

Testimony

Hearing on H.R. 735 and Project Labor Agreements: Restoring Competition and Neutrality to Government Construction Projects

The Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, U.S. House of Representatives

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Chairman Lankford and members of the subcommittee, I am Professor and Chairman of Economics and Executive Director of the Beacon Hill Institute at Suffolk University in Boston. I appreciate the opportunity to submit this testimony.

I direct my comments at H.R. 735, "The Government Neutrality in Contracting Act." H.R. 735 effectively nullifies a February 2009 executive order from the Obama administration "encouraging" federal agencies to consider using project labor agreements (PLAs) on construction projects costing \$25 million or more. In doing so it reinstates the executive orders, effective during the administration of President George W. Bush, which prohibited federal agencies and recipients of federal assistance from mandating PLAs. I would like to offer my strong support for the bill.

My comments are my own and do not represent the opinions of my employer, Suffolk University. Nor do they represent my support for any organization or private interest that might stand to benefit from the passage of H.R. 735.

In my capacity as Executive Director of the Beacon Hill Institute, I have directed six research projects on government-mandated PLAs, including three that identified the effects of PLA mandates on bids and on construction costs in three states and one that reviewed federal

construction projects under President Bush's Executive Orders 13202 and 13208. I have also authored articles on PLAs for the *Cato Journal* and the *Ripon Forum*. And I have submitted affidavits in support of plaintiffs in two cases involving PLAs, one in Connecticut and the other in New York. The details may be found in my attached resume. I will attempt to bring this experience to bear on the matter before the subcommittee.

PLAs are agreements between construction owners and labor unions under which construction contractors must hire workers through union hiring halls and pay union wages and benefits. In effect, a PLA requires the contractor to sever its connection with its own craft workforce (or almost all of that workforce) and to use tradespeople provided by the unions that are party to the PLA. Even if the contractor is a union contractor, it must hire through the hiring halls of the unions that are signatory to the PLA and, as necessary, deny its own union workers access to the project. And even if the contractor already pays fringe benefits to its own workers, it has to pay fringe benefits, a second time, to the fringe benefit plans of the unions designated in the PLA. This results in a financial windfall for the PLA unions and a financial penalty on the contractor and his employees. Finally, the contractor has to operate under work rules established by the PLA even if it could operate under more efficient work rules were it not required to accept the terms of the PLA.

The adoption of a PLA amounts, in effect, to the conferral of monopoly power on a select group of construction unions over the supply of construction labor. The putative reason for adopting a PLA, as articulated by PLA advocates, is quite different. The PLA is supposed to be something the owner would welcome. But the real reason a PLA is used or mandated by government agencies at the request of union supporters is to discourage bids from contractors who do not want to sign the PLA and/or do not employ a union workforce.

A writer affiliated with the union-leadership school at Cornell University, provides a typical rationalization:

PLAs provide job stability and prevent costly delays by: 1) providing a uniform contract expiration date so that the project is not affected by the expiration of various local union agreements while the PLA is in effect; ... 2) guaranteeing no-strikes and no-lockouts; 3) providing alternative dispute resolution issues for a range of issues; 4) assuring that

contractors get immediate access to a pool of well-trained and highly-skilled workers through the union referral procedures during the hiring phases and throughout the life to the project.¹

“Stability” is a word that PLA advocates like to use as a euphemism for “monopoly.” Another popular word is “complexity.” One test of whether a PLA is needed is whether “the project is of such complexity that a delay in one area will significantly delay the entire project.”² I say more about this idea below. But let me first address the no-strikes argument.

This argument is a combination of bluster and thinly-veiled intimidation. In fact, the threat to go on strike if there is no PLA is an empty one. In today’s construction industry, it is rare for a union to go on strike when it is already working on a project without a PLA. And if the union isn’t performing work on that job, it can hardly go on strike.

