



**Department of Energy
Acquisition Regulation**

**No. 2002-08
Date 12/02/02**

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Procurement Executives of DOE and NNSA.

Subject: Project Labor Agreements

References:

Executive Order 13202, dated February 17, 2001
Executive Order 13208, dated April 6, 2001
FAR 36.202

When is this Acquisition Letter (AL) Effective?

This AL is effective on the date of issuance.

Note: Executive Order 13202, as amended by Executive Order 13208, was the subject of litigation in the federal courts. The Federal Acquisition Regulation (FAR) and agency implementation was suspended pending resolution of the litigation. On July 12th, the U.S. Court of Appeals for the D.C. Circuit upheld Executive Orders 13202 and 13208 in its decision in Building and Construction Trades Dep't, AFL-CIO v. Allbaugh. On November 22, 2002, Federal Acquisition Circular 2001-10 was published in the Federal Register (67 FR 226). It included a final rule which terminates the stay and adopts the May 16, 2001 interim rule as final without change. The final rule was effective on November 22, 2002.

When does this AL Expire?

This AL remains in effect until superseded or canceled.

Who is the Point of Contact?

Contact Robert M. Webb of the Office of Procurement and Assistance Policy at (202) 586-8264, or via e-mail at Robert.Webb@pr.doe.gov.

Visit our website at www.pr.doe.gov for information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

The purpose of this AL is to provide guidance for implementation of Executive Orders 13202 and 13208, issued earlier this year. The guidance describes the Executive Orders' application to and provides a clause for use in the Department of Energy's (DOE's) management and operating and other major facilities contractors. It also provides a model clause that may be used to implement the Executive Orders in contracts for construction management services.

What is the Background?

On February 17, 2001, President Bush issued Executive Order 13202 establishing the policy of the Administration with regard to the use of project agreements ^{\1} by Federal agencies and their construction managers for Federal construction projects. An amendment to Executive Order 13202, Executive Order 13208, was issued on April 6, 2001.

Executive Order 13202 requires that agencies and their construction managers remain neutral towards project labor agreements. That is to say, for all Federal construction contracts awarded after the date of the Executive Order, neither the Federal agency for whom the construction is being performed nor its construction manager, if one is employed, may require the negotiation or execution of a project labor agreement. By the same token, they cannot prohibit a construction contractor from implementing a project labor agreement. Executive Order 13202 provides that the head of the agency, generally, may exempt construction contracts from the Order's requirements in order to avert an imminent threat to public health or safety or to serve the national security. Additionally, Executive Order 13208 authorizes the head of an agency to exempt a particular construction project awarded after the date of Executive Order 13202 where a project labor agreement for that project was in effect before that date. The Executive Orders are implemented in the Federal Acquisition Regulation at 36.202.

DOE has allowed the use of project labor agreements over many years. It has required them in four instances: Hanford, the Nevada Test Site, Rocky Flats, and the Idaho National Engineering and Environmental Laboratory. Generally, when the Department has required project labor agreements, all work at the site is subject to the agreement, and the agreement is known within DOE as a Site Stabilization Agreement.

DOE is unique in that most, if not all, of the construction that takes place for the Department takes place under the auspices of contractors that manage and operate the DOE sites. Project labor agreements normally run for the duration of a project. In DOE where a Site Stabilization Agreement is in effect, the expectation has been that the agreement will continue as long as there is a DOE presence at the site.

Currently, there are six other project labor agreements in effect for Departmental projects or sites. These are not the result of DOE direction, but have resulted from decisions of DOE contractors or subcontractors.

^{\1}- In DOE, the term "project agreements," means project labor agreements and includes Site Stabilization Agreements.

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I. How will Executive Orders 13202 and 13208 be Implemented Generally?

Executive Order 13202 requires that agencies and their construction managers remain neutral towards project labor agreements. Therefore, for all Federal construction contracts awarded after February 17, 2001, neither the Federal agency for whom the construction is being performed nor its construction manager, if one is employed, may require or prohibit the negotiation or execution of a project labor agreement. Additionally, Executive Order 13208 authorizes the head of an agency to exempt construction contracts awarded after February 17, 2001, when a project labor agreement for that construction project was required or was in effect as of the date of Executive Order 13202 and at least one other related construction contract had been awarded as of that date or upon a finding that special circumstances require exemption to avoid imminent threat to health, safety, or national security.

The Federal Acquisition Regulation (FAR) implementation of the Executive Orders is contained at FAR 36.202, but that coverage does not provide any implementing contract clauses. In order to comply with Executive Orders 13202 and 13208, contracting officers should insert the model clause included with this AL as Attachment 1 in contracts for construction management services.

II. Do Executive Orders 13202 and 13208 Apply to the Activities of DOE's Major Facilities Contractors, Including DOE's Management and Operating Contractors?

DOE's major site and facilities contracts are characterized by their broad scopes of work and the close relationship between the agency and the contractor. Most are national laboratories, including Federally Funded Research and Development Centers, special production facilities, or sites whose mission consists largely of clean up leading to closure. It is under these contracts that substantially all of the construction of DOE-owned facilities takes place.

