

**Testimony of Mike LaPointe on behalf of  
The Associated General Contractors of America  
Presented to the House Committee on  
Small Business  
regarding  
Project Labor Agreements  
August 6, 1998**



The Associated General Contractors of America (AGC) is a national trade association of more than 33,000 firms, including 7,500 of America's leading general contracting firms. They are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects and site preparation/utilities installation for housing development.

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Good Morning Mr. Chairman and Members of the Committee.

I am Michael LaPointe, Vice President, J.L. Steel, Inc., based in Roanoke, Texas. J.L. Steel is a minority-owned firm specializing in the placement of reinforcing steel. We also perform concrete paving and flat work. While we usually perform work as a subcontractor, we do act as a prime contractor with the Corps of Engineers and Department of Energy. I am here today representing the Associated General Contractors of America.

#### **Introduction**

The Associated General Contractors of America (AGC) has long opposed public owner project labor agreements (PLAs). As the largest and most diverse trade association in the construction industry, representing both open-shop and union contractors, AGC maintains that publicly financed projects should be open to competition among all qualified firms, without regard to labor policy. In 1992, when the Bush Administration issued an executive order excluding many union contractors from federal work -- because those firms had agreed to limit their subcontracting to other union firms - - AGC took the same position and opposed that order. Full and open competition in public works, regardless of a firm's labor policy, should be the norm.

To the surprise of many outside the construction industry, AGC has found that public owner PLAs are detrimental to both open-shop and union firms. Public owner PLAs effectively prevent open-shop contractors from bidding competitively on these projects. For union contractors, public owner PLAs substitute the government for the contractor in the collective bargaining process. By negotiating with the government, the building trade unions are able to take advantage of the lack of expertise the government has in labor/management negotiations and remove the free market economic forces that underlie the collective bargaining process to reduce or eliminate competition.

#### **Legal Analysis Shows that the Secretary's Memorandum Exceeds its Referenced Legal Authority.**

In June 1997, President Clinton issued a memorandum regarding project labor agreements. The President's memo forbids promulgation of a general mandate requiring PLAs on all federal construction. Instead, PLAs are permitted only on projects with a total cost of "more than \$5 million," and only after performing an evaluation to determine whether a PLA is appropriate on a "project-by-project basis" relative to six different factors. This evaluation must establish that the contemplated PLA will produce qualities, features and outcomes that could not be achieved with open competition. Lastly, the President's memo was not effective until the executive departments and agencies established "appropriate written procedures and criteria" for making the key determinations it requires.

On April 22, 1998, Secretary Slater issued a memorandum that purports to implement the President's memorandum on the same subject. Therefore, the use of project labor agreements must conform to the parameters of the President's guidance. The President's memo advises that executive departments and agencies may require "every contractor or subcontractor to negotiate or become a party to a (PLA)." However, it also cautions that the "executive department or agency has discretion whether to include such a requirement," and only "where no laws applicable to the specific construction project preclude the use of the proposed project labor agreement."

The Secretary's memorandum, in contrast, refers only to "fully implementing the President's memorandum." Addressees are directed to "seriously consider" the use of PLAs and "strongly encourage[d]" to "authorize and promote" their use by the recipients of DOT funds. The President's memorandum does not require the consideration of PLAs. However, the consideration required by the Secretary's memorandum is mandatory, and it contains none of the guidance and evaluation criteria required by the President's memorandum.

In addition, the Secretary's memorandum urges the use of PLAs on federal-aid highway work despite the fact that it conflicts with regulations promulgated by his department. The Secretary does not even attempt to address the apparent conflict between his memorandum and the unequivocal regulatory mandate of 23 C.F.R. 635.104(a) for "free, open, and competitive bidding" in the federal-aid highway program. The memorandum similarly conflicts with the regulatory prohibition of 23 C.F.R. 635.117(b) against requirements that "operate to discriminate against the employment of labor from any other State, possession or territory of the United States."

#### **DOT Memorandum Infringes on States' Proprietary Rights**

Secretary Slater encourages the use of PLAs on federal-aid work, which are essentially state and local highway, airport and transit projects. The memo states, "I strongly encourage each operating administration to authorize and promote the use of project labor agreements by its financial assistance recipients for DOT-assisted construction projects, consistent with underlying legal authorities."

The Federal aid highway program works this way: States are told how much they can spend. States decide how to spend the money, and, if they complete the project correctly, they are reimbursed by the DOT for the federal portion (typically 80%).

States are required to comply with various laws and regulations that govern contract administration, construction specifications, environmental protection, and other aspects of the program. If they do not follow to the letter each of the enumerated laws and/or regulations, the 80% reimbursement is in jeopardy.

