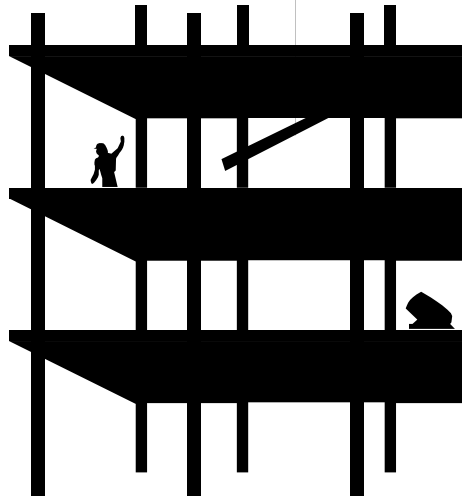


Project labor agreements



Reliable staffing Plans
for capital construction projects

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I. INTRODUCTION

Project Labor Agreements (“PLAs”), which are single-site craft labor agreements used in the construction industry, provide reliable, cost-effective project staffing for capital construction projects. Used widely in the United States for industrial, commercial and public construction, PLAs are relied upon by hundreds of project owners each year to facilitate billions of dollars worth of new construction, renovations and other capital improvement projects.¹

When seeking to use a PLA, a project owner usually adopts a short-form PLA bid specification in its project plans and specifications. This specification requires all construction firms working on the site to abide by employment terms stipulated in a model PLA document attached to the specifications. Once in place, the PLA bid specification provides all site contractors and subcontractors access to skilled construction personnel through the job referral systems operated by local building trade unions.

The building trades’ referral systems, which by law must be open to union and non-union employees and applicants, provide a critical project planning/project delivery tool. By supplying an organized structure within the industry for recruiting, screening and deploying hundreds, or even thousands of skilled craft personnel in multiple trades, these systems allow construction users to access a reliable supply of trained craft personnel and predict future labor costs for capital projects accurately. Owners not only obtain cost-effective staffing, but also secure quality control over the entire craft labor force for a project.

Not surprisingly, as construction markets have expanded in recent years the industry has witnessed a proliferation of PLA-built projects. In addition, several key conditions now unfolding throughout the industry are facilitating a new wave of PLA construction. These conditions include:

- ◆ Acute skill shortages remain the industry’s “Number 1” problem. Construction is a highly skilled, labor intensive business that requires intricate planning and coordination of multiple trades and specialty crafts. This means that the quality and availability of craft labor can make or break projects, especially large, complex or fast track projects.
- ◆ PLAs provide “the” most effective tool for deploying, managing and controlling the quality and cost of the craft labor force for a project, which is the precise reason that an overwhelming majority of the courts have upheld PLAs as legitimate bidding conditions for protecting the interests of public project owners and taxpayers.
- ◆ Massive building programs are needed for critical infrastructure programs nationwide. Virtually all areas or sectors in public works contracting need rebuilding, including schools, airports, roads and bridges, water utilities and wastewater treatment. Important

¹See AFL-CIO Building & Construction Trades Department, Partial Listing of U.S. PLA Construction Projects, 2000-2001.

market sectors in private construction, such as the power industry, are also planning billions of dollars in new construction.

Although legal challenges have been raised in the past over the use of PLAs on publicly-funded construction, these lawsuits have generally failed. In most cases, courts have upheld the use of PLAs and, in doing so; have emphasized the substantial benefits these agreements provide to construction owners in terms of project planning and project delivery.² For projects developed by state and local governments, the legal battles regarding project labor agreements are generally over and PLA opponents have ceased legal challenges, given the futility of such challenges, unless the process used for planning and developing the PLA is somehow flawed. This paper addresses this particular issue in detail and offers guidance for PLA planning.³

When considering PLAs for public construction, the most important step in the beginning of the process is due diligence. An economic study is usually advisable for public sector projects to evaluate whether the PLA will facilitate economical project delivery and serve the best interests of the project owner. As further discussed below, however, when such analyses are properly designed to take into account the key advantages of PLAs, as well as relevant market conditions, they invariably conclude that this project planning tool promotes economical project delivery and serves the best interests of the government owner and taxpayers.

