



U.S. Department
of Transportation
**Federal Highway
Administration**

**Federal Highway Administration
California Division**

June 30, 2010

650 Capitol Mall, Suite 4-100
Sacramento CA 95814
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In Reply Refer To:
HDA-CA

Ms. Cindy McKim, Director
California Department of Transportation
P.O. Box 942873
Sacramento, CA 94273-0001

Attention: Mr. Fardad Falakfarsa, Federal Programs Office

Dear Ms. McKim:

SUBJECT: Project Labor Agreements

The purpose of this letter is to transmit the Federal Highway Administration's (FHWA) new *Interim Guidance on the use of Project Labor Agreements* on federal construction contracts. On February 6, 2009, President Obama issued Executive Order 13502 (the order) specifically permitting the use of project labor agreements (PLAs) on federal construction contracts and revoking two previous orders issued under President Bush. FHWA has issued this interim guidance for use until final implementing guidance is released by the Office of Management and Budget.

Pursuant to the Executive Order, PLAs may be used on federal construction project contracts by State DOTs (and local public agencies) provided that the agency presents evidence that the use of such an agreement on the relevant project will (i) advance the government's interest in reducing construction costs and achieving economy and efficiency, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters as appropriate and (ii) consistent with law. The Federal government believes that these agreements could be beneficial for large-scale construction projects due to the benefits that PLAs can offer by promoting the efficient and expeditious completion of such projects.

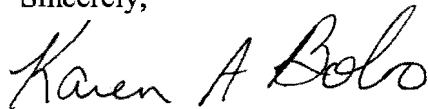
If an agency would like to use a PLA on a federal construction contract, the agency should obtain approval from the Division Office prior to construction authorization. The request for approval should include the draft PLA and written justification describing why the project advances the interest of the government. The interim guidance provides further information on the criterion



that the PLA and justification should address in order to be approved. Local agency requests should be submitted through the appropriate District Local Assistance Engineer.

If you have any questions regarding the use of PLAs on federal construction contracts, please contact Mr. Gary Sweeten at (916) 498-5128 or gary.sweeten@dot.gov.

Sincerely,

Handwritten signature of Karen A. Bolso in cursive script.

For
Walter C. Waidehich Jr.
Division Administrator

Enclosure



Memorandum

U.S. Department
of Transportation

**Federal Highway
Administration**

Subject: Interim Guidance on the use of
Project Labor Agreements

Date: May 7, 2010

From: Victor M. Mendez
Administrator

Reply to
Attn. of: HCC-30

To: Directors of Field Services
Division Administrators

**EXECUTIVE ORDER ENCOURAGING THE USE OF PROJECT LABOR
AGREEMENTS:**

On February 6, 2009, President Obama issued Executive Order 13502 (the Order) on the use of a project labor agreement (PLA) for Federal construction contracts. A copy of the Order is attached. The Order revoked two Executive Orders issued under President Bush, which required any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects to ensure that no project specifications were used that either required or prohibited bidders from utilizing PLAs.

Under the terms of the Order, the Federal Highway Administration (FHWA) may grant requests by States to use PLAs. The Order specifically permits the use of project labor agreements in projects receiving Federal financial assistance, including projects financed by the FHWA. The Order establishes that the policy of the Federal Government is to encourage the consideration of PLAs for large-scale construction projects due to the benefits that PLAs can offer by promoting the efficient and expeditious completion of such projects.

The FHWA may approve a request by a State department of transportation (State DOT) to use PLAs on a project-by-project basis so long as the PLA is consistent with applicable law. Division Offices should review and respond to State requests to use PLAs in a manner consistent with the interim guidance described in more detail below. Division Offices are directed to take appropriate steps to communicate this guidance to their respective State DOTs.



INTERIM PLA GUIDANCE:

Section 7 of Executive Order 13502 directs the Office of Management and Budget (OMB) to provide the President with recommendations with respect to the use of PLAs in construction contracts receiving Federal financial assistance. The OMB has not yet released that guidance. When OMB issues its recommendations regarding the use of PLAs, we expect that we will issue additional guidance to conform to those recommendations. In the interim, you should use the guidance outlined below when you receive a request to use a PLA on a Federal-aid project. This guidance supersedes FHWA's October 5, 2001, Guidance (Decision on Woodrow Wilson Bridge PLA Request) regarding PLAs.

State DOTs may require the use of a PLA by a contractor on a project if they are able to present evidence that the use of such an agreement on the relevant project will (i) advance the government's interest in reducing construction costs and achieving economy and efficiency, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters as appropriate and (ii) be consistent with law. Moreover, while the terms of the Order apply only to "large-scale construction projects" with a total cost of \$25 million or more, State DOTs may require the use of PLAs on projects totaling less than \$25 million if the project would otherwise comply with this guidance.

The use of a PLA may be approved if the State DOT has made a reasonable showing that the use of a PLA on the project will advance the interests of the government. In determining whether the use of a PLA is in the interest of the government, a State DOT may consider many factors. Those factors include, but are not limited to:

- The size and complexity of the project;
- The importance of the project and need to adhere to a certain timeline;
- The risk of labor unrest on the project and the circumstances that are present that may lead to a heightened risk of labor disruption, such as the history of labor unrest in the area, the anticipated working conditions of the project relating to the environment or work schedules, and the expiration of one or more collective bargaining agreements that could lead to jurisdictional disputes;
- The impacts of a labor disruption to the users, the operation of the facility, and the region;
- The costs of a delay should a labor disruption occur; and
- The available labor pool relative to the particular skills required to complete the project.

A showing of any one or more of these factors may be adequate to justify the use of a PLA in particular project. This list is not exclusive—other factors may reasonably permit a State to conclude that the use of PLA is appropriate for a given project.

