



Construction Law Newsletter

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Employee Free Choice Act

By Brian Hutchins

The Employee Free Choice Act bill was introduced in the 110th Congress as H.R. 800 and passed the House in March of 2007. The Senate version of the bill, S.1041, did not muster enough votes to invoke cloture, so the legislation died. In

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Green Building Standards

By Brian Hutchins

Most construction attorneys are probably familiar with LEED (Leadership in Energy and Environmental Design) certification possibilities through the U.S. Green Building Counsel, Inc. See www.usgbc.org.

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Project Labor Agreements in Federal-Construction Projects

By Evangelin Lee

In FAR Case 2009-005, a final rule was issued on April 13, 2010, amending the Federal Acquisition Regulation ("FAR") to implement President Barack Obama's Executive Order ("E.O.") 13502 encouraging Federal agencies to use project labor agree

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Introduction to Construction Bonds in Nevada

By Kurt C. Faux, Esq.¹ and Colin R. Chipman, Esq.

The downturn in the construction industry and the corresponding insolvency of many contractors has caused an ever increasing focus on the role of surety bonds. Despite the growing attention, the role of surety bonds is still often misunderstood by owners, contractors and subcontractors alike. As the title suggests, this article intends to provide an overview and introduction to the different types of construction bonds, which a Nevada construction law practitioner encounters most often.

INTRODUCTION

A surety is defined as someone who contracts to answer for the debt or default of another.² A bond involves a tripartite relationship between a surety, a principal and an obligee. A construction bond is a guarantee, in which the surety guarantees that the contractor or subcontractor, called the "principal", will perform the obligations stated in the bond. The obligee is the person or entity to whom the principal and the surety owe their obligation. The penal sum is the total amount the surety is obligated to pay, if the principal fails to meet its obligations.

Traditionally, the obligee (such as an owner) demands a bond from the contractor (principal) who then obtains a bond from the surety, typically through an agent. Before a surety provides a bond, it will almost always require indemnification from the principal and

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Project Labor Agreements

ments for large scale Federal construction projects. A project is considered large scale where the total cost to the Federal government is \$25 million or more. This final rule followed the E.O. 13502 signed on February 6, 2009, and a period of public comment. It became effective on May 13, 2010.

Federal agencies are encouraged to consider requiring the use of project labor agreements in large scale projects if it advances the Federal government's interest in "achieving economy and efficiency in Federal procurement..." A "project labor agreement" is 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). A project labor agreement ("PLA") will typically contain provisions where the signatories agree in advance that: the owner's designee and contractors, regardless of tier, will accept and be bound by the terms and conditions of the agreement, and that the agreement will apply to successful bidders who become signatories, whether they perform work on the project on a union, or nonunion basis the signatory contractors are the sole and exclusive bargaining representatives of all craft employees working on the project within the scope of the agreement there will be established measures to facilitate communication among labor representatives and the owner's designee about any issues relating to labor relations/management and the administration of the agreement that the contractors have full and exclusive authority for management and prosecution of its work, and that the contractors will utilize the most efficient methods of techniques of construction and use of tools that there will be no strikes, work stoppages, sympathy strikes, picketing, slow downs or any other disruptive activities affecting the project for any reason a set dispute and grievance procedure will be followed employee matters pertaining to wages, pension, and benefits, are left to local bar-

gaining

Under the final rule, when a Federal agency requires a project labor agreement, its terms must: bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents; allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements; contain guarantees against strikes, lockouts, and similar job disruptions; set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement; provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and fully conform to all statutes, regulations, and Executive Orders.

The stated policies for the preference of using a project labor agreement are to combat the special challenges posed by large scale construction projects such as labor disputes which may cause delay to a project, a lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers. Establishing a pre-hire collective bargaining agreement containing a resolution mechanism would counter the threat of these issues on the timely completion of a Federal construction project.

During the public comment period, the FAR Council—General Services Administration ("GSA"), Department of Defense ("DoD"), and National Aeronautics and Space Administration ("NASA") received comments from more than 700 respondents on the proposed rule. Many of these com-

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ments concerned the level of discretion an agency should be afforded in deciding whether to require a project labor agreement on a particular construction project and the manner in which such discretion is exercised.

A non-exhaustive list of factors was identified that the agencies may consider, in their discretion, in deciding whether a project labor agreement is appropriate for use in a given construction project, such as whether the project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades or whether there is a shortage of skilled labor in the region in which the construction project will be sited. A project labor agreement may also be appropriate when it has been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project, or the project is expected to require an extended period of time. However, a Federal agency can consider any other factors that it decides are appropriate.

In addition to the factors that agencies may consider to help them decide, on a case-by-case basis, whether the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project, the final rule provides the timing and process of submission of the project labor agreement. Under the final rule, Federal agencies may choose from among three options. Submission may be required: (1) when offers are due; (2) prior to award (by the apparent successful offeror); or (3) after award. If an agency decides that permitting execution of the project labor agreement after award is the best approach, the contractor will be required to submit an executed copy of the agreement to the contracting officer.

In response to those concerns raised

regarding the participation of nonunion contractors, the FAR Council reiterated that E.O. 13502 expressly states that all project labor agreements must allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. It went on to state that “[a]ny contractor may compete for—and win—a Federal contract requiring a project labor agreement, whether or not the contractor’s employees are represented by a labor union. The same principle of open competition would protect subcontractors as well.”

The final rule does not mandate the use of a project labor agreement, it only encourages agencies to require one if it would advance the economy and efficiency in Federal procurement in large scale construction projects. To permit the consideration of all of the relevant circumstances and needs of the stakeholders, the final rule encourages agency planners to consider the use of project labor agreements early in the acquisition process. Federal agencies are allowed broad discretion and flexibility to craft unique approaches to each project to maximize the success of each project labor agreement thereby promoting procurement goals.

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