Now, the Secretary's memorandum includes a sample letter to federal aid recipients that includes the line "Consistent with applicable laws, I encourage your agency to seriously consider using project labor agreements on construction projects that

receive funding from this agency." So, the agency decides if a state qualifies for the federal reimbursement of money the state has already spent. It is important to remember that this is real money. For example, New York receives over \$1.3 billion annually, and Missouri about half that, just through the highway program. The reimbursement will be evaluated, in part, on whether it has "seriously consider[ed]PLAs." It does not sound optional.

#### **DOT Memorandum States As Fact What Cannot Be Substantiated By The GAO**

Secretary Slater asserts that PLAs "guarantee efficient, timely and quality work; establish fair and consistent labor standards and work rules; supply a skilled experience and highly competent workforce; and ensure stable labor management relations." The memorandum goes on to say that the use of PLAs will promote cost savings, efficiency, quality, and labor-management stability. According to a May 1998 General Accounting Office (GAO) report, none of these assertions can be substantiated.

#### **Why Is The Government Promoting PLAs?**

Any construction contractor can sign a collective bargaining agreement or a PLA if they believe it will help with project completion. Union contractors regularly sign collective bargaining agreements. Assertions that PLAs promote the use of trained craft workers ignores the ability of open-shop contractors – consisting of more than 80% of the construction workforce – to train craft workers. Promotion of PLAs also implies that open-shop contractors are not able to complete projects in a timely fashion. There is no data to substantiate that open-shop contractors fail to complete work in a timely and cost-effective fashion.

The Bureau of Labor Statistics (BLS) estimates that in 1997, 18.6% of the construction workforce were union members. This is a decrease of 20% estimate from the 1996 estimate. According to the BLS, the overall loss in membership for the 15 building trade unions over the two-year period ending June 30, 1997 was 161,000 dues-paying members or about 5.5%. At the same time, the construction workforce experienced an increase from 5 million to over 5.3 million Americans in 1997. Given the increase in the workforce, unions have clearly failed to keep pace with the construction industry's growth. What is the compelling reason to actively promote union-only requirements on transportation projects if the pool of available union labor is not capable of performing the work?

#### **What Are Public Owner Project Labor Agreements?**

Public owner PLAs come in a wide variety of shapes and sizes. By definition, public owner PLAs involve a public entity, such as the federal, state or local government. A public owner PLA can also involve local agencies, boards, commissions, development authorities, public hospitals, and toll road authorities. The line between a private PLA and a public owner PLA can be difficult to draw and may require a careful analysis of the structure of the contracting entity and its relationship with the governing entity.

The terms of a public owner PLA can range from a single sheet of paper to a complex document. A public owner PLA typically requires jobsite contractors and subcontractors to use building and construction trade union hiring halls to obtain craft employees for the project. In exchange for using only union labor on the project, the union will agree to a "no-strike" clause for the duration of the project. In addition to these two basic features, a public owner PLA may include some or all of the following:

- Mandatory recognition of the signatory unions as the exclusive bargaining agents for all construction employees.
- Mandatory union membership and dues payments in non-right-to-work states; Mandatory agency fee payments in right-to-work states
- Mandatory payments into union fringe benefit funds for all employees.
- Restrictive subcontracting provisions requiring all subcontractors at every tier to execute the PLA.
- Mandatory grievance and jurisdictional dispute resolution procedures.
- Union stewards for all crafts.
- Derivative liability for subcontractor wage and fringe benefit delinquencies.

Public project labor agreements are negotiated either by the public entity or its agent directly with the local unions or the local AFL-CIO Building and Construction Trades Council. Typically, there is no contractor involvement in the negotiations. Once negotiated, the public owner PLA is incorporated into the project specifications and becomes binding on all successful bidders.

#### **How Public Owner Project Labor Agreements Affect Women and Minority Contractors**

The Associated General Contractors represents all contractors, regardless of the race or gender of their owners. Our concern about the federal government endorsing project labor agreements is focused on the barrier it creates to many companies successfully bidding and performing federally funded contracts. It has always been our contention that everyone should be on equal footing when competing for federal contracts. The federal government should not prefer one contractor over another, or one laborer over another, but evaluate bidders on price and technical qualifications. Because the Bureau of Labor Statistics has determined that more than 80% of the construction workforce is nonunion it is neither fair nor economical to prefer the use of less than 20% of the nation's construction workforce to construct federal projects.

I believe the Women Construction Owners and Executives USA will be testifying today. I believe they share our concern and said so in a letter to Secretary Slater earlier this year. They are really the authority on the adverse impact PLAs have on women owned businesses in the industry.

#### Why AGC Opposes Public Owner Project Labor Agreements

AGC supports the well-established principle of open competition among all qualified firms for taxpayer-financed construction opportunities, regardless of the contractor's labor policy. PLAs create barriers for both union and open-shop contractors.