That, of course, does not rule out union intimidation. When recently a Boston area hospital hired a nonunion contractor, Boston’s Local 103 of the International Brotherhood of Electrical Workers launched a campaign to discredit the hospital’s doctors – a tactic that the hospital described as “heavy-handed bullying.”³ There is therefore no doubt that owners who are willing to use nonunion labor for major projects make themselves vulnerable to this kind of bullying. Yet, caving in to bullies is not the kind of thing that government agencies or hospitals can permit themselves to do.

As noted, PLA advocates also claim that PLAs are sometimes needed in order to avoid “costly delays” and jurisdictional disputes. Without a PLA, so it is said, contracts with some unions might expire before a project is completed, and the contracts might expire at different times, making the project vulnerable to disruptions over contract renegotiations. Jurisdictional disputes between unions might arise. And some unions might have negotiated onerous work rules that the PLA could modify. The solution, then, is to enter into a PLA.

¹ Philip J. Kotler, “Project Labor Agreements in New York State: *In the Public Interest*,” Cornell University ILR School (March 2009) 3.

² *Ibid.*, 11.

³ Bruno Matarazzo Jr., “Hospital job awarded to nonunion electricians,” *Daily News*, May 14, 2011, <http://www.newburyportnews.com/local/x616689241/Hospital-job-awarded-to-nonunion-electricians> (accessed May 30, 2011).

But consider the tortuous reasoning by which PLA advocates reach this conclusion: The builder is supposed to enter into an agreement with the very unions whose agreements with contractors are the source of the problems that the PLA is supposed to correct. In effect, the unions are telling the owners, "Look, unless you do something, you are going to end up with contractors whose agreements with us will bedevil your project going forward. So be smart and work with us to figure out some way to fix these agreements before you put the project out to bid."

That's the real agenda. There is, to be sure, a pretense that the PLA does not prevent contractors who don't use these unions from bidding. But the implication always is that the owner is going to end up, anyway, with contractors who will use labor supplied by the PLA unions. The owner might as well play ball now rather than find out the hard way later what can happen if he does not take pre-emptive action.

There are two flaws in this logic: First, it is not the owner's responsibility to solve problems that arise from contracts negotiated outside its purview by vendors who might want to do business with the owner. It is the owner's responsibility only to get the job done by a qualified contractor at the lowest bid. How the contractor manages to submit the lowest bid is the contractor's responsibility, not the owner's. Second, and fortunately for the owner, there is a simple procedure available for getting contractors to submit low bids. That procedure is to encourage as many qualified contractors as possible to bid, which is to say, to avoid conferring monopoly power on the very unions that are the source of the problems that the PLA is supposed to correct.

Fortunately also for the owner, there are nonunion contractors, and sometimes union contractors, that are eager to bid and that have not acquired the baggage that burdens the contractors whose unions want the PLA. One of the advantages that a nonunion contractor has over its union counterpart is that it can hire workers representing different trades on its own terms without having to fix the problems posed by the union collective bargaining agreements (CBAs). And there might be unions excluded from the PLA that have negotiated CBAs that avoid the very problems the PLA is supposed to fix. Finally, there might be contractors who

operate under work rules that are less burdensome than those that would be in effect under a PLA.

The Cornell University study mentioned above makes much of the argument that, because PLAs put union labor on the job, they also improve the quality of the labor that will be put on the job. The study goes so far as to instruct nonunion contractors as to how they can get better workers by taking advantage of the union hiring hall from which they would have to hire were they to win a job under a PLA.

Non-union contractors who are signatories to the PLA may be persuaded to sign area agreements once they experience the advantage of systematic and ready access to properly trained, highly skilled workers. Union-trained journey-level workers must meet certain clearly defined standards for competence and contractors with access to this labor pool can then compete for – and more likely successfully perform – jobs requiring a higher degree of worker skill and technical experience.⁴

Thus nonunion contractors are supposed to believe that they are better off dealing with a union monopoly in recruiting workers than they are using their own workforce. The sheer chutzpah of this remark aside, a lawsuit currently under way in New York City illustrates the hypocrisy with which PLA advocates will argue their case.

