

PART VII

GOVERNMENT-MANDATED PROJECT LABOR AGREEMENTS

1. WHAT IS A GOVERNMENT-MANDATED PLA?

Although a PLA is a contract with varying terms and conditions, most contain provisions that ensure construction contracts are awarded only to companies that agree to recognize unions as the exclusive representatives of their employees on that job; use the union hiring hall and union apprenticeship programs to obtain workers at the expense of their existing qualified, skilled and safe employees; abandon the innovative workforce development and apprenticeship programs they use to differentiate their workforce and drive productivity; pay into union benefit and multi-employer pension plans that the company's employees will never benefit from unless they join a union and meet lengthy vesting requirements; and force their existing employees to pay union dues and/or join a union as a condition of employment.

In the *Boston Harbor* case (1993), the Supreme Court held that government-mandated PLAs were not preempted by federal labor law, so long as the government involved was acting as a “market participant” and not a regulator. However, the court did not rule on other legal theories challenging governmental PLAs, such as state and local competitive bidding laws. Since *Boston Harbor*, a number of legal challenges on a state-by-state basis have been filed against government-mandated PLAs. The results have been mixed. The majority view of the state courts seems to be that government-mandated union agreements are permitted under state and federal laws, provided that they are not “regulatory” in nature, that they are supported by studies demonstrating legitimate need for the type of construction at issue, and are tailored to meet legitimate procurement objectives.

At the same time, public or private owners and construction managers are never required to enter into such agreements. The choice is up to them whether to restrict free competition. Under this principle, President George W. Bush issued federal Executive Orders 13202 and 13208 prohibiting government-mandated PLAs on federal and federally assisted construction projects. This order was upheld by the courts in the case of *BCTD v. Allbaugh* (2002).

President Obama rescinded the Bush Executive Orders in 2009 and signed Executive Order 13502, which encourages federal agencies, on a case-by-case basis, to require PLAs on federal construction projects exceeding \$25 million in total value, and allows state and local governments procuring construction contracts with federal assistance to mandate PLAs.

ABC helped stop government-mandated PLAs on all federal contracts exceeding \$25 million in FY2018 ensuring that construction contracts totaling more than \$9.6 billion were subject to fair and open competition. In addition, from FY2009-FY2018, there were 1,471 prime federal NAIC 23-classified construction contracts exceeding \$25 million worth a total of \$82.69 billion performed in the United States. Just 12 of these contracts (less than 1%) worth \$1.25 billion (1.5% of total value) were built with PLAs.

A total of 25 states have passed laws restricting government-mandated PLAs on state, state-assisted and local public works construction projects to varying degrees, while eight states have passed policies encouraging the use of PLAs on state-procured and financed construction projects.

Legal battles over government-mandated PLAs are ongoing at both the federal and state levels.

Most recently, the U.S. Supreme Court held in the *Janus case* that it is a violation of the First Amendment for governments to compel employees to pay dues or fees to a union. Litigation is ongoing to determine whether the Court's holding prohibits government-mandated PLAs that force construction workers to join or pay dues to a union as a condition of performing work.

2. SEVEN STEPS TO COMBATTING GOVERNMENT-MANDATED PLAS: A GUIDE FOR ABC CHAPTERS

As government-mandated PLAs have appeared throughout the country, no single strategy or device has emerged that guarantees the preservation of open competition. At the same time, chapters that have followed the following strategies have had the greatest success in blocking government-mandated requirements, particularly on public projects.

Prepare in Advance. The chapter should establish a committee or task force of staff and members who will be available on short notice to meet with public officials, testify at hearings, etc., and who will be familiar with the issues surrounding government-mandated agreements. Advance preparation also should include meetings and contacts with local procurement officials and politicians before any talk of government-mandated PLAs occurs.

Coordinate with ABC National. ABC National staff has collected information from around the country—including sample letters, editorials, studies, ad campaigns, talking points, brochures, videos and legal pleadings—connected with every aspect of government-mandated PLAs. Through the Construction Legal Rights Foundation (CLRF), assistance funds are also available to chapters confronted with this problem. Countless hours and chapter funds can be saved by contacting ABC National at the earliest possible stage and taking advantage of the accumulated experiences of other chapters and national staff.

Get the Facts. When the PLA issue surfaces, there is a great need for research into such matters as union-only cost overruns, delays, safety, labor availability, minority hiring and related factors. Independent local studies may be necessary to supplement materials that have been collected by ABC National. Paid economists or academics may be needed to refute pro-union studies. The research process is time-consuming and expensive and should begin early.

Mobilize Grassroots Membership Support. Public officials and/or private developers must hear from someone other than paid staff. Government-mandated PLAs cannot be stopped without genuine outrage vocally expressed by taxpaying contractors and, if possible, their employees. Members must send as many letters, faxes, e-mails and phone calls as possible. Personal attendance at meetings and public appearances, and even public demonstrations, also have proven effective.