II. PROJECT LABOR AGREEMENTS: GOALS & OBJECTIVES

Project Labor Agreements (“PLAs”), which are construction labor agreements typically limited to a single site, are a form of contractual arrangement unique to the construction industry. Public and private developers use PLAs to ensure that major construction projects proceed in a timely and cost-effective manner. Specifically, PLAs are designed to:

- (a) facilitate sound project planning by supplying project owners with predictable labor costs;
- (b) promote timely and successful project completion by ensuring an adequate supply of skilled craft personnel for all trades for the full term of the project;
- (c) guarantee labor peace and stability on the job through mandatory grievance procedures and no strike/no lockout provisions; and
- (d) provide uniform terms and conditions of employment for all contractors and craft workers on the construction project.

²See Exhibit 1 hereto, PLA Case List.

³The lawfulness of PLAs on federally funded projects currently remains in question. An Executive Order issued by President Bush that sought to prohibit their use on federal and federally assisted projects was recently enjoined by the U.S. District Court in Washington, D.C., but this case is still in litigation.

III. PROJECT LABOR AGREEMENTS: BASIC FEATURES

The most common approach to PLA construction is for the project owner to include a PLA requirement in bid conditions or specifications it establishes for contractors seeking to bid the project. PLA projects are open to bidding to all contractors, union and non-union. Under the terms of the PLA, all site contractors and subcontractors are bound to certain uniform terms and conditions of employment for all craft personnel hired for the project.

PLAs are generally limited to a single site or single construction project and the contractors and subcontractors hired for the project are required to abide by the labor terms and conditions only for that project. The typical provisions included in most PLAs are as follows:

- (a) All contractors and subcontractors, of every tier, on the project are required to be parties to the PLA;
- (b) The agreement should cover all work performed by all craft workers employed on the project;
- (c) The appropriate labor organization is recognized as exclusive bargaining representative for employees in its craft;
- (d) Hiring is conducted through union referral or placement procedures on a non-discriminatory basis;
- (e) Uniform work schedules, holidays, overtime provisions, start times, work-day, work-week duration, work rules and other terms are used;
- (f) The PLA, being site-specific, is solely for the length of agreement whether or not individual craft collective bargaining agreements expire;
- (g) "No-strike", "no lockout" and "no picketing" provisions;
- (h) Dispute resolution is through a grievance-arbitration procedure;
- (i) Prevailing wage laws are applied to wage and fringe benefit payments;
- (j) Apprentice program and local minority hiring are utilized;
- (k) Joint labor-management pre-job conferences are used; and

- (1) Jurisdictional disputes resolved through AFL-CIO Building Trades' Plan for Settlement of Jurisdictional Disputes in the Construction Industry.⁴

IV. THE STATE OF THE LAW ON PLAS: VALID BY A SUPER-MAJORITY

While clearly lawful in the private sector, the legal status of PLAs in public works contracting has created some confusion. Fortunately, this question has largely been resolved by a number of important court cases issued in the last few years.

A. The PLA Scorecard: PLAs Overwhelmingly Ruled Lawful

A survey of the law on this issue shows that PLA proponents have prevailed in at least thirty (32) cases.⁵ These cases have specifically upheld the validity of PLA requirements and/or have dismissed various legal challenges and claims. On the other hand, there have only been a handful of cases wherein courts have invalidated PLAs and in virtually all of these cases the only legitimate legal challenge was the failure of the bidding authority to conduct a proper due diligence investigation.⁶

Thus, the numerous legal theories and claims advanced against PLAs, including those based on state competitive bidding laws, antitrust law and federal labor law, have been addressed and generally found to be without merit. The major exception has been where due diligence was not performed and the contracting agency failed to demonstrate the need for and the economic benefits of the PLA in question.

These results are not surprising. The fact is that when a proper due diligence investigation is conducted during the planning phase for almost any large construction project, construction professionals will normally conclude that the use of a PLA will facilitate timely, cost-effective project delivery. But the investigation must be conducted. These facts must be documented. When this approach has been used, courts have repeatedly upheld PLAs.

