



January 17, 2013

**By Electronic Mail**

The Honorable Joseph Szabo  
Administrator  
Federal Railroad Administration  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington D.C., DC 20003

RE: Federal Railroad Administration Approval of Project Labor Agreement on California High-Speed Rail Project

Dear Administrator Szabo:

Associated Builders and Contractors (ABC) is a national trade association representing 22,000 employers in the construction industry, including general contractors, subcontractors and material suppliers belonging to 72 local ABC chapters. ABC and its members promote the merit shop construction philosophy, which ensures public works contracts are procured through fair and open competition that encourages a level playing field for all qualified contractors and their skilled employees, regardless of whether they belong to a union. Experience demonstrates the merit shop philosophy helps government agencies provide taxpayers with the best possible construction product at the best possible price.

The merit shop contracting community is troubled by a project labor agreement (PLA) the California High-Speed Rail Authority (HSRA) has mandated<sup>1</sup> on the California High-Speed Rail project receiving funding from the Federal Railroad Administration's (FRA) High-Speed Intercity Passenger Rail Program (HSIPR) and the American Recovery and Reinvestment Act (ARRA). The HSRA is calling this agreement a Community Benefits Agreement (CBA), but it contains the same anti-competitive and costly terms as most PLAs.<sup>2</sup>

ABC is opposed to government-mandated PLAs because these agreements typically restrict competition,<sup>3</sup> increase costs,<sup>4</sup> cause delays,<sup>5</sup> discriminate against nonunion employees and place merit shop contractors at a significant competitive disadvantage.<sup>6</sup> Typical government-mandated PLAs are nothing more than anti-competitive schemes that end open and fair bidding on taxpayer-funded projects. PLAs should never be *mandated*; instead, a contractor may *voluntarily* adopt a PLA if the firm believes it would help promote the economy and efficiency in which a construction project is delivered to a government agency.<sup>7</sup>

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<sup>1</sup> See Section "10.1 Key Prerequisites to Award: The Authority will not make a recommendation for award of the Contract unless the successful selected Proposer has submitted the following:...A letter of assent executed by the Proposer agreeing to be bound by the Community Benefits Agreement." <http://www.cahighspeedrail.ca.gov/assets/0/443/549/551/84634b9d-e593-4a66-bb25-01ba79f9f3ac.pdf>

<sup>2</sup> The project's 12/26/12 Community Benefit Agreement/Project Labor Agreement is available here: <http://www.cahighspeedrail.ca.gov/assets/0/443/545/546/1f1c2054-a2a1-4308-928f-71d44c504612.pdf>

<sup>3</sup> See *More Evidence Shows Project Labor Agreements Injure Competition*, TheTruthAboutPLAs.com, 1/20/11.

<sup>4</sup> See *Measuring the Cost of Project Labor Agreements on School Construction in California* (Vince Vasquez, Dr. Dale Glaser and W. Erik Bruvold; 2011) and Tuerck, Bachmann and Glassman, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution in Search of a Problem*, (Beacon Hill Institute at Suffolk University) August, 2009, at 36, available at [www.abc.org/plastudies](http://www.abc.org/plastudies) and [www.thetruthaboutplas.com/tag/anti-pla-mandate-study](http://www.thetruthaboutplas.com/tag/anti-pla-mandate-study).

<sup>5</sup> See *Report Documents Construction Delays on PLA Projects*, TheTruthAboutPLAs.com, 4/11/11.

<sup>6</sup> See *Get The Truth*, TheTruthAboutPLAs.com, 1/16/13

<sup>7</sup> PLAs are authorized under the [National Labor Relations Act](#) (NLRA), 29 U.S.C. §§ 151-169. Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f) make special exceptions from other requirements of the NLRA in order to permit employers and unions in the construction industry to enter into PLAs. The NLRA permits firms to voluntarily enter into PLAs at any time.

The HSRA has imposed a PLA on the five prime contractors prequalified to submit a technical proposal and price proposal as part of the second phase of the project's two-phase best value procurement process. A number of qualified and experienced firms would be interested in working as subcontractors for these short-listed prime contractors, if not for the PLA they are required to sign by the HSRA.

ABC is concerned the HSRA's PLA violates federal law, regulations and contracting rules that other U.S. Department of Transportation agencies follow when evaluating the use of a PLA on federally assisted construction projects.<sup>8</sup>

Is there a formal guidance memo or process the FRA uses to evaluate a PLA on a FRA-assisted project?<sup>9</sup> Has the FRA reviewed the terms and conditions of this PLA and ensured it is consistent with requirements of applicable federal law, regulations, and conditions in the Grant/Cooperative Agreement with FRA? If so, I would like to learn more about this process and receive a copy of your analysis of this PLA.

The following provisions in the HSRA PLA are particularly objectionable to nonunion companies and their employees, as well as restrict competition, increase costs, and may violate federal contracting rules and regulations.

