Project Labor Agreements – They’re Back In Federal Government Construction Contracts – What Does It Mean To You?

On Friday, February 6, 2009, President Obama issued an Executive Order entitled “Use of Project Labor Agreement for Federal Construction Projects” (the “Order”). That Order both effectively reverses the prior Administration’s policy on precluding use of Project Labor Agreements (“PLAs”) on federal construction projects, while simultaneously reinstating President Clinton’s Memorandum (discussed below), establishing a preference for use of PLAs on such projects.

What Is A PLA?

A PLA is an agreement entered into between an owner and prime contractor, typically on public or publicly funded projects, in which the prime contractor and subcontractors on the project in question agree up front to utilize and sign on to a collective bargaining agreement (“CBA”) with one or more labor organizations/unions for the duration of the subject project.

The Obama Order defines a PLA as: “... a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).” Order at §2(e).

Traditionally, while some federal construction projects were performed by union contractors, others are performed by open shop or merit shop (i.e., non-union) contractors. Effectively, the award of such a contract was to the lowest responsive and responsible bidder, regardless of whether the contractor was union or non-union. Typically, the government has not cared whether the contractor was unionized or not.

With the Obama Order, however, the government’s executive branch, which oversees and performs a significant amount of federal construction (often through the General Services Administration, Department of Defense, Federal Aviation Administration and Department of Homeland Security, to name a few), has now reinstated its preference for PLAs.

PLAs, in effect, require that all labor on a PLA-specific project be awarded solely to contractors and subcontractors who agree in advance to:

- recognize labor unions as the representatives of their employees on the project in question;
- utilize the applicable union halls to obtain workers for the project if needed;
- exclusively use apprentices from union apprenticeship programs;
- pay union wages, benefits, pensions, and the like; and
- obey the union work rules, job classifications and arbitration procedures.
As a result, both union and non-union contractors must sign on to the union CBAs for purposes of the project in question.

History Of Presidential Use Of PLAs

For the most part, until the 1990s U.S. presidents did little policy-wise to endorse the use or preference for open shop or union labor on federal or federally funded construction projects. There is little history of presidents of the United States asserting their authority and power in requiring or preferring the use or non-use of union labor on a given project.

A. The Clinton Memorandum

That history changed, however, when on June 5, 1997, President Bill Clinton issued his “Memorandum on Use of Project Labor Agreements for Federal Construction Projects” (“Memorandum”). That Memorandum stated, in short, that in order to “implement rigorous performance standards, minimize costs, and eliminate wasteful and burdensome requirements,” the president by issuing his Memorandum was “encourage[ing] departments and agencies in this Administration to consider project labor agreements in governmental contracting, to achieve economy and efficiency in Federal construction projects.”

As a result, President Clinton directed that the agencies and executive departments under his authority were authorized to, “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 labor requirements governing safety and health, equal employment opportunity, labor and employment standards, and other matters . . . .”

The determination as to whether to use a PLA on a given project was left to the agency’s/department’s discretion. If, however, the agency/department elected to require a PLA, then the department/agency was permitted to “ . . . 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.” This policy continued throughout the balance of the Clinton presidency, but was limited to projects costing in total more than $5 million.

B. Bush II’s Executive Order

As exemplified by a change in office, often significant policy changes are effectuated with the entry of a new president. For example, the George W. Bush Administration took a diametrically opposed view of PLAs from that set forth in the Clinton Memorandum. On February 17, 2001, President Bush issued Executive Order No. 13202, entitled “Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects.” This Order was amended by Executive Order 13208, dated April 6, 2001 (the “Bush Order”).

When read together, the Bush Order states, in relevant part, that the federal government would reverse the Clinton Memorandum so that the government could: “(1) promote and ensure open competition on Federal and federally funded or assisted construction projects; (2) maintain Government neutrality towards government contractors’ labor relations on Federal and federally funded or assisted construction projects; (3) reduce construction costs to the Federal Government and to the taxpayers; (4) expand job opportunities, especially for small and disadvantaged businesses; and (5) prevent discrimination against Government contractors or their employees based upon labor affiliation or lack thereof; thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects.”

As a result, the Bush Order stated that all executive agencies obligating funds to, or awarding, construction contracts were required to make sure that neither the awarding governmental entity nor any construction manager acting for the government mandate or prohibit any bidder, offeror, contractor, or subcontractor to enter into, or comply with, agreements with labor organizations on the same or related construction projects. The agency also could not take other actions that would discriminate against bidders, offerors, contractors, or subcontractors for either signing or refusing sign on,
or otherwise adhere, to such labor agreements on the same or other related construction project.

Comparison of the Bush Order with the Clinton Memorandum reveals that the executive branch of the U.S. government completely reversed course, from a preference for PLAs under Clinton to an absolute bar on any preference or non-preference for PLAs under Bush II.

C. The Obama Executive Order

As discussed in the following section, President Obama has reversed course from the prior Administration and instead followed the same path as President Clinton’s Memorandum.