On the other hand, courts have consistently dismissed numerous legal challenges to these agreements, including the primary claim that PLAs, which by definition are open to all contractors, somehow exclude non-union contractors from participating. An examination of the case law on both of these key points -- that PLAs provide major advantages in construction project delivery and that the primary challenges to PLAs have no basis in fact or law, is instructive in promoting PLA programs.

⁴Recently, the suggestion has been made that alternative dispute resolution procedures (ADR) be used to resolve disputes involving the payment of workers' compensation benefits. Such a provision may be appropriate as a cost-containment feature that can help justify a PLA; however, significantly more study is required on this point.

⁵See Exhibit 1 hereto, Case Law on Publicly-Financed Project Labor Agreements, pp. 1-5

⁶A review of the cases invalidating PLAs shows that, with the exception of New Jersey which has taken an unusually restrictive position on the issue, the several other cases all involved the failure of the agency or project owner to conduct a proper due diligence investigation demonstrating the need for and economic benefits of the PLA in question. See Exhibit 1 hereto, pp. 6-7.

B. PLAs Are Fully Open to All Contractors

In the seminal case of Boston Harbor,⁷ the Supreme Court addressed this issue head on and found that a PLA bid specification doesn't exclude anyone from participating in the bidding process. Specifically, the Court ruled, in a 9 to 0 decision, that such conditions simply require contractors to make a choice:

they may alter their mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement.⁸

A bid specification requiring a PLA is thus like any other legitimate bidding condition, such a payment bond or performance bond. It is a condition uniformly imposed by a project owner or construction manager on all bidders to ensure the successful completion of the work. Contractors can accept it, or bid elsewhere. No contractor is excluded from the bidding process unless it excludes itself.

In addition, it is clear that in practice non-union firms regularly bid and win work on PLA projects. See e.g. Associated Builders and Contrs. v. Metropolitan Water District, 69 Cal. Rptr.2d 885, 888 (Cal. Ct. App. 1997) (75% of all contracts awarded to non-union companies; thus unwillingness to bid by any non-union company was a "case of self-imposed exclusion"), review granted, 951 P.2d 1182 (Cal. 1998); Associated Builders and Contrs., Inc. v. Southern Nevada Water Auth., 979 P.2d at 229 n.1 (finding that competition increased under PLA and six of sixteen contracts were awarded to non-union contractors).

C. PLA Bid Specification Satisfy Lowest "Responsible" Bidder Rules

Generally, cases challenging PLAs have relied on state competitive bidding laws. In reviewing such challenges, courts have repeatedly upheld PLAs as fully consistent with the goals and purposes of public procurement laws. In so ruling, courts have found that PLAs are economically beneficial to contracting agencies because they facilitate the procurement of the "best work at the lowest possible price."⁹

In other cases, courts have simply inquired as to whether the use of a PLA bid specification was reasonably related to project needs and agency goals. For example, in reviewing a PLA requirement for airport construction, the California Supreme Court recently took this approach. In finding the PLA valid, the court held that where a public agency is

⁷Associated Builders & Contractors v. Massachusetts Water Resources Auth., 507 U.S. 218 (1993) (This case is commonly referred to as "Boston Harbor" since the project at issue is involved the environmental clean-up of Boston Harbor.

⁸507 U.S. at 231.

⁹Albany Specialties, Inc. v. County of Orange, 662 N.Y.S.2d 773, 740 (N.Y. App. Div. 1997), leave to appeal denied, 91 N.Y.2d 802 (N.Y. 1997) citing New York State Chapter, Inc., Associated General Contractors v. New York State Thruway Auth., 88 N.Y.2d 56, 151 L.R.R.M. (BNA) 2891 (N.Y. 1996).

required to award contracts pursuant to lowest responsible bidder laws it may adopt “any requirements reasonably relating to the ‘quality, fitness and capacity of a bidder to satisfactorily perform the work.’”¹⁰ PLAs so qualify, the court found, particularly since they can help ensure timely project completion.

Similarly, the Alaska Supreme Court recently ruled that PLAs will be found lawful where the contracting agency has a “reasonable basis” for determining that such bid specifications further the interest of the public procurement/lowest responsible bidder rules.¹¹ In the case before it, the court found that the PLA clearly furthered such interests, emphasizing that the bid condition helped the agency meet scheduling challenges.

