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Union labor or bust! Project labor agreements now required for large federal construction projects

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On February 4, President Biden signed the Executive Order on Use of Project Labor Agreements for Federal Construction Projects,[1] which mandates, with limited exceptions, that contractors and subcontractors working on federal construction projects valued at $35 million or more agree that for that project, the companies will "become a party to a project labor agreement [PLA] with one or more appropriate labor organizations."

The EO asserts that large-scale construction projects pose challenges to timely and efficient procurement by the government and that mandatory use of unionized labor will prevent or relieve those problems.

A prior EO issued by President Obama,[2] which the recent EO drew liberally from, encouraged the use of labor agreements on large construction projects, but we are not aware of any prior EO mandating their use.

The supposed authorization for the authority for this EO that will impact nearly 200,000 workers and an estimated $262 billion in federal construction projects, the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq*. (FPASA), is the same statute that the White House claimed gave the president the authority to mandate that government contract employees be vaccinated.

Numerous federal courts have already ruled that, at least in the vaccine context, FPASA does not mean what the president thinks it means, and construction companies may challenge the new EO on that basis. Our post from late January[3] provides an overview of those decisions and the status of the vaccine mandates.

The rationale for the EO

The EO asserts that large-scale construction projects pose challenges to timely and efficient procurement by the government and that mandatory use of unionized labor will prevent or relieve those problems.

Those problems are claimed to be caused by:

- The lack of a permanent workforce by most construction companies, "which makes it difficult to predict labor costs when bidding government contracts and to ensure a steady supply of labor … ."
- Construction projects "typically involve multiple employers at a single location, and a labor dispute involving one employer can delay the entire project."
- In the absence of a formalized resolution mechanism, friction and disputes can occur due to the lack of coordination between different employers on a single construction and "uncertainty about the terms and conditions of employment of various groups of workers."

Because these problems negatively impact the "efficient and timely completion of federal construction projects, particularly larger, more complex projects undertaken by Federal contractors," the EO explains, the president asserts that he has the authority to mandate private companies rely on unionized labor.

The use of project labor agreements, the EO continues, will allegedly:

- Provide structure and stability.
- Avoid labor disruptions by:
  - Establishing dispute-resolution mechanisms.
  - Prohibiting work stoppages such as strikes and lockouts.
- Ensure all of the "stakeholders" commit to proceeding efficiently without stoppages.
- "Advance the interest of project owners, contractors, and subcontractors, including small businesses," although the EO does not explain how. It does, however, claim that such agreements are "routinely" used by companies in the public and private sectors to "reduce uncertainties."

For those reasons, the EO proclaims that the government's policy is "for agencies to use project labor agreements in connection with

large-scale construction projects to promote economy and efficiency in Federal procurement."

What does the EO require?

In short, the EO mandates that, as part of any award of a federal contact "in connection with" a federal construction project valued at $35 million or more, agencies require all contractors and subcontractors "engaged in construction on the project" to agree, for that project, to negotiate or become a party to a PLA with one or more unions. The EO also requires that the PLA:

- Cover all contractors and subcontractors on the project.
- Does not restrict contractors and subcontractors from competing for other contracts or subcontracts.
- Include "guarantees against strikes, lockouts, and similar job disruptions."
- Include "effective, prompt, and mutually binding procures" for labor dispute resolution.
- Include mechanisms for labor-management issues such as, but not limited to, "productivity, quality of work, safety, and health."
- Comply with all applicable laws.

Are there exceptions?

The EO includes three exceptions that appear to give agencies some discretion to decide not to apply the PLA mandate. The exceptions, which must be made in writing no later than the solicitation date by a "senior official within an agency," include:

- Based on the application of five factors, a PLA for a particular project would not achieve the government's interests in achieving economy and efficiency:
    - Short duration and lack of operational complexity.
    - The project only includes one craft or trade.
    - The project involves specialized construction work available from a limited number of companies.
    - The need for the project "is of such unusual and compelling urgency that the [PLA] would be impracticable."
    - Other similar factors "deemed appropriate" in the implementing regulations and guidance.
- Market analysis shows that mandating a PLA "would substantially reduce the number of potential bidders so as to frustrate full and open competition."
- Mandating a PLA would be inconsistent with law.