A union umbrella organization, the Building and Construction Trades Council of Greater New York and Vicinity, has negotiated five PLAs for the purpose of bringing billions of dollars in New York City construction under its control. An electrical contractors association is challenging the legality of the PLAs in court.⁵ What makes this case interesting is that the association does not consist of nonunion contractors, but rather contractors who are under a collective bargaining agreement with a union, the United Electrical Workers of America, which was excluded from the PLAs. Here we have government-mandated PLAs that discriminate against not only nonunion contractors but also those union contractors who do not have CBAs with the unions that are party to the PLA. It shows that the real purpose of the New York City PLAs is not to

⁴ Kotler, 13.

⁵ The Building Contractors Electrical Contractors Association and United Electrical Contractors Association v. The City of New York and The Building and Construction Trades Council of Greater New York and Vicinity, (S.D.N.Y. October 2010).

capitalize on the “ready access to properly trained, highly skilled workers” that comes with hiring union labor, but to exclude a disfavored union from what amounts to a union cartel.

As for the “complexity” issue, it would seem that nonunion contractors would have a cost advantage in bidding for “complex” projects in that they are not burdened by the necessity of having to deal simultaneously with several union hiring halls, each with its own CBA, culture and work-rule history. If a project is truly “complex,” it would seem better to deal with a contractor that has its workforce under a single roof.

Thus, the logical solution to the problem is to proceed without a PLA and let the job go to the lowest bidder who is qualified to do the job. If a contractor, union or nonunion, can show convincingly that it can do the job on time for the budgeted amount without a PLA, then the PLA is unneeded. On the other hand, if a PLA is truly needed, then that’s because there has been a political decision to proceed without offering nonunion contractors (or contractors who work with disfavored unions) a realistic chance of getting the work. Then, but only then, can the PLA make sense. Which is to say, a PLA can make sense only if the owner takes the existence of a union monopoly as a given and takes cover under the smarmy rhetoric of the pro-PLA flaks.

What about costs? The Cornell study refers to “costly delays.” And PLA advocates always claim – and indeed, must ordinarily show – that builders can reduce costs by entering into a PLA.

The problem of estimating the effects of PLAs on construction costs is a daunting one. There are wide variations between construction projects in size, type and complexity. But because government agencies are legally required to show that the adoption of a PLA will reduce construction costs, there is an abundance of government-sponsored studies that address themselves to the question of costs.

I have read many of these government-sponsored studies and have found them all to be useless. Such studies have a common feature: The authors always assume (1) that the project in question will be performed by the very unions that would be signatories to the PLA and (2) that, absent a PLA, the collective bargaining agreements into which those unions have entered

would impose costs that can be reduced or avoided only by entering into the PLA. Having made those, very whopping assumptions, the authors then calculate the cost “savings” that would be made possible if a PLA were adopted, given that the PLA would modify, to the advantage of the owner, certain terms of the existing CBAs and given that the owner would sacrifice that advantage without the PLA.

What the studies fail to consider is that adoption of a PLA does not represent the only option available to the owner for fixing the CBAs that are at the heart of the problem. Another option, as mentioned, is *not* to adopt a PLA and thus to encourage bids from nonunion contractors (and sometimes from union contractors that are not party to the PLA). By *not* adopting a PLA, the owner encourages bids from these other contractors and thus broadens the scope for competitive bidding and cost savings. Insofar as these other contractors have not burdened themselves with the same crazy-quilt array of work rules, contract expiration dates, etc. that burden the PLA-union contractors, they can eliminate the problem by simply submitting the lowest bid.

The PLA studies put out to rationalize the adoption of a PLA never account for these subtleties. In fact, they are not studies at all but accounting exercises that show, for example, how an owner could save money by entering into a PLA that would limit the number of vacation days that are available to some trades. Such exercises make sense when the owner decides that the best he can do is get the unions he is predestined to work with to limit the number of vacation days. But they make no sense if the owner wants the bidding process to do what it is supposed to do, which is to induce contractors to submit the lowest possible bid in part by getting such matters as vacation days under control through their own negotiations with their workforce.