1. Section 7.1 and Section 7.2 require nonunion companies to obtain most or all of their employees from union hiring halls. The agreement prohibits firms from using most of their existing workforce. Section 7.1.2A allows nonunion contractors to use a maximum of five members of their existing core workforce. The rest of their workforce for this project must be hired from the appropriate union hiring hall. This provision is problematic because firms can't use most of their trained, productive employees. In addition, it provides unions with the opportunity to dispatch "salts" with conflicts of interest to nonunion companies. Unfamiliar union workers may be of unknown quality and may delay time- and cost-sensitive construction schedules that add uncertainty to the ability of a contractor to deliver a quality, on-time and on-budget construction product to the HSRA.
2. Section 6.2 requires the few nonunion employees allowed on the project to pay nonrefundable union dues and/or fees to the union as a condition of working on the PLA project, even though they have decided to work for a nonunion employer.<sup>10</sup>
3. Section 6.1 requires unions to be the exclusive bargaining representative for workers during the life of the project. When agreeing to participate in a PLA project, the decision to agree to union representation is made by the employer (through the act of agreeing to the PLA by signing a letter of assent) rather than the employees.<sup>11</sup> Construction employees often argue that forced union representation—even for one project—is an infringement of their workplace rights and runs contrary to their intentional decision not to join a union.
4. Section 2.3 and Section 3.1 require contractors to follow union work rules, which changes the way they otherwise would assign employees to specific job tasks—requiring contractors to abandon an efficient labor utilization practice called "multiskilling" and instead assign work based on inefficient and archaic union craft jurisdictional boundaries that increase labor costs. Open shop contractors achieve significant labor cost savings

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<sup>8</sup> See Federal Highway Administration (FHWA) Administrator Victor Mendez May 7, 2010, [Interim Guidance on the Use of Project Labor Agreements Memo \(pdf\)](#), which requires local and state entities to submit government-mandated PLAs to the FHWA for approval on projects receiving federal assistance from the FHWA.

<sup>9</sup> The CHSRA implies there is a formal FRA PLA review process. See Section 7.11.3: "Proposers are advised that, subject to FRA [Federal Railroad Administration] approval, the Authority intends to develop a Community Benefits Agreement consistent with the Community Benefits Policy adopted by the CHSRA [California High-Speed Rail Authority] Board at its December 6, 2012 meeting with which the Contractor will be required to comply." p. 24 of 62 of CHSRA's [AD.9 - B.1. Pts A-C - Instructions to Proposers, Certifications, and Forms - CLEAN01/09/2013](#), available at: <http://www.cahighspeedrail.ca.gov/assets/0/443/549/551/84634b9d-e593-4a66-bb25-01ba79f9f3ac.pdf>.

<sup>10</sup> The legality of clauses in typical PLAs that require compulsory union membership and payment of union dues and fees to unions by workers in order to work on a PLA project depend on the state's Right to Work law status and the wording of the PLA. See [Understanding PLAs in Right to Work States](#). TheTruthAboutPLAs.com, 7/20/09. California is not a Right to Work state so workers can be forced to join a union as a condition of employment.

<sup>11</sup> Workers normally are permitted to choose union representation through a card check process or a federally supervised private ballot election. PLAs are called pre-hire agreements because they can be negotiated before the contractor hires any workers or employees vote on union representation. The [National Labor Relations Act](#) generally prohibits pre-hire agreements, but an exception in the act allows for these agreements only in the construction industry. In short, PLAs strip away the opportunity for construction workers to choose a federally supervised private ballot election or a card check process when deciding whether union representation is right for them.

through multiskilling, in which workers possess a range of skills that are appropriate for more than one work process and are used flexibly across multiple trades on a project or within an organization. This practice has tremendous labor productivity advantages for contractors, but it is forbidden by typical union work rules and, by extension, PLAs.<sup>12</sup>

5. Section 8.1, Section 8.2 and Section 3.3 require nonunion companies to pay their existing nonunion employees' and new union workers' health and welfare benefits to union trust funds and be bound by their plan rules, even though these companies have their own benefits plans. Existing nonunion employees cannot access any of their union benefits accrued during the life of the PLA project unless they decide to leave their nonunion employer, join a union and remain with the union until vested.<sup>13</sup> Few nonunion employees will join a union after working on a PLA project, so in order to ensure nonunion employees have retirement and benefits plans that actually help their employees, companies pay benefits twice: once to the union plans and once to the existing company plan. Nonunion contractors have to factor this double benefit cost into their bid, which needlessly increases costs and puts them at a competitive disadvantage against union contractors that are not saddled with these unnecessary costs. In addition, paying into underfunded and mismanaged union-affiliated multi-employer pension plans may expose merit shop contractors to massive pension withdrawal liabilities. Depending on the health of a union-managed multi-employer pension plan, signing a PLA could bankrupt a contractor or prevent it from qualifying for construction bonds needed to build future projects for other clients.<sup>14</sup>

Without these anti-competitive and discriminatory provisions that discourage otherwise qualified contractors from competing for public projects, unions rarely agree to concessions regarding labor peace, work schedules and other provisions that are the cornerstones of the alleged benefits of a PLA. PLA proponents require these provisions because they are crucial to reducing competition and ensuring union contractors have an unfair advantage over nonunion contractors, and union tradespeople enjoy a virtual monopoly building taxpayer-funded projects.