While these exceptions seem to grant broad authority to agencies to waive the PLA requirement, that discretion will likely be constrained by the fact that the use of PLAs, as well as descriptions of any exceptions granted, will be published "on a centralized public website."

Should this EO be implemented, that information will likely be carefully tracked by both government and private entities, all of which will bring attention to agencies that make frequent use of these exceptions.

How will this be implemented?

The EO requires that the FAR Council propose implementing provisions within 120 days. Unlike the FAR provision implementing the contractor vaccine mandate, those proposed FAR provisions will be subject to notice and comment.

It is not clear that the president has the authority to proclaim that contractors and subcontractors must use unionized labor on all federal construction projects valued at $35 million or more.

In addition, OMB must issue guidance to implement the exception and reporting provisions. Finally, within 90 days, the Secretaries of Defense and Labor and the Director of OMB, must coordinate to develop a training strategy to ensure contracting officers can effectively implement the EO. A report containing the contents of that strategy must be submitted within 180 days to the National Economic Council.

Can the president force private companies into PLAs?

That's not clear. Setting aside whether any of the EO's conclusory statements about PLAs improving economy and efficiency on construction projects are accurate, and ignoring the fact that unionization may be favorable for those who have jobs but is often viewed as making it more difficult for the unemployed to find work, it is not clear that the president has the authority to proclaim that contractors and subcontractors must use unionized labor on all federal construction projects valued at $35 million or more.

There has been considerable recent analysis of the scope of the president's FPASA authority in multiple district court and appellate decisions that have found that challenges to the contractor vaccine mandate are likely to succeed in their claim that FPASA did not authorize the president to issue that mandate. It is not clear how a similar challenge to the construction EO would come out, but some of the reasoning in the vaccine decisions seems to weigh against a finding that the president has the authority to mandate that union labor be used.

First, it does not appear that any prior president has claimed such authority under FPASA. Indeed, President Obama's 2009 EO, upon which the new EO appears to be modeled, recommended but did not require, the use of PLAs.

Second, it is doubtful that Congress could have conceived that a statute giving the president authority to ensure the country has an "economical and efficient ... *system*" for procurement could be understood to authorize the president to dictate the terms of employment between private companies and their employees.

While there are some clear distinctions between mandating that contractor employees undergo an irreparable medical procedure that protects them from a risk not specific to the workplace, both assertions of executive authority seem to relate primarily to the economy and efficiency of *contractors*, not to the *procurement system*. That said, we are not aware of any challenges to the EO that have been of the date of this article.

But, in light of industry response, it seems likely that they are coming. For example, Associated Builders and Contractors (ABC) issued a scathing attack on the EO,[4] stating in part that the "new policy will not help America 'Build Back Better;' instead, it will exacerbate the construction industry's skilled workforce shortage,[5] needlessly increase construction costs and reduce opportunities for local contractors and skilled tradespeople."

The statement continued, asserting that "[t]his anti-competitive and costly executive order rewards well-connected special interests at the expense of hardworking taxpayers and small businesses who benefit from fair and open competition on taxpayer-funded construction projects."

Incidentally, it was primarily because of ABC's intervention in the challenge to the contractor vaccine mandate filed in the District Court for the Southern District of Georgia that the injunction issued by that court[6] on December 7, 2021, applied nationwide.

It is, of course, possible that this union labor mandate will not be challenged or that, if challenged, will survive. For that reason, companies that expect to compete for construction contracts on federal construction projects valued at $35 million more should carefully analyze what will be required to comply with this EO and track the development of the FAR implementing provision to ensure they have the ability to timely submit comments.

Notes

[1] https://bit.ly/3pa9qLO

[2] https://bit.ly/34Va1dz

[3] https://bit.ly/3sdrMgX

[4] https://bit.ly/3vaz3jn

[5] https://bit.ly/3HejZU8

[6] https://bit.ly/3LTwnws

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