Getting back to costs, there is one way to conduct a legitimate study of cost effects: to select a sample of comparable projects, some performed and some not performed under PLAs, and attempt to measure the cost differences attributable to the PLAs through regression analysis. One can approach this problem by comparing final bid prices or final construction costs. In order to make the comparison, it is necessary to control for factors other than the adoption of a PLA that affect costs. This means comparing projects that are sufficiently similar that it is

possible to separate the effect of a PLA on cost from other effects on cost. School building projects offer a good opportunity to perform this kind of analysis.

The Beacon Hill Institute estimated the effects of PLAs on final construction costs and on final bids for school building projects in Massachusetts, Connecticut and New York. We found that PLAs added 12 percent to 18 percent to final construction costs in Massachusetts and Connecticut and 20 percent to final bids for school construction projects in New York.⁶ The findings were robust for alternative regression specifications.

We were able to get statistically significant results from these regressions because of the similarities between school construction projects. In general, however, construction projects are so disparate in size, scope and type that there is no reliable method to determine, on a project-by-project basis, just how adoption of a PLA would affect costs. All we can say, with confidence, is that the cookie-cutter reports put out by government-hired consultants, most of which show that PLAs reduce costs, are not to be taken seriously.

With or without a cost study, PLAs have only one purpose: to discourage competition from nonunion contractors (and, in some instances, union contractors) to the end of shoring up declining union power, along with union-mandated wages and benefits, against competitive pressures.

⁶ Paul Bachman, Darlene C. Chisholm, Jonathan Haughton and David G. Tuerck, *Project Labor Agreements and the Cost of School Construction in Massachusetts* (September 2003) <http://www.beaconhill.org/BHISTudies/PLApolycystudy12903.pdf> (accessed May 13, 2009); Paul Bachman, Jonathan Haughton and David G. Tuerck, *Project Labor Agreements and the Cost of Public School Construction in Connecticut* (September 2004) <http://www.beaconhill.org/BHISTudies/PLA2004/PLAinCT23Nov2004.pdf> (accessed May 13, 2009); and Paul Bachman and David G. Tuerck, *Project Labor Agreements and Public Construction Costs in New York State*, (April 2006) <http://www.beaconhill.org/BHISTudies/PLA2006/NYPLAReport0605.pdf>. See also Paul Bachman and Jonathan Haughton, "Do Project Labor Agreements Raise Construction Costs," *Case Studies in Business, Industry and Government Statistics*, 1(1): 71-79.

President Obama wants us to ignore this logic. His executive order “encouraging” PLAs claimed that “large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government.”⁷ But do they?

To test this hypothesis, the Beacon Hill Institute reviewed the experience of the U.S. government under President George W. Bush, who, as mentioned, prohibited government-mandated PLAs from federal and federally-assisted contracts over the course of his administration.⁸ The premise of our study was that the Bush years would provide a good laboratory in which to test the claim that PLAs ward off labor strife, delays and such. If federal projects that cost \$25 million or more and that were undertaken during the Bush years were plagued by the “special challenges” claimed by President Obama’s pro-PLA Executive Order 13502, then there should be evidence of the labor disputes, coordination problems and uncertainties of the kind that the executive order is intended to avoid.

To this end, we asked the Associated Builders and Contractors (ABC) to assist us in getting the needed data from the federal government. Using the Freedom of Information Act (FOIA), ABC wrote to federal agencies with procurement responsibilities, including the Office of Management and Budget (OMB) and the U.S. General Services Administration (GSA), for information relating to their experience with construction contracts over the period 2001-2008. ABC asked for information relating to any problems caused by the absence of government-mandated PLAs over the period of the Bush executive order.

No respondent to the ABC letter, including the OMB and the GSA, could produce evidence of delays or cost overruns on projects worth \$25 million or more that were attributable to the absence of a PLA. If there were any such delays or cost overruns, the respondents were unable or unwilling to provide evidence of them. We also surveyed large federal contractors and examined a U.S. government database of federal construction projects to learn what we could

⁷ See Office of the Press Secretary, The White House, “Use of Project Labor Agreements for Federal Construction Projects,” (February 2009) <http://www.whitehouse.gov/the-press-office/executive-order-use-project-labor-agreements-federal-construction-projects> (accessed May 30, 2011).