These terms and conditions discourage competition from qualified contractors and their existing skilled workforces. The Bureau of Labor Statistics' (BLS) most recent report indicates 86 percent of the U.S. private construction industry workforce does not belong to a union.<sup>15</sup> In California, just 16.9 percent of the private construction workforce belongs to a union.<sup>16</sup> However, many ABC members in California and across the country employ union tradespeople, utilize unionized subcontractors and work harmoniously with union tradespeople on jobsites without the need for a PLA mandate.

By mandating this PLA, the HSRA has shown favoritism toward a narrow class of unionized contractors supportive of PLAs at the expense of both union<sup>17</sup> and nonunion contractors opposed to government-mandated PLAs. This needless discrimination may not meet federal rules requiring "full and open competition" for federally assisted projects, as this PLA deters a particular class of bidders (i.e.. union and nonunion contractor bidders harmed by the PLA) from participating in the bid process for reasons unrelated to their ability to competently complete the substantive work of the project.

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<sup>12</sup> See [Understanding the Merit Shop Contractor Cost Advantage](#). TheTruthAboutPLAs.com, 5/17/10.

<sup>13</sup> An October 2009 report by Dr. John R. McGowan, *The Discriminatory Impact of Union Fringe Benefit Requirements on Nonunion Workers Under Government-Mandated Project Labor Agreements*, finds that employees of nonunion contractors that are forced to perform under government-mandated PLAs suffer a reduction in their take-home pay that is conservatively estimated at 20 percent. PLAs force employers to pay employee benefits into union-managed funds, but employees will never see the benefits of the employer contributions unless they join a union and become vested in these plans. Employers that offer their own benefits, including health and pension plans, often continue to pay for existing programs as well as into union programs under a PLA. The McGowan report found that nonunion contractors are forced to pay in excess of 25 percent in benefit costs above and beyond existing prevailing wage laws as a result of "double payment" of benefit costs. See [New Report Finds PLA Pension Requirements Steal From Employee Paychecks, Harm Employers and Taxpayers](#). TheTruthAboutPLAs.com, 10/24/09.

<sup>14</sup> See [The Dismal Future of Construction Industry Multi-Employer Pension Plans](#). TheTruthAboutPLAs.com, 4/23/12.

<sup>15</sup> See [Union Members Summary](#). BLS.gov, 1/27/12.

<sup>16</sup> The *Union Membership and Coverage Database*, available at [www.unionstats.com](http://www.unionstats.com), is an online data resource providing private and public sector labor union membership, coverage and density estimates compiled from the Current Population Survey (CPS), a monthly household survey, using BLS methods. The database, constructed by Barry Hirsch (Andrew Young School of Policy Studies, Georgia State University) and David Macpherson (Department of Economics, Trinity University), is updated annually. The most recent data lists the union membership of the private construction workforce.

<sup>17</sup> See [Government-Mandated Project Labor Agreements Harm Union Contractors and Tradespeople](#). TheTruthAboutPLAs.com, 8/24/11.

Additionally, the FRA should closely review other provisions in the PLA related to local hiring, discrimination, and small and disadvantaged business utilizations goals that may violate federal contracting regulations.<sup>18</sup>

If the FRA has not done so already, we urge the agency to refrain from approving the HSRA's PLA. It is bad public policy, it will not improve the economy and efficiency in federally assisted contracting, and it violates the spirit of a number of applicable federal laws, regulations, policies and related administrative practices.

ABC National appreciates the opportunity to share its perspective on government-mandated PLAs. We believe these anti-competitive and costly agreements should not be mandated on the California HSR project and other federally assisted construction projects across the United States. We encourage the FRA to direct the California HSRA to proceed in the spirit of fair and open competition. Doing so will help the FRA provide taxpayers with the best possible construction product at the best possible price.

If you or a member of your team would like to discuss this matter further, please do not hesitate to contact me. I look forward to hearing from you.

Sincerely,



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cc: Congressman Jeff Denham, House Rail Subcommittee Chair  
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<sup>18</sup> See [Analysis of the Phony Community Benefits and Other Provisions in the Union Project Labor Agreement for the First Segment of California's High-Speed Rail](#). LaborIssuesSolutions.com, 1/11/12.