

New Federal Initiatives Project

**Executive Order 13502: Use of Project Labor
Agreements for Federal Construction Projects**

**By
William L. Messenger***

July 22, 2010



*The Federalist Society
for Law and Public Policy Studies*

The Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author or authors. We hope this and other publications will help foster discussion and a further exchange regarding current important issues.

www.fed-soc.org

Executive Order 13502: Use of Project Labor Agreements for Federal Construction Projects

On February 6, 2009, President Obama issued Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects ("EO 13502"). The Executive Order encourages federal agencies to use union-only project labor agreements ("PLAs") on construction projects, the cost of which exceeds \$25 million. On April 13, 2010, the Federal Acquisition Regulations were amended to implement EO 13502. (Federal Acquisition Regulation; FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects, Fed. Reg. 19168 (13 Apr. 2010) (codified at 48 C.F.R. §§ 2.7,17,22,52)).

A PLA is a union collective bargaining agreement that all contractors must sign to work on a construction project. PLAs generally require that contractors recognize the union as exclusive bargaining representative of all employees who work on the project; contribute to union pension and healthcare funds; operate under union work rules; follow union procedures for hiring, firing, and disciplining employees; and, in non-Right to Work states, require all employees to pay union dues as a condition of employment. A PLA is a species of a union "pre-hire" agreement, as it is entered into without any indication that the affected employees support unionization.

The use of PLAs is controversial in both the private and public sectors. Proponents usually claim that PLAs ensure timely completion of construction projects by reducing labor strife. Opponents contend that these agreements increase construction costs by excluding from the competitive bidding process all contractors who wish to operate nonunion. In the public sector, PLAs are also criticized as being imposed due to union political influence instead of pecuniary benefits.

With Executive Order 13202, President George W. Bush banned federal agencies from imposing PLAs on federal construction projects during his administration. Shortly after coming into office, President Obama reversed this ban with EO 13502, opting to encourage the use of PLAs on federal construction projects.

Both EO 13502 and the administrative rule implementing it grant federal agencies broad discretion with respect to whether to impose a PLA, how to impose it, and what PLA terms to mandate. For example, agencies may require a PLA as a condition of bidding on a project, after bidding but prior to award of work, or after the award of work. The only substantive contract terms required under EO 13502 are clauses prohibiting strikes, establishing a dispute resolution procedure, and binding all contractors and subcontractors to the PLA. Agencies otherwise have discretion to decide what other union terms contractors and their employees must abide to work on a federal project.

Critics of EO 13502 suggest that a federal agency's requiring contractors and their employees to abide by a union PLA as a condition of working on a federal construction project may well be subject to legal challenge, and imposing a PLA may violate the Competition in Contracting Act, 41 U.S.C. § 253, by discriminating against bids from merit-shop contractors and their employees who operate nonunion. They also assert that it may conflict with the National Labor Relations Act, which grants employers the freedom to determine whether or not to enter into agreements with unions and does not permit entities other than employers in the construction industry to enter into or impose PLAs. The outcome of these and other legal challenges may depend on precisely how a federal agency exercises discretion under EO 13502 when imposing a PLA on contractors and employees.

** William L. Messenger is a Staff Attorney with the National Right to Work Legal Defense Foundation.*

Related Link

Executive Order 13502, "Use of Project Labor Agreements for Federal Construction Projects," February 26, 2009

http://www.whitehouse.gov/the_press_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects/