



Statement for the Record for Associated Builders and Contractors

Testimony of
Maurice Baskin, Esq.

Before the
House Oversight and Government Reform Committee
Subcommittee on Regulatory Affairs, Stimulus Oversight and
Government Spending

On
“Regulatory Impediments to Job Creation: The Cost of Doing Business
in the Construction Industry”

March 16, 2010

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TESTIMONY OF MAURICE BASKIN, ESQ.
BEFORE THE HOUSE SUBCOMMITTEE ON REGULATORY AFFAIRS,
STIMULUS OVERSIGHT AND GOVERNMENT SPENDING

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Chairman Jordan, Ranking Member Kucinich, and members of the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending:

Good afternoon and thank you for the opportunity to testify before you today on "Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry." In the interest of time, I request that my full written statement be included in the hearing record.

My name is Maurice Baskin. I am a partner in the Washington, D.C. law firm of Venable LLP. I have written widely about project labor agreements, known as PLAs, and I have been involved in many of the lawsuits and bid protests filed against government-mandated PLAs in recent years. I appear before you today on behalf of Associated Builders and Contractors (ABC). ABC is a national construction industry trade association representing 23,000 merit shop contractors, employing 2 million workers. ABC's membership is bound by a shared commitment to the *merit shop philosophy*. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts to the lowest responsible bidder through an open and competitive bidding process.

These same principles have been written into federal law. The Competition in Contracting Act (CICA) requires federal agencies to award procurement contracts on the basis of "full and open competition" and to draft all specifications and bid requirements so as to promote competition to the "maximum extent practicable."¹

Unfortunately, recent efforts of the Administration to make PLAs part of the federal

¹ 40 U.S.C. § 253(a)(1).

procurement process threaten to violate the longstanding Congressional mandate of full and open competition in federal procurement, at the expense of taxpayers. These actions are adding to the nation's budget deficits and should be fully investigated and brought before the House through this Subcommittee's oversight.

Government-Mandated Project Labor Agreements (PLAs)

Typically, a PLA is a contract awarded only to contractors and subcontractors that agree to recognize unions as the representatives of their employees on that job.² Other common features of PLAs are requirements that nonunion contractors use a union hiring hall to obtain workers; obtain apprentices exclusively through union apprenticeship programs; pay fringe benefits into union-managed benefit and pension programs; and obey unions' restrictive and inefficient work rules and job classifications.

Government-mandated PLAs discourage competition from the majority of our nation's contractors and subcontractors who are not unionized. According to official government statistics, 87 percent of construction workers currently choose NOT to belong to any labor unions.³ Rather than promoting full and open competition and maximizing the overwhelmingly non-union labor pool for government construction projects, government-mandated PLAs result in the award of federal construction contracts primarily to the much smaller group of unionized contractors and their union employees. Government-mandated PLAs are a corrupt form of favoritism in government contracting, having nothing to do with getting the best performance for the best price.

President Bush recognized the discriminatory and costly impact of government-mandated PLAs in 2001, and so he issued an Executive Order prohibiting the federal government from requiring or prohibiting contractors from entering into labor agreements.⁴ During the eight years of that Executive Order, there were no significant labor-related problems

² As defined in FAR 52.222-34, a "PLA" is "a collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project."

³ See bls.gov "Union Members Summary" (Jan. 2011).

⁴ Executive Order No. 13202 (2001).

or delays on any federal contracts.⁵ Nevertheless, in February 2009, President Obama signed his own Executive Order 13502 which revoked the Bush order and instead “encouraged” federal agencies to mandate PLAs on any federal construction projects exceeding \$25 million in costs. The FAR Council issued a rule to implement the Executive Order in April 2010.⁶ Since then, the Administration and its union allies have exerted constant pressure on federal agency officials to impose PLAs on federal projects.

ABC members and their employees have serious concerns regarding the legality of Executive Order 13502 and the subsequent Federal Acquisition Regulatory (FAR) Council rulemaking implementing it. Neither the President nor the FAR Council has the authority to override the statutory mandate of full and open competition in all federal procurements. No fact-based justification for the change in policy has ever been shown, leading to the widespread belief that the Administration’s policy is simply a political payback to organized labor. It is this kind of political favoritism that CICA was enacted to prevent.

Therefore, since 2009, ABC members have filed a series of bid protests with the Government Accountability Office (GAO) to stop unjustified PLA mandates from being imposed by federal agencies. In each case, the federal agency has withdrawn the PLA mandate rather than risk a finding of a procurement law violation. As a result of this process, we have learned that the government’s own market research has shown repeatedly that PLAs will not serve the interests of the taxpayers, will discourage competitive bidding and will increase costs. Yet, we continue to see threatened PLA requirements popping up on agency procurements around the country.

Most recently, the General Services Administration (GSA) has adopted a new procurement policy creating a completely unjustified “preference” in favor of PLAs.⁷ The GSA adopted its new policy without advance public notice or comment in violation

⁵ See Tuerck, Glassman and Bachmann, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem* (August 2009), available at <http://abc.org/plastudies>.

⁶ FAR Case No. 2009-005 (Apr. 13, 2010).

⁷ See GSA Public Buildings Service Procurement Instructional Bulletin 10-04 (Sept. 24, 2010).

of federal law. The GSA preference policy discriminates against non-union contractors and subcontractors without any justification. Public information on the government's own procurement website reveals that GSA authorized a multi-million dollar increase in the cost of construction on a project awarded last year, known as the Lafayette Building in Washington, D.C., specifically in order to implement a PLA on the project.⁸

Many reputable and independent studies have found that PLAs increase the cost of construction by as much as 18 percent when compared to similar projects in the same construction market not subject to a government-mandated PLA.⁹ Given that there is a finite amount of public construction spending that can be paid for by taxpayer dollars, then government mandates of PLAs will obviously result in reduced job creation within the construction industry. All this comes at a time when the U.S. Department of Labor's Bureau of Labor Statistics reports that the construction industry is suffering from an unemployment rate of 22 percent.

Government-mandated PLAs serve as a regulatory barrier to the growth of small businesses. They discriminate against minority- and women-owned businesses which are overwhelmingly non-union. They do nothing to increase construction employee wages on government contracts, because such wages are already set at high levels by the Davis-Bacon Act on all federal construction projects.¹⁰ Finally, in a disturbing number of cases, government-mandated PLAs have failed to deliver any of the benefits promised by their special interest supporters, and have instead become "problem" projects. I have personally monitored the public reports on the performance of government-mandated PLA projects for the last ten years.¹¹ The subtitle of my monograph on this subject - "The

⁸ See www.usaspending.gov.

⁹ See, e.g., *Annual Report to the Governor and Legislature, use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008* (NJDOl Oct. 2010), available at www.thetruthaboutplas.com; *Project labor Agreements – Impact Study for the Department of Veterans Affairs*, Rider Levett Bucknall (June 2009), available at www.thetruthaboutplas.com; Beacon Hill Institute, *An Economic Analysis of Government-Mandated PLAs: A Reply to Professor Kotler* (2009), www.beaconhill.org/BHISudies.

¹⁰ 41 U.S.C. § 3141.

¹¹ Baskin, *Government-Mandated Project Labor Agreements: The Public Record of Poor Performance* (2011 Ed.).

Public Record of Poor Performance” - should tell you what the record has been. Over and over again, where government-mandated PLAs have been imposed, there have been increased costs to taxpayers, reduced numbers of bidders, delays and defects in construction, worker safety problems, discrimination against minorities and women, and other law violations. An updated edition of this publication is about to be issued, and I will be happy to forward a copy to the Subcommittee.

ABC applauds the efforts of this Subcommittee to exercise oversight over the Administration’s wasteful and, we believe, unlawful push for PLAs on federal and federally assisted construction projects. We also ask that the members of this subcommittee support the Government Neutrality in Contracting Act (H.R. 735), introduced by Congressman John Sullivan (R-OK), which will prohibit the federal government once and for all from requiring contractors to execute a PLA as a condition of winning federal or federally-assisted construction projects. This legislation will result in more construction jobs, more infrastructure renewal, and a more accountable federal government.

Concerns with the Occupational Safety and Health Administration

ABC and its members understand that exceptional jobsite safety and health practices are inherently good for business. ABC contractors strive for zero-accident work sites. They believe in the importance of common-sense regulations that are based on solid evidence and sound scientific analysis, with appropriate consideration paid to implementation costs and input from employers. Unfortunately, recent regulatory proposals from the Occupational Safety and Health Administration (OSHA) have threatened to increase costs that could cripple job creation and stifle growth in the construction industry, while offering little in return in terms of worker safety.

ABC has expressed concerns about several recent OSHA proposals, some of which circumvent existing checks and balances within the federal regulatory framework. In 2010, OSHA proposals regarding noise standards as well as injury and illness reporting threatened to impose exorbitant costs on businesses large and small. For months, OSHA remained unable to explain publicly why such costly proposals were necessary, and in January, the agency withdrew the proposals to obtain more information from businesses.

While ABC appreciates that OSHA has agreed to reevaluate these proposals in light of business' concerns, it is worth reiterating that both proposals will impose substantial burdens on employers and impact job creation in the construction industry. Recent economic research found that the costs associated with OSHA's noise proposal alone could total in the billions.

In addition to its rulemaking agenda over the last two years, OSHA's emphasis on enforcement and de-emphasis on its long-successful cooperative efforts with employers has been a growing concern. ABC strongly believes that employers should be viewed as partners in achieving safer workplaces, and that OSHA's cooperative programs, including the Voluntary Protection Program (VPP), should not be de-funded or diminished.

Need for Federal Regulatory Reform

In general, ABC supports federal regulatory reform, including across-the-board requirements for departments and agencies to evaluate the risks, weigh the costs and assess the benefits of their regulations. Existing regulations should be reviewed periodically to ensure they are necessary, current and cost-effective. Furthermore, federal agencies must be held accountable for full compliance with existing rulemaking statutes and requirements when promulgating regulations.

ABC applauds the Oversight and Government Reform Committee for its continued interest in the issue of burdensome federal regulation. We appreciate this Subcommittee's attention to these important matters, and look forward to working with you on reforming burdensome regulations placed on the business community. Mr. Chairman, this concludes my formal remarks. I look forward to answering any questions that you may have.



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- U.S. District Court for the District of Maryland
- U.S. District Court for the District of Columbia
- U.S. Court of Appeals for the D.C. Circuit
- U.S. Court of Appeals for the First Circuit

Maurice Baskin is co-chair of Venable's Labor and Employment Law Practice Group.

Mr. Baskin focuses on all aspects of labor and employment law representing management. He counsels and litigates on behalf of employers dealing with union organizing, collective bargaining, wrongful discharge, employment discrimination, arbitration, government contracts, wage/hour law and "prevailing" wages, executive agreements, unfair competition, and personnel advice.

As attorney for Associated Builders and Contractors, Inc. (ABC) and many of its 25,000 members, Mr. Baskin has served as one of the chief legal advocates for the rights of construction employers. He also represents management in a number of other service sectors, including telecommunications, higher education, hospitality, security, nonprofit/trade associations and government contractors.

Mr. Baskin has defended the rights of employers at all levels of the federal and state courts, including service as lead counsel before the U.S. Supreme Court. He also regularly appears before administrative agencies dealing with both labor and employment issues.

Mr. Baskin is a frequent speaker and author on labor and employment law issues including independent contractor misclassification, government contracts, changes to disability law, hiring and firing, wage and hour laws, and employee verification.

Mr. Baskin has regularly been recognized as one of the region's top labor and employment lawyers in *Super Lawyers*, *Best Lawyers in America* and the *Washington Business Journal*. He is listed by the Labor Relations Institute as one of the Top 100 Labor Attorneys in the United States. He is AV® Peer-Review Rated by *Martindale-Hubbell*.

3/15/2011

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U.S. Court of Appeals for
the Third Circuit

U.S. Court of Appeals for
the Fourth Circuit

U.S. Court of Appeals for
the Sixth Circuit

U.S. Court of Appeals for
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U.S. Court of Appeals for
the Ninth Circuit

U.S. Court of Appeals for
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EDUCATION

J.D., *with honors*, University
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1978

Senior Editor, Law
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Moot Court Winner and
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B.A., *magna cum laude*,
Harvard University, 1975

Committee on Oversight and Government Reform
Witness Disclosure Requirement - "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: MAURICE BASKIN, GENERAL COUNSEL, ASSOC. BUILDERS & CONTRACTORS

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2008. Include the source and amount of each grant or contract.

NONE APPLICABLE (N/A)

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

MR. BASKIN IS TESTIFYING ON BEHALF OF ASSOCIATED BUILDERS and CONTRACTORS, INC (a 501-c(6) organization) as its GENERAL COUNSEL.

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2008, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

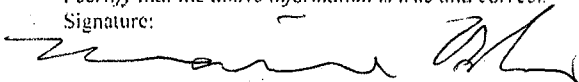
source: U.S. DEPARTMENT OF LABOR

amount: \$624,300.00

grant name: "ADVANCING REGISTERED APPRENTICESHIP INTO THE 21ST CENTURY"

date: AUGUST 12, 2009

I certify that the above information is true and correct.
Signature:



Date: MARCH 15, 2011