



Government Contracts Advisory

February 10, 2009

President Obama Signs Executive Order Allowing Agencies to Require Project Labor Agreements (PLA's) on Large Construction Projects

A week after issuing his first three Executive Orders affecting government contractors' labor and employment practices, President Obama issued another on Friday, February 6, 2009. The most recent Order allows federal executive agencies awarding contracts or "obligating funds" for "large-scale construction projects" to "require the use of a project labor agreement by a contractor."

A "project labor agreement" (PLA) is a pre-hire collective-bargaining agreement – often involving multiple employers and multiple unions – designed to systemize labor relations at a construction site. By its express terms, this Order provides that if a PLA is required in a given case, it will "bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents."

Under Section 8(f) of the National Labor Relations Act, pre-hire collective-bargaining agreements, such as a PLA, are only lawful with regard to employees who are or will be engaged in the building and construction industry. Accordingly, the February 6 Order will not affect contracts other than for building and construction.

The Order defines "large scale construction project" as a project which costs the Federal Government in excess of \$25 million. On such projects, the agency may require a PLA if it finds that it would "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement..." The Order expressly states that it does not, however, prohibit the use of PLA's in other contracts.

The Order expressly states that non-union contractors are allowed to compete for work on covered projects, but, all contractors will be required to compensate employees according to the terms of the PLA. Within 180 days, the Director of the Office of Management and Budget and the Secretary of Labor are to provide the President with recommendations about whether broader use of PLAs would "promote the economical, efficient, and timely completion of such projects." Finally, the Order revokes Executive Orders 13202 and 13206, issued by President George W. Bush, which forbade anyone receiving Federal money from requiring or prohibiting the use of a PLA on a related project.

The February 6 Executive Order in part revives, and in part expands a prior Order issued by President Clinton and subsequently revoked by President Bush. President Clinton's EO 12836 rescinded President George H. W. Bush's EO 12818 which prohibited use of PLA's. Clinton's rescission obviously allowed for their use again. The most recent President Bush issued EO 13202, which provided that recipients of federal funds for a construction project could neither require nor prohibit the use of PLA's. Thus, in addition to substantially modifying contractor obligations in its own right, this Order is part of a troubling pattern wherein successive Presidents entirely reverse significant legal requirements every four to eight years.

This Order is virtually certain to drive costs to contractors up on these types of projects, and any PLA could impose additional obligations with serious legal consequences -- for example, participation in and contribution to

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multi-employer pension funds, many of which are seriously underfunded. Negotiation of a favorable, comprehensive PLA now becomes a significant preliminary component of any bid preparation. The breadth of the Order's inclusionary language may pose significant additional risk. In addition to authorizing the agencies to require a PLA when "awarding any contract," the Order also allows for the use of the requirement whenever the agencies are "obligating any funds pursuant to such a contract." To the extent that some of these contracts were previously awarded and work is underway, but that reimbursement for some or all of the project is forthcoming, this Order may be intended to generate additional responsibilities from this point forward. Contractors who have not yet received full compensation for particular contracts should perform a prompt review of their circumstances and obligations in order to formulate an appropriate legal strategy.

Finally, there is certain to be trickle-down impact on state and local levels. The Bush EO required "any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects" to ensure that the related projects did not require the use of PLA's. President Obama's removal of that prohibition opens the door for state and local governments to issue mandates requiring the use of PLA's on any size project -- notwithstanding any receipt of federal funds in connection therewith. Contractors on state and local projects should perform immediate risk assessments and develop an appropriate responsive strategy.

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