



Insights: Alerts

Collaboration with Unions No Longer Required for Large-Scale Federal Construction Projects

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On January 20, 2024, the U.S. Court of Federal Claims struck down a 2022 Executive Order which required construction contractors to collaborate with unions in order to be considered for large-scale federal construction projects. In invalidating the Executive Order, the court agreed with the challenging contractors that the mandate runs afoul of the 1984 Competition in Contracting Act's (better known as "CICA") requirement for the federal contract bidding process to promote "full and open competition."

The Executive Order was issued by then-President Biden on February 4, 2022, and established a mandate that was finalized by the Federal Acquisition Regulatory Council in late 2023. The mandate required construction contractors who bid on federal construction contracts in excess of \$35 million to enter into a project labor agreement ("PLA") with a construction trades union or unions. A PLA is a type of binding, pre-hire collective bargaining agreement between an employer and a union which, among other things, contains common labor and dispute resolution terms.

When the mandate was issued, numerous industry groups vehemently opposed the measure. Among other things, the critics of the mandate were concerned about construction contractors being at a disadvantage in the bidding process if they declined to work with a union. In addition, critics emphasized that the Executive Order would significantly increase construction costs, and direct large-scale construction contracts to unionized firms and union labor, all at the expense of taxpayers and federal laws and regulations requiring fair and open competition.

The Court of Federal Claims agreed with the critics of the mandate. According to Judge Holte, "the agencies' implementation of the mandate – ignoring the agencies' own market research concluding project labor agreements would be anticompetitive – [and that] relying solely on executive order presidential policy is arbitrary and capricious." He further noted that, "the mandate stifles competition and violates the statutory directive that agencies must promote 'full and open competition' in federal procurements unless a statutory justification is properly invoked." In this particular case, according to Judge Holte, "the statutory justification that the federal government attempted to invoke – Section 3306 of the U.S. Code, which 'authorizes agencies to specify their needs' – was not strong enough. In other words, "the statute would need to be more direct and specific in order for the government to claim that it supports requiring contractors to enter a PLA."

Kilpatrick's Government Contracting and Public Procurement and Labor and Employment teams are here to answer any questions you have concerning this recent development and to provide compliance advice.

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