



What Contractors Need to Understand About Project Labor Agreements

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President Biden recently signed an executive order which will implement new pro-union project labor agreements in order to increase union membership in the federal, public and private sectors.

The move has set off a round of opposition from construction industry organizations, not to mention individuals who see the move as detrimental to fair and open competition for bids related to the Infrastructure Investments and Jobs Act of 2021.

To find out how all contractors are affected by the new requirements, and how they might be able to work with them, we talked with James Terry, partner at construction law firm Zetlin & De Chiara LLP. Following is an excerpt from that discussion.

CONEXPO-CON/AGG 365: Tell us about your involvement in this topic?

Terry: We've worked as a firm on a number of these agreements in the private sector, and also in the public sector, so we're familiar with the agreements and with the feasibility studies that go into supporting the agreements. We've found that they have been effective in a variety of situations.

CONEXPO-CON/AGG 365: You've been doing this for different owners and contractors for quite some time. Is that right?

Terry: We work with a combination of different clients and were doing so well before this executive order. We've done a number of them with the Building and Construction Trades Council in the New York metropolitan area.

We've advised in connection with the feasibility of these PLAs and we've actually helped to draft and do the negotiations with respect to the agreements. So we've been engaged from the drafting side, the negotiating side and the advisory side.

CONEXPO-CON/AGG 365: What does our audience need to understand about how PLAs work and what the new executive order might mean to the way they do business?

Terry: The new executive order is only mandatory with respect to some very large projects, \$35 million and above; however, the intention is to encourage the use of them on other projects as well.

In fact, for projects that are being built by states and municipalities with loan grants or guarantees or other favorable financial terms that the government has provided, contractors should know that although this executive order is aimed at the largest projects, the policy underlying it is clearly to enhance the use of these agreements, even in projects that are below that \$35-million threshold.

It's important for contractors to understand that they are already bound under the federal Davis Bacon Act to pay prevailing wages, which are generally in line with union wages in a given area.

So, the question of how much it's going to cost the project in terms of labor, there may well be an upward tick, but there should not be a dramatic increase because contractors have to abide by Davis Bacon anyway.

CONEXPO-CON/AGG 365: What are some aspects of PLAs that contractors might not be aware of?

Terry: There's a lot of political disagreement with respect to PLAs and they're disfavored in many states, mainly in the red states. But what PLAs have been focusing on over the years is the ironclad 'no work stoppage provisions, no strikes, no lockouts.' That is what owners negotiating these agreements will be laser focused on.

There are dispute resolution provisions, and general arbitration provisions that are built into these agreements to make sure there is no work stoppage.

There's also a very heavy emphasis on uniform work rules, as much uniformity as possible in terms of hours of work, terms of holidays - which you wouldn't think is that major but can be fairly significant - in terms of differentials for working later shifts. The PLA is seeking to standardize all of those things to the extent that they can.

The other thing that people have to realize is that, generally speaking, you are negotiating with one fairly centralized group on the labor side, and whatever their local trades council may be, but most of the PLAs also include a series of riders, where the individual trade unions that want to deviate to some extent from what's in the PLA will have a section that dictates how a given circumstance is going to be handled for their workers.

They may not agree to a shift differential that the others are agreeing to, and so that would be particularized and put into a separate rider, which means that you're negotiating primarily with a central trade organization, but you are also very likely to have negotiations with the individual unions as well, so that their specific riders to the PLA can be crafted.

There's an impression that you just need to sit down with one person and it's over and done with, but that generally is not the case. There are almost always individualized riders that have to be worked on.

CONEXPO-CON/AGG 365: If you're not a union shop, is this executive order going to mean you're not eligible for jobs that are over \$35 million? Simply put, does this executive order favor union shops?

Terry: It will favor union shops, yes. But no one can be kept out of the process by virtue of not being a union shop. You're basically saying that you're going to sign up for this on a one-off basis.

There are reporting provisions that go along with this executive order that are going to make it very clear as to who's signing these, and there is a lot of apprehension that non-union shops may be more frequently targeted, now that they're in the forefront because everything is being reported, and that will be detrimental to them.