Current Policy

The recent Obama Order yet again reverses direction, effectively retracting the Bush Order and reinstating in an executive order format the Clinton Memorandum, albeit with one significant change. While the Obama Order reinstates the preference for PLAs on federal construction projects or on federally funded projects, instead of the $5 million threshold set forth by President Clinton, President Obama has established a $25 million floor.

This $25 million level represents what the Obama Administration calls a “large-scale construction project.” In furtherance of this finding, the Obama Order states that:

Section 1. Policy. (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise due to the fact that construction projects typically involve multiple employers at a single location. A labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create frictions and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On larger projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) The use of a project labor agreement may prevent these problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. Accordingly, it is the policy of the Federal Government 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.

As discussed above with regard to the Clinton Memorandum, and given the Obama-stated policy position, the Obama Order likewise grants discretion to the executive agencies and departments as to whether to require the use of PLAs on large-scale projects, and then on a project-by-project basis. In electing to assert a PLA, it appears that the agency will need to make an affirmative showing that the imposition of such a PLA will further the government’s interests in “achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards and other matters . . . .” See Obama Order at §3(a).
Given this agency discretion and the present political climate, it is likely that PLAs will be required on many, if not most, applicable projects.

With this in mind, however, where PLAs are required on federal procurements, the PLA is required to:

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

(b) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

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

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

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

(f) fully conform to all statutes, regulations, and Executive Orders.

See Obama Order at §4.

These requirements and limitations make it clear, among other things, that: (1) the imposition of a PLA on a given project is not required, but left to the agency’s discretion; (2) if a PLA is set in place, it is applicable to all contractors and subcontractors on the project; (3) all contractors, regardless of union affiliation, have a right to compete for federal work; (4) guarantees against strikes and other similar labor unrest are required; and (5) binding and prompt dispute resolution processes must be established in the PLA.

Interestingly, the stated policy bases for the Obama Order appear to include the mitigation of possible labor unrest during the project, avoidance of discrimination and assertion of other applicable labor standards. In reality, most of these policy bases have already been met and apply on federal construction projects. For example, as to hourly wages and benefits, the Davis-Bacon Act, 40 U.S.C. §276a et al. provides that all contractors on a federal project must pay at a minimum the Department of Labor (“DOL”) established prevailing wages to their employees. Those wages include both hourly wages plus benefits as denoted in the applicable prevailing wage determination appended to the contract. Most of the time these prevailing wages are determined by the DOL’s looking at the local union wages and benefits and inserting them verbatim into their wage determination. Therefore, both union and non-union contractors are paying at least the union wage on federal construction projects. See 48 C.F.R. Subpart 22.4.

Similarly, as a matter of policy, all contractors on a federal project are required to comply with applicable non-discrimination and affirmative action, including EEOC and other like minority programs. See, e.g., 48 C.F.R. Subparts 22.8 (Equal Employment Opportunity) and 22.9 (Nondiscrimination Because of Age).

These and other like policies already in place appear to address the majority of the concerns raised in the Obama Order. It bears mention that the Order is effective only for solicitations made after the new FAR regulations are issued, which in this case would be at least 120 days from the Order’s date.

Another important note is Order Section 7. That Section requires the Office of Management and Budget Director “in consultation with the Secretary of Labor and with other officials as appropriate,” to provide President Obama “within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.” Therefore, it is possible that the scope and breadth of the present Obama Order may be modified, likely by expanding its scope to other project sizes/types. Only time will determine if this expansion takes place.

What Does This Mean For Me?

There has been a long debate among union and non-union construction organizations as to the true
impacts of PLAs on projects. This debate ranges from topics such as costs, efficiencies, timeliness of performance and other like issues. This Alert does not discuss these issues or intend to enter into this debate.

With this in mind, however, if you perform federal construction work, regardless of union affiliation, you need to be aware of the possibility that your future projects (which exceed total costs of $25 million under the Obama Order) may be subject to a PLA and the associated use of union labor and/or need to budget for union dues, fees, benefits and wages.

If you are a merit or open shop contractor and/or are not otherwise familiar with union-based projects, then it is incumbent upon you to learn the intricacies of PLAs and unionized projects. You also need to familiarize yourself with the labor laws associated with unfair labor practices, and other aspects of labor and employment law to verify your compliance with such rules and regulations.

Conclusions

The Obama Executive Order is not a sea change from prior government policy, but it is a significant revision from the Bush Administration. The Obama Order does not mandate or compel the use of PLAs. With this in mind, however, federal executive agencies are now armed with the discretion of imposing PLAs on any federal project or federally financed construction project with a total value (presumably inclusive of design and other pre-construction/pre-award costs) of $25 million or more.

This Order impacts both open shop and union contractors and subcontractors in a number of ways, possibly imposing new requirements on both classifications of contractor.

With the stimulus becoming law on February 17, the possibility for the imposition of PLAs on many of the projects resulting from that package is significant. Federal construction contractors and subcontractors alike need to be aware of these requirements and how best to address the challenges they impose.