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55 CLR 805

Project Labor Agreements

Officials May Extend Deadline on Proposal To Implement Project Labor Agreement Policy

The Federal Acquisition Regulation councils are considering extending by 30 days the comment period that expired Aug. 13 for proposed rules to implement President Obama's executive order on the use of project labor agreements on federal construction projects, agency and union sources told BNA on Aug. 17.

Several construction employer associations submitted letter to meet the published Aug. 13 deadline. Some urged federal officials to not mandate the use of project labor agreements, while others recommended expanding the directive to include smaller projects and also those that receive funding assistance.

Jacob Hay, spokesman for the Laborers International Union and Tom Owens, spokesman for the Building and Construction Trades Department, AFL-CIO, told BNA in separate e-mails Aug. 17 their respective organizations will file comments on the proposed regulations closer to the expected extended deadline, which they predicted would be on or near Sept. 12.

The councils' proposals were published as proposed rules for the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, in the July 14 *Federal Register* (74 Fed. Reg. 33,953). The proposal would amend the Federal Acquisition Regulation to encourage federal departments and agencies to consider requiring the use of project labor agreements for federal construction projects that total more than $25 million (55 CLR 621, 7/16/09).

When releasing the proposed rule, the FAR councils also requested comments concerning the process that agencies should follow when soliciting proposals for construction contract awards where use of a PLA is required. The councils asked whether each offeror should be required to submit the PLA "as part of its bid or only from an apparent successful offeror."

The proposed rule is expected to implement Obama administration Executive Order 13502, which the president signed Feb. 6 to revoke Bush administration executive orders 13202 and 13208 and was similar to memorandum language relating to PLAs that former President Bill Clinton sent to the heads of executive departments and agencies in June 1997. The Bush order prohibited making project labor agreements a bid specification on federal construction contracts (54 CLR 3165, 2/11/09).

Government officials used contract data from fiscal year 2008 to estimate the proposed regulations would apply to approximately 300 large-scale construction contracts that exceed the $25-million-per year-threshold, according to the proposed rule.

AGC Opposes Mandates for PLAs

The Associated General Contractors "neither supports nor opposes PLAs 'per se'," the comment letter said. "What AGC strongly opposes is 'government-mandated' PLAs on any publicly funded construction project," it said.

The organization, which represents more than 33,000 construction industry firms nationwide, commended the administration for limiting the directive, by choosing to "encourage" agency executives to consider requiring the labor agreements rather than by requiring the use of the agreements outright.

Still, in the letter, Marco Giamberardino, senior director of AGC's Federal and Heavy Construction Division, said the proposed rule would change far more than officials have acknowledged and that its approach would create greater complications than officials may have contemplated. For example, requiring employers to make fundamental changes in the way they do business could lead to increased project costs, inefficiencies, restrained competition, and legal challenges, he warned.

"[N]either a public owner nor its representative should 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," the letter stated. The decision on whether to enter into and negotiate the terms of a PLA should be left to the employers and labor organizations that form the basis for the employer-employee relationship, and which have a vested interest in forging a fair and stable employment relationship, it said.

According to AGC, officials were trying to establish uniform standards and dispute-resolution mechanisms they assume will improve coordination between multiple employers, or clarify uncertainties about work terms and conditions for various groups of workers. But, the letter added, "a government-mandated PLA could also exacerbate such problems."

First, according to the letter, a government-mandated PLA could cause new frictions, disputes, and confusion by forcing a new labor framework onto previously nonunion employees, or by forcibly altering the prior agreed upon status quo of union-contractor employees. Second, it pointed out, proposed provisions intended to minimize workforce problems on a PLA-covered project site cannot protect it, for example, from job disruptions caused by off-site strikes or work stoppages at related facilities.

Contracting officers should be required to make objective determinations based on empirical evidence and on a project-by-project basis that a PLA mandate would advance the government's interests better than operating without the mandate. To achieve that, AGC suggested that agencies be required to demonstrate that a PLA mandate would:

• save money and improve efficiency beyond what is already provided for under the Competition in Contracting Act;

• improve labor-management stability beyond what is already provided for under the Davis-Bacon Act and the National Labor Relations Act; and

• enhance compliance with labor laws and regulations beyond those already enforced by the Labor Department's Occupational Safety and Health Administration, Wage and Hour Division, Office of Labor-Management Standards, Office of Federal Contract Compliance Programs, and the Equal Employment Opportunity Commission.

PLAs Should be Default Option, CQC Says

Executive Order 13502 should be regarded as creating a presumption that PLAs will automatically be used on large projects, unless the project fails to meet certain criteria, according to comments submitted by the 27,000 union employers represented by the Campaign for Quality Construction. The PLA presumption should apply, the letter said, "unless the agency finds that the project does not satisfy any one or more of the following criteria":

• projects that would require the services of two or more construction contractors and/or subcontractors that together employ workers in three or more crafts or trades;

• projects that would require an extended completion period;

• situations that are deemed to require "peaceful, orderly, and mutually binding" procedures for resolving labor disputes and conflicts;

• projects that would require a substantial number of experienced, skilled building trades and craft workers;

• project with tight completion schedules and budget restrictions; and

• geographic areas where labor organizations can provide a reliable source of experienced workers and can negotiate a PLA applicable to the project.

The consortium also recommended that the administration consider expanding the scope of the executive order:

• to encourage PLAs on projects worth $5 million or more,

• to encourage PLAs on projects receiving federal assistance; and

• to clarify that nothing would preclude an agency from using PLAs on federal projects valued at less than $5 million, if the agency determines it would be in its best interest.

The member associations of the CGC include the Finishing Contractors Association, International Council of Employers

of Bricklayers and Allied Craftworkers, Mechanical Contractors Association of America, National Electrical Contractors Association, the Sheet Metal and Air Conditioning Contractors' National Association, and The Association of Union Constructors.

TAUC Opposes Size Restriction

TAUC told officials in a separate statement, "[T]he use of PLAs should not be restricted by the size of the project budget."

TAUC is also affiliated with the National Maintenance Agreements Policy Committee, which negotiates and administers collective bargaining agreements, and urged officials to expand the application of the executive order to projects smaller than $25 million.

In the statement, TAUC said agencies should be required to use PLAs on any construction project where officials have determined that a PLA would achieve economy and efficiency in the federal procurement process and where it would be consistent with the law. According to the statement, "Time after time our contractors have seen significant advantages in using PLAs on modest multimillion [dollar] projects and multibillion dollar projects alike."

TAUC recommended that the use of PLAs also be encouraged for projects that are funded with federal assistance.

Executive Order is Illegal, ABC Says

The Associated Builders and Contractors, whose 25,000 members support open-shop employers, called the executive order "an unlawful exercise of power that violates numerous federal laws and the Constitutional rights of government contractors and their employees." In their comment letter the association said the proposed rule "should be rescinded or at least significantly modified in order to mitigate the irreparable harm otherwise likely to be caused by the President's Executive Order."

Among the criticisms leveled by ABC was that the proposed rule violated the Competition in Contracting Act, which it said, was enacted to assure that all interested and responsible parties had an equal opportunity to bid for government contracts. "Since the enactment of CICA, no President has previously adopted a rule or executive order authorizing, let alone encouraging, any federal agency to require contractors or subcontractors to sign union labor agreements as a condition of performing federal construction projects," it stated.

Moreover, ABC said, because of the project-specific nature of a PLA, any nonunion workers it covered would be required to pay into employee plan and union dues systems from which they would be unlikely to benefit because of vesting period requirements.

Similarly, nonunion apprentice workers would no longer receive credit towards their nonunion apprenticeship programs and would be forced to enroll in union apprenticeship programs, which the group argued, was a form of discrimination barred by the Employee Retirement Income Security Act and the National Apprenticeship Act.

The letter made a distinction between workers who would be covered by the Davis-Bacon Act and those who would be covered by both Davis-Bacon prevailing wage requirements and a PLA.

"Under Davis-Bacon, without a PLA, such employees receive 'prevailing' wages and benefits which are equal to those paid to union employees. On projects subject to a PLA, however, the employees must pay dues to the union, which are deducted from their regular take home pay. Such employees would also forfeit significant dollar amounts that their employer would be required to pay into union benefit funds," ABC said.

NRTW Says Order is 'Unlawful' Policy

The National Right to Work Legal Defense Foundation also questioned the legality of the proposed rule and criticized the executive order as an "unlawful and unwise policy" — no matter how it is implemented — that would infringe upon the rights of nonunion workers. However, the NRTW offered two suggested modifications if officials decided to adopt the proposed rule over the group's objections.

The NRTW has experience with the issues presented by project labor agreements and has participated in cases concerning the legality of PLAs, it said.

In its comment letter, the organization recommended that if the proposed rule is implemented anyway that it:

- require that agencies' determinations on the use of PLAs occur only *after* all bids for the project are submitted and considered; and

- limits the clauses of any PLA included in a contract award to a prohibition on union strikes and a dispute resolution procedure for union employers.

"These are the only terms that potentially relate to the government's ostensible procurement interest in preventing unions from disrupting work on a construction project through strikes and other job actions," the letter said. The clauses should be applicable to only union employers, it said, "as only union contractors are susceptible to union strikes and job actions."

Rule Would Implement Executive Order 13502

If made final, as proposed, the proposed regulation would amend the FAR to:

- provide a new FAR Subpart 22.5, "Use of Project Labor Agreements for Federal Construction Projects;"
- add a new provision under FAR Section 52.222, for "Notice of Requirement for Project Labor Agreement, to be included in solicitations where the agency has exercised its discretion to require a project labor agreement as prescribed at FAR 22.505(a);" and
- add a new clause under FAR Section 52.222, for "Project Labor Agreement, to be included in contracts in accordance with FAR 22.505(b)."

Office of Management and Budget Director Peter Orszag in a July 10 memo told agency officials to be prepared to implement Obama's order "without delay."

Orszag said the councils were working with Labor Secretary Hilda Solis and other officials "to provide recommendations to the president on whether to broaden the application of project labor agreements on both construction projects awarded under federal contracts and construction projects receiving federal financial assistance, to promote the economical, efficient, and timely completion of such projects."

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