⁸ See David G. Tuerck, Sarah Glassman and Paul Bachman, *Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem* (August 2009) <http://www.beaconhill.org/BHISTudies/PLA2009/PLAFinal090923.pdf>.

about the fate of federal construction projects over the same years and found no evidence of non-PLA projects suffering from strikes, delays and other problems that PLAs supposedly prevent. On the basis of these efforts, we concluded that, almost certainly, there were no federal construction projects undertaken during the Bush years that would have been benefitted from Obama's executive order, had it been in place. The "challenges" that Obama cites turn out to be a red herring – a solution in search of a problem. We estimated that, had President Bush's executive order not been in place in 2008, the federal government would have incurred \$1.6 billion to \$2.6 billion in additional construction costs in that year alone.⁹

So why did President Obama issue his order in the first place? The answer is political, not economic. The labor unions are a key component of the Democratic base, and the labor unions, especially the construction unions, are in trouble.

In my *Cato Journal* article of 2010, I showed that there has been a long-term downward trend in union membership among construction workers and in the union wage premium for construction workers.¹⁰ There I observed that, whereas 87.1 percent of construction workers reportedly belonged to unions in 1947, the percentage belonging to unions was 27.5 percent in 1983 and 15.6 percent in 2008. The wage premium earned by union construction workers fell in tandem from 74.4 percent in 1983 to 51.8 percent in 2008.¹¹

The short term trend is different. The decline in construction union membership continues apace. The fraction of all construction workers who belonged to unions fell by 25 percent, from 17.5 percent in 2000 to 13.1 percent in 2010.¹² But there was a halt in the decline in the union wage premium, which rose slightly, from 50.0 percent in 2000 to 51.9 percent in 2010.¹³ And

⁹Tuerck, Glassman and Bachman, 24.

¹⁰ The union wage premium equals the percentage by which the union wage exceeds the nonunion wage. Thus the wage premium is 50% if the union wage is \$60 per hour and the nonunion wage is \$40 per hour.

¹¹David G. Tuerck, "Why Project Labor Agreements Are Not in the Public Interest," *Cato Journal* 30, no. 1 (Winter 2010): 46-47.

¹² U.S. Bureau of Labor Statistics, "Table 1: Union affiliation of employed wage and salary workers by occupation and industry," <http://www.bls.gov/cps/cpslutabs.htm> (accessed May 30, 2011).

¹³ Ibid.

this was despite the recent collapse in the economy, which hit construction particularly hard. The 2010 unemployment rate for construction workers was 20.6 percent.¹⁴

From these data, it is clear that the unions have managed to sustain a hefty wage premium in recent years despite declining membership and adverse market conditions. But their grip on that wage premium is, as they no doubt realize, becoming increasingly weak. How is it possible for 13 percent of construction workers to make 52 percent more than the other 87 percent when 21 percent of them can't find jobs? Questions like this are driving union bosses to ever more desperate tactics. Thus, any Boston owner who dares to use nonunion labor can expect bullying of the kind that the Boston IBEW local likes to display.

Thus also PLAs have become the construction unions' line in the sand. Unless the unions can protect their existing turf, which is to say, their dominance over major public projects, they will suffer further erosion of their wage premium. The unions depend on the prevailing wage laws to protect that premium. The government-determined "prevailing" wage and benefit rates are applicable to tradespeople employed on all federal government jobs greater than \$2,000, and state prevailing wage and benefits rates are paid to tradespeople employed on state government jobs in 33 states. But this does not guarantee that the unions will be able to protect their wage premium indefinitely against market realities. Inasmuch as the prevailing wage laws are largely based on the collectively bargained union wage and benefit rates, a steady decline in union participation in construction work will put downward pressure on the prevailing wage and thus also the union wage premium.

This is the 800 pound gorilla that sits in the room whenever government officials decide whether to adopt a PLA or not. Will they or won't they continue to protect the construction union monopoly against the market forces at work?

A recent study published by the Regional Plan Association casts a new light on this matter.¹⁵ The Association, which has offices in New York, New Jersey and Connecticut, describes itself as

¹⁴ U.S. Bureau of Labor Statistics, "Unemployed persons by industry, class of worker and sex," <ftp://ftp.bls.gov/pub/special.requests/lf/aat26.txt> (accessed May 30, 2011).

“America's oldest and most distinguished independent urban research and advocacy group.”

As stated on its website:

RPA prepares long range plans and policies to guide the growth and development of the New York- New Jersey-Connecticut metropolitan region. RPA also provides leadership on national infrastructure, sustainability, and competitiveness concerns. RPA enjoys broad support from the region's and nation's business, philanthropic, civic, and planning communities.¹⁶

The RPA study begins by opining the steep decline in New York City's construction business over the current recession. Housing starts are down 63 percent. Commercial starts are down 19 percent and would have been down by more but for the World Trade Center rebuilding project. The report also mentions the imminent expiration of many “crucial” construction contracts. The sense of the report is that New York City construction unions should go into the contract renegotiations with a view toward cutting labor costs.¹⁷

Although the authors warn that the unions are up against stiff competition from nonunion contractors, they also go out of their way to opine any further erosion of the unions' share of the construction market. “While the city's largest and most important developers and contractors wish to continue with union labor because of the advantages it offers in skill, speed, and safety,” they write, “nearly all developers and many contractors are considering nonunion options, including open and merit shops.”¹⁸

Why? Because the nonunion contractors offer a huge cost advantage:

A 10 percent differential between union and nonunion construction is tolerable to union developers and contractors, while the existing 20-30 percent differential is not. If the high differential continues, developers will convert some projects that would have been union in earlier times to merit shop, and will simply not go forward with other projects.¹⁹

¹⁵ Julia Vitullo-Martin and Hope Cohen, *Construction Labor Costs in New York City: A Moment of Opportunity* (May 2011) Regional Plan Association.

¹⁶ See the Regional Plan Association's Mission Statement at <http://www.rpa.org/mission.html> (accessed May 30, 2011).

¹⁷ Vitullo-Martin and Cohen, 1.

¹⁸ Ibid.

¹⁹ Ibid., 2.

“The consensus among developers and contractors—both union and nonunion—is,” the authors write, “that the price tag on nonunion labor is between 20 and 30 percent lower than on union labor. Some of the cost differential comes from lower nonunion wages and benefits, but most derives from unproductive union-mandated work rules and practices.”²⁰ The report goes on to cite examples of union featherbedding.

As for PLAs, they are “a solution that didn’t work.”

Labor’s response to the drop in construction activity was to negotiate a series of PLAs (project labor agreements) with building contractors and with city government.... For management, a PLA offers the opportunity to renegotiate work rules, while securing short-term wage and benefit concessions. Management has been almost universally disappointed with the actual savings achieved—2 to 4 percent rather than the promised 20 percent.²¹

“PLAs,” the authors conclude, “should be seen as the negotiating placeholder they are—a temporary means of easing some of the most egregious work-rule practices, but not a long-term solution to the unworkable economics of current labor terms.”²²

This language is damning for PLA advocates. Here we have a mainstream New York City research group simultaneously warning that nonunion labor competes effectively with union labor and that construction owners who expect PLAs to save on costs can expect to be “disappointed.” The broader implication is that the unions cannot rely much longer on using gimmicks like PLAs to protect their market power. The tide is shifting. The only question is how much longer it will take politicians to see this reality.

When the construction business was booming, government agencies and politicians sympathetic to the unions could support PLA mandates and rely on professional union sympathizers to give them academic cover. Now that those days are over, it is time for all parties involved to recognize that the case for PLAs never held water to begin with. I therefore urge Congress to pass H.R. 735 and to send that message back to the White House.

²⁰ Ibid., 6.

²¹ Ibid., 2.

²² Ibid., 18.