D. PLAs Facilitate Timely, Successful Project Completion

A central theme running through most of the cases upholding PLAs is the notion that these agreements provide distinct and substantial benefits to the construction process. Thus, the Supreme Court’s Boston Harbor decision, as well as many subsequent authorities squarely recognize that Project Labor Agreements assist project owners in facilitating the successful, timely delivery of capital improvement projects. Of course, this is what drives the widespread use of PLAs in the private sector.

The reasoning here is straightforward. Facility owners, construction managers and other entities responsible for capital improvements often require PLAs, as a matter of prudent project planning, to address critical project staffing requirements for craft labor. The failure to adequately staff a project with properly trained craft personnel can undermine and even cripple any construction job in terms schedule, quality and/or cost.

Other conditions unique to the industry also compel the use of PLAs. A construction project of any magnitude typically involves at least 15 individual tradecrafts (e.g., plumbers, pipefitters, electricians, carpenters, etc.), hundreds, even thousands of craft personnel and dozens of contractors and subcontractors. Recruiting, deploying and coordinating these various forces can be performed in a more orderly and efficient manner when all site contractors, subcontractors and craft personnel are subject to a single labor policy, establishing uniform terms and conditions for the project.

¹⁰Associated Builders and Contractors, Inc. v. San Francisco Airports Comm.’s 87 Cal Rpt. 2d 654, 663 (Cal 1999)(citations omitted).

¹¹Laborers Local #942 v. Lampkin, 956 P.2d 422, 435, 157 L.R.R.M. (BNA) 2985 (Alaska 1998).

In Boston Harbor, the Supreme Court recognized that these are the realities that face project owners in the construction industry and that Congress understood these realities in crafting federal labor law. Thus, in authorizing PLAs, the Court explained, “Congress intended to accommodate conditions specific to the . . . industry,” which include:

- (a) the short-term nature of employment which makes post-hire collective bargaining difficult;
- (b) the contractor’s need for predictable costs;
- (c) a steady supply of skilled labor; and
- (d) a long-standing custom of prehire bargaining in the industry.”¹²

Project Labor Agreements serve these interests and address the unique demands of the construction industry because they:

- (a) provide project owners with predictable labor costs;
- (b) establish uniform wages, benefits and other working conditions for all contractors and all crafts employees on the site; eliminate union/non-union friction among the crafts;
- (c) guarantee labor peace through no-strike/no lock-out provisions; and
- (d) ensure a secure supply of skilled workers for the duration of the Project.

Since these are the key factors relied upon by the courts, these are the factors that should be emphasized when planning and promoting new PLA programs in order to avoid legal challenges in the future.

V. ENSURING DUE DILIGENCE: LEGAL GUIDELINES FOR PLANNING PLAS

The case law is clear: the failure to conduct a proper due diligence investigation and demonstrate the need for and economic benefits of a proposed PLA will render the agreement and the affected construction program vulnerable to attack. Accordingly, when developing a PLA program, the following guidelines and recommendations should be considered.

Early on, in the construction planning process, the project owner should retain a project manager or consultant to prepare a report and to recommend whether it would serve the public agency's interests to utilize a PLA on a particular project. The project manager/consultant's report should analyze the particular cost savings and other benefits that a PLA would provide. Among factors to be considered are the following:

A. **Guidelines for the Report & Recommendations**

- (1) Set forth the projected potential cost savings, direct and indirect, that may be realized through the implementation of a PLA, taking into account the cost, complexity and time schedule of the project. These savings should be quantified and set forth in a written report;

¹² 507 U.S. at 231 (emphasis and numbers added).

- (2) Document national and local skill shortages from industry reports and trade journals; document any local examples of projects adversely affected by skill shortages. If applicable, include data on other building projects in the area that will be competing for manpower at the same time as the subject project.
- (3) Include findings that prevailing wage rates would be required for the project without a PLA.
- (4) Set forth the labor cost savings due to coordinating various craft schedules and other terms and conditions by uniform agreement instead of various local union agreements.
- (5) Set forth cost savings from implementation of uniform work days and shift work definitions;
- (6) Set forth cost savings from on-time and on-budget completion of a specific project, including, for example, through savings in construction management fees, lack of disruption in public owner's operations (as an example, if certain public owner's operations have to be moved to rental properties while renovation/construction takes place), etc.;
- (7) Potential benefits (e.g., time and money saved, public convenience) of ensuring labor harmony for the duration of the project, including analysis of other jobs where there has been cost impact resulting from labor disputes (for example, the assurance that a work stoppage will not occur should be quantified as part of any report);
- (8) List potential cost savings and flexibility due to alternative dispute resolution procedures in response to job site problems and workers compensation claims;
- (9) Demonstrate how the PLA will provide more immediate, efficient and reliable access to an adequate pool of skilled journey-level workers and apprentices;
- (10) Provide documentation of the project staffing capabilities of the affected Building Trades council, and its constituent construction unions; including:
 - ❖ local union resumes for each trade on the number of skilled craft persons for each trade,
 - ❖ the type of skill and safety training programs offered, trade licenses, specialty certifications, the training facilities available and annual funds invested in training facilities and training programs.

- ❖ data on the staffing capabilities of sister local unions associated with the Council’s affiliate members.
- (13) Provide documentation, if available, that the skill level of union-trained workers, *e.g.*, because of apprentice training programs, will translate into safer and better quality job performance, with reduction in costs due to lower injury rates and lower likelihood of work having to be redone.
- (14) Provide documentation on successful construction projects performed by the affected Building Trades council work performed on specific projects and how they can supply skilled labor to the project.
- (15) If available, provide information regarding the negative consequences of contractors hiring craft labor “off the street” or through temporary agencies, for example, where eight out of ten workers are found to be unqualified.
- (16) Have the construction manager or consultant spell out instances where there has been a history of labor unrest on similar type projects, which supports the use of a PLA.
- (17) Use an independent consultant to prepare a PLA report for credibility purposes. Identifying large public and private sector construction projects to determine union affiliation on those jobs.
- (18) Provide background as to where PLAs have been ruled to be lawful; spell out how PLAs are open to all contractors.
- (19) Set forth construction surveys and studies that demonstrate the substantial benefits of PLAs and how PLAs have resulted in cost-effective, timely construction.

B. Actions In Addition to the Project Manager Report

After the project manager’s evaluation and report are completed, the following steps should be followed:

- (1) The contracting agency or project owner should make sure that the decision to require PLA is based on a review of the project manager/consultant's report.
- (2) If the decision is made to require the PLA clear that the contracting agency retains the right to reject or approve the resulting agreement, and direct that negotiations be concluded prior to the solicitation of bids.
- (3) Further, Building Trades Councils should be advised not to enter PLA directly with government agencies. From the owner’s perspective, the PLA

requirement is essentially a bid specification, a unilateral condition imposed on the project for the benefit of the project, as determined by the project manager's report.

- (4) The PLA itself, which often contains a good deal of standard language and pre-existing wage and benefit rates, should be negotiated between the Building Trades and the project manager.
- (5) Once it is completed, the PLA bid specification is imposed in the bidding documents for the project and incorporated by reference. Thereafter, the project owner should ensure that all contractors and subcontractors hired on the site execute a full copy of the PLA before commencing work.
- (6) In some cases, the project manager can prepare its evaluation and report on the basis of a model PLA used by the Building Trades Council in question; final details for the PLA could be negotiated later between the project manager and the Building Trades.
- (7) In other cases, it may be beneficial for the project owner to authorize the project manager to negotiate a model PLA with all terms and conditions included; that completed model would then serve as the basis for the project manager's evaluation, but the owner's decision to require the PLA would not be made unless and until the project manager's report was completed with a recommendation that the PLA bid specification be adopted.
- (8) Further, any model PLA included in the owner's bid specifications should include the following provisions:
 - ❖ That hiring will be done on a nondiscriminatory basis;
 - ❖ That there is a procedure for expedited dispute resolution, along with a project-long prohibition of strikes and lockouts; and
 - ❖ There will be uniform job conditions (start-times, work-day, work-week, and work rules) for contractors and subcontractors on a project. Again, this may depend on area practices.
 - ❖ Ensure that bidding is open to both union and non-union contractors, provided only that any non-union contractor that is a successful bidder must be willing to become a party to and comply with the PLA (but not separate local union CBA).