A State DOT applying for the use of a PLA should provide a written statement to the Division Office asserting that the use of PLA in the relevant project advances

the interest of the government. The State DOT should describe the basis for that determination and provide reasonable documentation demonstrating its factual underpinnings. If the State DOT has provided evidence that the Division Office believes is reasonably adequate to satisfy the decision of the State DOT to use a PLA on a particular project, the Division Office may accept that evidence as satisfying the first requirement for the use of a PLA unless it is concerned that the State DOT's conclusion or the information supporting it is incomplete or inaccurate.

In addition to furthering the interest of the government, PLAs must be consistent with law. Division Offices must ensure that PLAs are used and structured in a manner so as to be effective in securing competition, as required by 23 U.S.C. 112¹. First, the PLA must not prohibit any contractor from submitting a bid or working as a subcontractor on the project. Second, in order to be consistent with the competition mandate of 23 U.S.C. 112, the use of a PLA must lead to a more cost effective use of Federal funds. Note that this second requirement may be satisfied by the same showing required by the State DOT in order to demonstrate that the PLA is in the interest of the government, as described above.

Division Administrators must ensure that the use of a PLA for a particular project is in compliance with all title 23 and 49, United States Code and Code of Federal Regulation, requirements. Those requirements include compliance with DOT's disadvantaged business enterprise (DBE) program at 49 CFR Part 26, FHWA's restrictions on the use of labor employment preferences under 23 CFR 635.117(b) and the FHWA's Equal Employment Opportunity Requirements under 23 CFR Part 230.

If a State DOT requests that a PLA be used, the Division Office must also review the terms of the PLA. A valid PLA must:

- (a) bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;
- (b) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
- (c) contain guarantees against strikes, lockouts, and similar job disruptions;
- (d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the PLA;
- (e) provide other mechanisms for labor-management cooperation on matters of mutual and concern, including productivity, quality of work, safety, and health; and
- (f) fully conform to all statutes, regulations, and Executive Orders.

¹ Section 112(a) of title 23, United States Code, applies to all highway projects using Federal-aid highway funds "where construction is to be performed by the state transportation department or under its supervision." Section 112(a) provides that the Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition. Additionally, Section 112(b) provides that "construction of each project...shall be performed by contract awarded by competitive bidding." These provisions have governed the process for awarding Federal-aid highway contracts since 1938 and 1954 respectively.

For additional questions regarding this Interim Guidance or PLAs, please contact Mr. Gerald Yakowenko in the Office of Program Administration (HIPA-30) at 202-366-1562 or Mr. Michael Harkins in the Office of Chief Counsel (HCC-30) at 202-366-4928.

Attachment

cc: Mr. King W. Gee, Associate Administrator for Infrastructure
Ms. Karen J. Hedlund, Chief Counsel

Presidential Documents

Executive Order 13502 of February 6, 2009

Use of Project Labor Agreements for Federal Construction Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote the efficient administration and completion of Federal construction projects, it is hereby ordered that:

Section 1. Policy. (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise due to the fact that construction projects typically involve multiple employers at a single location. A labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create frictions and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On larger projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) The use of a project labor agreement may prevent these problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. Accordingly, it is the policy of the Federal Government to encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.

Sec. 2. Definitions.

(a) The term "labor organization" as used in this order means a labor organization as defined in 29 U.S.C. 152(5).

(b) The term "construction" as used in this order means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

(c) The term "large-scale construction project" as used in this order means a construction project where the total cost to the Federal Government is \$25 million or more.

(d) The term "executive agency" as used in this order has the same meaning as in 5 U.S.C. 105, but excludes the Government Accountability Office.

(e) The term "project labor agreement" as used in this order means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

Sec. 3. (a) In awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where use of such an agreement will (i)

advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) be consistent with law.

(b) If an executive agency determines under subsection (a) that the use of a project labor agreement will satisfy the criteria in clauses (i) and (ii) of that subsection, the agency may, if appropriate, require that every contractor or subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.

Sec. 4. Any project labor agreement reached pursuant to this order shall:

(a) bind all contractors and subcontractors on the Construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) fully conform to all statutes, regulations, and Executive Orders.

Sec. 5. This order does not require an executive agency to use a project labor agreement on any construction project, nor does it preclude the use of a project labor agreement in circumstances not covered by this order, including leasehold arrangements and projects receiving Federal financial assistance. This order also does not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

Sec. 6. Within 120 days of the date of this order, the Federal Acquisition Regulatory Council (FAR Council), to the extent permitted by law, shall take whatever action is required to amend the Federal Acquisition Regulation to implement the provisions of this order.

Sec. 7. The Director of OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall provide the President within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.

Sec. 8. *Revocation of Prior Orders, Rules, and Regulations.* Executive Order 13202 of February 17, 2001, and Executive Order 13208 of April 6, 2001, are revoked. The heads of executive agencies shall, to the extent permitted by law, revoke expeditiously any orders, rules, or regulations implementing Executive Orders 13202 and 13208.

Sec. 9. *Severability.* If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Sec. 10. *General.* (a) Nothing in this order shall be construed to impair or otherwise affect:

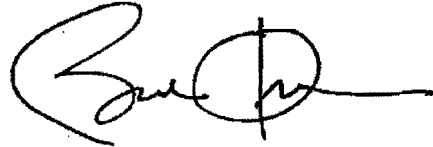
(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 11. *Effective Date.* This order shall be effective immediately and shall apply to all solicitations for contracts issued on or after the effective date of the action taken by the FAR Council under section 6 of this order.

A handwritten signature in black ink, appearing to be Barack Obama's signature, consisting of a large 'B' followed by a circle and a horizontal line.

THE WHITE HOUSE,
February 6, 2009.