Build Coalitions and Involve the Public at Large. It is important to reach out beyond ABC’s membership, and beyond the construction industry, to show government officials that government-mandated PLAs are unpopular with taxpayers in general. Coalitions with other like-minded groups are strongly recommended. Again, advance contacts are helpful.

Use Paid and Earned Media Strategies to Reach the Public. Surveys have shown that the public at large typically opposes government-mandated requirements once they hear about it. Without the use of paid media or a focused PR campaign generating earned media, however, the issue often does not reach the public. Digital, print, radio, TV and billboard ads have all been used successfully in a number of campaigns against government-mandated PLAs. Use of paid PR consultants also should be considered to help determine the most effective local message and strategy to receive earned media and coverage. Keep in mind that many ads for all media have already been developed by other chapters and collected for your use by ABC National. Financial assistance can be obtained by contacting the CLRF.

Prepare for Legal Action. There have been many court cases on the government-mandated PLA issue around the country. Some have been successful; some have not. Going to court should be a last resort, as the process is expensive and favorable decisions are hard to achieve. However, the credible threat of legal action still resonates with many public officials, and sometimes litigation is the only way to force politicians to listen. Legal counsel should be selected who are familiar with the issue, and they should be encouraged to make use of the substantial resources collected by ABC National in order to conserve costs. Financial assistance also may be available from the CLRF. It is important to request assistance at an early stage.

Post-PLA, monitor bad projects and prepare for the next fight. Even if all of the above efforts are unsuccessful and a particular project is performed on a government-mandated basis, the chapter’s efforts should not end. Several chapters have turned failure into success by closely monitoring government-mandated PLAs and publicizing their cost overruns, safety problems, delays and other defects. Politicians who feel the pressure from the first PLA are sometimes more reluctant to do the unions’ bidding the next time around or their support of a PLA mandate becomes a hot button issue in their next election. It is also important to send any material on “bad” government-mandated PLAs to ABC National for use in the next battle.

3. UNION ARGUMENTS AND COUNTER ARGUMENTS REGARDING PLAs

“Tradition” of union only in some geographic areas and on big projects justifies continued reliance on unions.

“Tradition” has been overstated; in any event, today’s private construction workforce is 87.2% nonunion; many large projects have been built nonunion or mixed (merit); even union contractors and groups representing union firms (Associated General Contractors) have opposed government-mandated PLAs; it’s not just a union vs. nonunion issue.

Private sector does it.

Private owners are not bound by competitive bidding laws; they are spending their own money, not the taxpayers; and most private owners think government-mandated PLAs are a bad idea.

<i>Saves money (vs. unionized projects without PLAs).</i>	There is no evidence demonstrating that PLAs save money on taxpayer-funded projects. Numerous studies show government-mandated PLAs can drive up costs between 12% and 18%. Discouraging nonunion contractors from bidding is inherently likely to reduce the number of bids and increase the prices of bids that are received.
<i>No increased costs to public where projects are covered by prevailing wage laws.</i>	Nonunion contractors are able to reduce bid prices due to greater efficiencies, even on prevailing wage jobs.
<i>Courts have upheld them.</i>	Some have, some haven't; at the highest state court level, the majority view is to limit government-mandated PLA requirements.
<i>Lack of impact on competition; "anyone can bid" and "many" non union companies have bid on PLA projects.</i>	Being able to bid is hollow if the work cannot be performed on a more efficient nonunion basis without using one's own employees and work practices; previous claims that many nonunion contractors have bid on PLAs have turned out to be untrue; in any event, it is clear that the number of nonunion bidders is reduced when PLAs are in place.
<i>Union workers are safer.</i>	Evidence is to the contrary, according to OSHA fatality statistics.
<i>Prevents labor strife, jurisdictional disputes and delays.</i>	The threat of labor strife is extortionate; and very little labor strife has caused real delay in most parts of the country; there are many legal devices available to control labor-based delay; reserved gates, injunctions, police, performance clauses; finally, litigation is more likely to cause delay.
<i>Insures higher quality workers and guarantees labor supply.</i>	Union workers are not necessarily higher quality; local union contractors often face labor shortages, forcing reliance on out-of-state contractors; discouraging contractors that employ 87.2% of the private construction workforce from bidding on contracts will exacerbate or create a workforce shortage.
<i>Non-bidders are making mere "philosophical" choices and are not really harmed.</i>	Nonunion companies are discouraged from bidding, not for mere philosophical reasons, but because signing a union agreement interferes with the very attributes that have made them more efficient as contractors, requires them to duplicate their fringe benefits costs, and discriminates against their employees and apprentices who have chosen not to work under union agreements
<i>PLAs are not discriminatory and do not violate right to work laws.</i>	The issue is not whether they legally require union membership, but whether employees should have to give up their right to refrain from union representation in order to work on public projects; most minority and women contractors have come out against government-mandated requirements.