VI. POLICY JUSTIFICATIONS FOR PLAS

In developing Project Labor Agreements, it may also help to highlight a number of the policy justifications that support PLA construction, including the following:

1. **Reports From Local Project Owners.** Recent reports from project owners regarding several local PLA projects provide critical data showing that these agreements help owners build quality facilities in a timely and cost-effective manner. This is the best evidence on the effects of PLAs and it proves that PLAs present a win-win-win situation for the contracting agency, the local contracting community and taxpayers.
2. **Growing Demand for PLA Construction.** Each year hundreds of government agencies and companies in the private sector invest TENS OF BILLIONS of dollars in PLA construction.
3. **PLA's Relation to Prevailing Wage Law.** When PLAs are being considered for public construction in areas where union rates are prevailing, such as in our area, there will be no increase in labor costs for the project since the PLA rates and the prevailing rates are the same. This assumes, of course, that contractors on non-PLA projects will abide by the law and pay the required rates.
4. **The Connection Between Skilled Labor and Project Performance.** Anyone familiar with construction can attest that there are several common sense points supporting this connection:
 - ❖ Construction is a highly skilled, highly labor intensive and highly mobile industry in which project owners are presented with a constantly changing mix of contractors and subcontractors for each new project.
 - ❖ A single project requires many, if not hundreds, of well-trained, experienced craft personnel in numerous occupations and classifications and can involve dozens of subcontractors.
 - ❖ Consequently, the quality and availability of the craft labor force and the manner in which it is organized, deployed and coordinated on the job site can have a substantial impact on overall project success.
5. **Organized Recruitment & Deployment Systems.** Requiring a PLA means that all site contractors and subcontractors will be required to hire craft personnel through the referral systems of local building trade unions.
 - ❖ The local craft unions participate in registered apprenticeship training programs, which utilize established skill standards and qualification screening procedures to ensure that all craft personnel are properly trained and tested.

6. **Best Trained and Highest Qualified Craft Personnel in the Local Area.**
 - ❖ If a project owner elects to use a PLA for its construction projects, it will secure access to the best-trained, highest-qualified craft workers in this area.
 - ❖ Building Trade programs have the highest quality training facilities and the best training program for both apprentices and journeymen. Typically, these apprenticeship and journeyman training programs, which are state-registered programs, require thousands of hours of closely supervised, on-the-job training, plus an additional 1,000 hours or more of related classroom and shop instruction.
7. **Risk to Project Staffing Without PLAs.** Without a PLA, project owners are forced to rely on contractors that hire their workforce “off the street.”
 - ❖ This means that the contractor may get enough manpower, but then again, it may not. This also means that the personnel the contractor is able to find and bring to the job site may be qualified, but then again, they may have no training or experience.
 - ❖ The continuing skill crisis and the planning of major infrastructure investments are commonly known facts. It remains an extremely difficult challenge to attract new people to occupations in the industry and to ensure they are properly trained in time to meet these market demands.
8. **PLAs Get the Job Done Right the First Time.** PLAs are cost-effective because they offset very real risks created by current market conditions and ensure that projects are adequately staffed with skilled craft personnel. This not only helps to ensure that the work gets done right and on time but that it gets done right the first time.
9. **PLAs Promote Labor Peace and Ensure Uniform Employment Conditions.** Since PLAs require no strike - no lockout provisions, they promote labor stability on construction projects. This is an invaluable benefit in terms of maintaining project schedules. PLAs also provide uniform employment conditions for all site contractors and the entire craft labor force, a key factor for effective construction management.
10. **PLA Grievance - Arbitration Procedures Promote Project Stability.** PLAs offer protection to all site workers by providing an established grievance -arbitration system to resolve all disputes.

VII. CONCLUSION

Project Labor Agreements remain a vital tool for assisting project owners in planning and delivering capital construction projects. This paper is designed to provide general legal and policy guidelines for successfully developing PLA construction, but should not be substituted for specific legal advice.