, and whether it is construction work covered by the PLA, is an important step in evaluating a PLA. The agreements sometimes exclude certain types of work or employees, such as supervisors and engineers, from their scope, but that discretion will rest with each individual federal agency.

Nonunion employers must fully appreciate the cost implications of a PLA and the impact of union requirements imposed by it when bidding on a project. Although wages on a federal project under a PLA are not likely to be higher than Davis-Bacon prevailing rates already in place, the cost of employee union dues, union fund contributions and grievance proceedings should not be ignored. There are also potential restrictions on an employer's ability to hire and discipline employees, as well as other administrative requirements to consider.

Most PLAs are limited to a specific project, but nonunion employers should be especially careful that signing a PLA does not potentially require the use of union labor on other projects.

Construction firms will certainly continue to do business with the federal government and its many agencies. In order to be a successful bidder on a federal construction project, a contractor must be fully aware of an applicable PLA and have factored in the impact of the PLA.

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