At the end of the day, the point is that the law can't discriminate between union and the non-union shops. Everybody gets a chance to compete.

There are exceptions in the executive order. If an agency finds that the PLA would be non-competitive in a specific circumstance, the burden is on the opponent to show that. The idea is that you're basically signing this one-off contract in order to be able to derive the benefits of landing that contract.

CONEXPO-CON/AGG 365: As this goes into effect, what can contractors do to prepare?

Terry: They really have to start to sharpen their pencils in order to see what the benefits of A) the uniform work rules and B) the no-strike provisions would be for them in order to determine whether it makes sense for them to get involved in these projects with the PLA.

Again, it's informed to some extent by the notion that Davis Bacon is going to be required of them, union or non union. Those prevailing wages will have to be paid regardless. Once that levels the playing field a little bit, then the next question becomes, are these other advantages enough to offset what could still be an uptick in their labor prices?

You have to do the analysis upfront to try to determine if by having uniform work rules, uniform holidays, fairly uniform shift differentials and an ironclad guarantee that you won't get involved in a work stoppage that could cause a tremendous amount of delay and the attendant delay claims, then is this right for you at this point?

CONEXPO-CON/AGG 365: So far we've been talking about the federal level, but will this trickle down to the state and local levels as well?

Terry: On the state level, again, the executive order is intended to point the way in a policy direction and this administration's policy direction is very clearly pro-union. A lot of the projects are not built directly by the federal agencies, they're built with state or municipal organizations with the financial backing of the federal government. There is room now for those states and municipalities that are inclined to do so to say, we're going to build it according to a project labor agreement.

Yes, you're likely to see that in areas that are generally politically disposed to the PLAs. A lot of Midwestern states are not, their public policy is firmly rooted in the notion that these projects are just a lot more expensive if the PLA is used. There are studies that go both ways.

CONEXPO-CON/AGG 365: What would you say to those with firmly rooted beliefs that are resistant to a PLA?

Terry: I think the message is if you're in a project that already requires you to pay prevailing wages, then if you pursue the PLA, what other advantages are you likely to derive?

There's a fairly clear quality enhancement that comes from union labor, that's been pretty well documented. The apprenticeship programs over the last couple of decades have generated a more efficient and qualitative labor force. So it's likely you're going to have a better project built for the work, which will help you get the next project.

You do have the certitude that regardless of what happens, you're not going to have a cessation problem. On many of these large projects, you find collective bargaining agreements (CBAs) for different trades expiring and that means you run the risk of not being able to negotiate and navigate that risk over the course of your project.

With the PLA, even if a given trade's collective bargaining agreement is about to expire, it's not going to hurt you because the PLA takes the place of that collective bargaining agreement for the purposes of this project, and ensures that no matter how long it takes the two sides to hammer out a new CBA, the project covered by the PLA is not going to be adversely impacted.

CONEXPO-CON/AGG 365: If contractors want to be open minded to PLAs and the opportunities they present, who do they go to for guidance?

Terry: Generally speaking, it is a good idea to get the lay of the land from counsel who practice in the area, no doubt about that. If people want to try to strike out on their own, then most of the local building and trades councils have their own sample of project labor agreements on their websites. You can do a lot of investigation on your own.

There are a lot of builders now who already have at least one individual on staff whose responsibility is to be the liaison with the various subcontractors on labor matters. Those individuals can be a good source of information and can be assigned the task of familiarizing themselves with the PLAs that are used in the locality. A lot of it can be done in house.

It makes a lot of sense to do a little bit of research on your own first and when you know enough to pose some questions, then to come to counsel to flesh out the right approach.

CONEXPO-CON/AGG 365: Anything else that you would like to let our audience know about this topic?

Terry: Our takeaway is this is a clear policy directive, it's likely to filter down to like-minded states and municipalities. And it's also something that, while it shows a clear policy directive, it is not so rigid, it's not without exceptions that can be invoked in the right circumstances.

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