The problems open-shop contractors face with public owner PLAs include:

- The inability to use their own employees: Public owner PLAs require that all contractors performing work on the project hire employees through union hiring halls.
- Disregard for the competitive bidding procedures: Public owner PLAs inject political considerations into what would otherwise be fair and open competition. These agreements run counter to the Competition in Contracting Act and the Federal Acquisition Regulations that require federal agencies engaged in "procurement for property or services to obtain full and open competition."
- The employer may have to pay into union benefit plans from which its employees will never be eligible to receive benefits due to time-based vesting and qualification requirements. At the same time, the employer must continue to make payments to its own plans in order to maintain benefits for its employees.

The problems faced by open-shop employees under a public owner PLA include:

- Unable to work for an employer with whom you may have a long employment history.
- If allowed to work for the employer the worker may be forced to join a union or pay agency fees to a union that does not represent you.
- If allowed to work for the employer the worker may have to change the way you perform your job to conform to union work rules.
- If allowed to work for the employer the worker may lose seniority on the job to a union member who has less experience.

For union contractors, the problems caused by public owner PLAs are:

- Removal of the contractor from the collective bargaining process: Public owner PLAs take control of the collective bargaining process away from contractors and give it to the government. The government does not have the experience or expertise to negotiate with union officials.

- Agreements that tilt in favor of union interests: Since the government is not experienced in construction labor-management relations, public owner PLAs typically favor unions.
- Disrupting local labor conditions: Public owner PLAs typically include terms and conditions that the local building-trade unions cannot obtain from construction employers. Public owner PLAs create this situation by removing the market factors that drive labor-management relations.

Other problems associated with public owner PLAs are:

- Increased cost of public construction projects: Public owner PLAs discourage many companies from bidding on a project, and impose extra costs on those who do.
- Conflicts with other federal laws: Public owner PLAs on federal construction may conflict with other federal laws, such as the Employee Retirement Income Security Act, the National Labor Relations Act, and in the case of the President's executive order, the Davis-Bacon Act.

#### **How Public Owner Project Labor Agreements Discourage Open-shop Contractor Competition**

Although public owner PLAs do not expressly exclude open-shop contractors, they prevent open-shop contractors from bidding competitively for the work that they cover.

The payment of union wages and benefits does not prevent open-shop contractors from participating on public owner PLAs. Most public projects are covered by state and local prevailing wage laws, and all federal contractors must comply with the requirements of the Davis-Bacon Act. The problem open-shop contractors face when bidding under public owner PLAs is that they cannot use their own employees on the project. Instead, the open-shop contractor must hire the majority of trade workers through union hiring halls. It is not cost-effective for an open-shop company to hire a new workforce and develop an entirely new set of work rules and employment practices while maintaining its current workforce.

Open-shop firms are free to work under a public owner PLA. But, a public owner PLA requires open-shop contractors to so fundamentally change the way they do business so that such firms cannot competitively perform the work unless they fire their non-union workers.

#### **How Public Owner Project Labor Agreements Discourage Union Contractor Competition**

Public owner project labor agreements also discourage competition from union contractors. Most significantly, public owner project labor agreements remove

contractors from the collective bargaining process. AGC does not believe that the public's interests will be best served by substituting a government procurement officer for the industry's own negotiators. A government procurement officer lacks the experience in construction labor-management relations necessary to negotiate a competitive, cost-effective agreement with the building trade unions.

Eliminating the management experts from the collective bargaining process undermines the negotiating process at the heart of collective bargaining. In fact, it is directly contrary to the collective bargaining process that the National Labor Relations Act was created to encourage and regulate. Public PLAs replace the free market as the mechanism for determining wages and benefits by allowing parties who have no experience and no bottom line to seek cost-effective agreements on wages, benefits and other conditions of employment to negotiate these terms and conditions.

#### **Do Public Owner Project Labor Agreements Decrease Construction Costs?**

According to the Federal Highway Administration, wages account for about 20% of total project costs. Minimum wages and benefits on highway and other construction funded through the Department of Transportation are established by the Davis-Bacon Act. Because Davis-Bacon establishes the floor, project labor agreements cannot decrease the cost of labor on a federally funded construction project.

In its May 1998 report on project labor agreements on federal construction contracts, the General Accounting Office was unable to document any cost-efficiencies achieved by project labor agreements. The GAO further concluded that such efficiencies could probably never be documented.

By effectively shutting out open-shop contractors from the project, public owner PLAs limit the number of contractors that can bid on the project. Public owner PLAs also remove the market forces that otherwise serve to establish wages and benefits, and replace experienced contractors with disinterested government officials. Neither, the elimination of competition for public work, nor the elimination of experienced negotiators from labor contract negotiations, is a realistic way to save money.

#### **Public Owner Project Labor Agreements May Violate Several Federal Laws**

Public owner project labor agreements may violate several federal laws. Various laws public owner PLAs could violate include:

- **The Employee Retirement Income Security Act (ERISA)**

The Employee Retirement Income Security Act preempts any and all state laws which relate to employee benefit plans. Most public owner PLAs require contractors to contribute to specific building trade fringe benefit plans. These requirements may violate ERISA's prohibition on the mandatory use of specific benefit plans, as well as specific

funding agreements and methods. In addition, project labor agreements that mandate participation in apprenticeship programs may violate ERISA for the same reason.

- **The National Labor Relations Act (NLRA)**

In the Boston Harbor case, the Supreme Court held that the National Labor Relations Act does not preclude a state agency from including a PLA requirement in the bid specification for a public project. The key to the Court's decision was its conclusion that the agency was acting in a *proprietary* rather than a *regulatory* capacity, *i.e.*, that the agency "owned" the property under construction and had the same rights as a private owner to place conditions on those providing services on and to that property. The case left open the possibility that a government agency improperly infringes on the primary jurisdiction of the NLRA when it imposes a PLA in a regulatory nature.

Furthermore, even when the agency is acting in a proprietary nature, it may only act in the same manner as a private party may act. The NLRA restrains such parties from entering into certain types of restrictive agreements. One such limitation is found in § 8(e), which generally prohibits employers from entering into "hot cargo" agreements -- agreements providing that an employer will cease or refrain from handling or otherwise dealing in the products of, or doing business with, another employer or person. It contains an exception permitting "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. Neither a public owner nor its agent (such as a construction manager) not actually employing construction workers at the site constitutes such an employer, and is therefore prohibited from entering into restrictive PLAs. A government-mandated PLA may also violate § 8(e) even when executed by the contractor itself, when and to the extent that the PLA restricts subcontracting of deliveries to and from the construction site or work that is performed off site.

In addition, NLRA § 8(a) and (b) generally prohibit pre-hire agreements -- agreements establishing a union as the representative of a workforce or requiring union membership when the union has not demonstrated majority support. Section 8(f) provides an exception for "an employer engaged primarily in the building and construction industry." Because the public owner is not such an employer, it is prohibited from executing such agreements.

- **The Davis-Bacon Act**

Almost all federal and federally-funded construction is subject to the Davis-Bacon Act. It requires all contractors and subcontractors performing work on a federal project to pay prevailing wages and benefits as determined by the Department of Labor. The wage determinations issued by the Department usually cover one or more counties, and one or more of four types of construction.

In determining prevailing wages and benefits, Department of Labor (DOL) identifies the source of those wages and benefits as those paid by either union contractors or open-shop contractors, then includes them in the wage determinations it issues. In the case of wages and benefits that originate from union contractors, DOL also identifies the local union contract they came from. Not only must contractors and subcontractors performing work on the project pay these rates, they must also comply with the labor and jurisdictional practices of that union local.

If a federal agency negotiates a project labor agreement in an area where DOL has determined that union rates and practices prevail, is it free to negotiate different rates and practices than those mandated by DOL under the Davis-Bacon Act? Must the agency negotiate with the same unions identified by DOL as determining the prevailing rates and practices in that area, or can it negotiate with others for a better deal?

If the area has been identified by DOL as one where open-shop wages, benefits and labor practices prevail, can a federal agency negotiate with unions and/or union contractors to impose nonprevailing rates and practices on the project? Can the agency negotiate with the open-shop contractors in the area for a project labor agreement? If an agency is a party to a project labor agreement that is inconsistent with the practices required by DOL under the Davis-Bacon Act, would the agency share liability for violations?

If the Davis-Bacon Act cannot be superseded by a project labor agreement, what is the purpose of urging the use of a project labor agreement? What terms and conditions can be negotiated? If the project labor agreement supersedes local wages, benefits and labor practices, does the executive order effectively repeal the Davis-Bacon Act?

These outstanding questions undermine the credibility of the government's wholesale endorsement of project labor agreements. If PLAs simply reaffirm the Davis-Bacon Act, they have no economic justification. However, if PLAs are intended as a vehicle to impose additional terms and conditions, then proponents cannot argue that the cost of federal projects will be not be escalated by the PLA.

#### Conclusion

Government negotiated project labor agreements preempt collective bargaining agreements by union contractors and override an open-shop contractor's employees' rights to not belong to a union. AGC does not object to a union contractor negotiating its own project labor agreement after being awarded the work in an open, competitive bidding process. AGC objects to government mandates and interference in this process. Despite this Administration's assertion that PLAs are cost effective and efficient, there is no evidence supporting this conclusion. The Administration should retract the DOT's PLA memorandum since it is based on unsupported economic assumptions and overreaches the underlying legal authority on which it is based.