DOE management and operating and other major facilities contractors have varying roles with regard to the construction activities on their sites.

- Generally, DOE management and operating contractors are required to subcontract for construction. Under some limited circumstances, they may be constructors, i.e., perform at least a portion of the construction activity with their own forces.
- These contractors may perform what is normally considered construction management services, but they are not hired as construction managers.
- They may also subcontract for construction management services; or they may subcontract directly for construction.

- If the major facilities contractor hires a construction manager, that construction manager might subcontract for construction.

When the management and operating and other major facilities contractors act as a construction manager, the Executive Orders prohibit them from requiring or prohibiting project labor agreements. In those projects for which these contractors act as the constructor, they retain the right to require or, not inconsistent with governing law, prohibit project labor agreements for that particular construction project.

In order to comply with Executive Orders 13202 and 13208, contracting officers should insert the model clause provided with this AL as Attachment 2 in management and operating contracts and other major facilities management contracts. Because of the unusual nature of these contracts, the next section discusses the point in time when the model clause should be incorporated.

III. For Major Facilities Contracts Already Awarded, when do the Executive Orders Apply?

Executive Order 13202 states that it does not affect contracts awarded prior to its effective date. Executive Order 13208 authorizes the agency head to exempt contracts for a particular construction project where, with respect to that construction project, a project labor agreement was in effect or had been required and at least one construction contract subject to the project labor agreement had been awarded as of February 17, 2001.

Where a new contract is solicited and awarded, that contract will be subject to the Executive Orders, unless the Cognizant Secretarial Officer (CSO) seeks exemption. See IV *infra*. Additionally, some major facilities contracts are extended noncompetitively in five year increments with a major renegotiation of the terms. The requirement of the Executive Orders should be applied at the noncompetitive extension of these contracts. The Executive Orders are made to apply by the insertion of the clause, included as Attachment 2.

Alternatively, if the contract has been competitively awarded with an option to extend the period of performance, the exercise of the option does not equate to the award of a new contract, and the Executive Orders do not apply. They also do not apply at the annual fee negotiation or other similar points.

IV. How are Requests for Exemption to be Processed?

Executive Order 13202 provides that the head of the agency may exempt certain agreements under special circumstances, such as, to avert an imminent threat to public health or safety or to serve the national security.

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Additionally, Executive Order 13208 provides that the head of the agency may exempt construction projects where a project labor agreement was required or negotiated and at least one construction contract was awarded as of the effective date of Executive Order 13202, February 17, 2001.

Should the need for an exemption from application of the Executive Orders arise, the Manager of the affected operations office should forward a request for exemption with supporting rationale, to the CSO for concurrence. The CSO must acquire concurrences prior to forwarding the request to the Secretary for approval, by forwarding the request:

- (1) For DOE contracts or projects, to the Office of Contract Management (ME-621) of the Office of Procurement and Assistance Management and to the Office of General Counsel; or
- (2) For National Nuclear Security Administration (NNSA) contracts or projects, to the Director, Office of Procurement and Assistance Management, NNSA, and to the General Counsel, NNSA,

Attachment 1- Clause for Use in Contracts for Construction Management

Contracting Officers should include the following model clause in any solicitation and contract for construction management services.

Open Competition and Labor Relations on Federal Contracts (DEC 2002)

“Labor organization,” as used in this clause, shall have the same meaning it has in 42 U.S.C. 2000e(d).

(a) The Contractor shall not-

- (1) Require bidders, offerors, contractors, or subcontractors to enter into or adhere to nor prohibit those parties from entering into or adhering to agreements with one or more labor organizations, *i.e.*, project labor agreements, for this or other related construction project(s); or
- (2) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for refusing to become or to remain signatories or to otherwise adhere to project labor agreements for this or other related construction project(s).

(b) Nothing in this clause shall limit the right of bidders, offerors, contractors, or subcontractors to voluntarily enter into project labor agreements for this or related construction projects.

Attachment 2- Clause for Use in Contracts for Management and Operating and other Major Facilities Contracts

Contracting Officers should include the following model clause in any solicitation and contract for the management or operation of a DOE site or facility.

Open Competition and Labor Relations under Management and Operating and Other Major Facilities Contracts (DEC 2002)

“Labor organization,” as used in this clause, shall have the same meaning it has in 42 U.S.C. 2000e(d).

(a) Unless acting in the capacity of a constructor on a particular project, the Contractor shall not-

- (1) Require bidders, offerors, contractors, or subcontractors to enter into or adhere to nor prohibit those parties from entering into or adhering to agreements with one or more labor organizations, *i.e.*, project labor agreements, that apply to construction project(s) relating to this contract; or
- (2) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for refusing to become or to remain signatories or to otherwise adhere to project labor agreements for construction project(s) relating to this contract.

(b) When the Contractor is acting in the capacity of a constructor, *i.e.*, performing a substantial portion of the construction with its own forces, it may use its discretion to require bidders, offerors, contractors, or subcontractors to enter into a project labor agreement that the Contractor has negotiated for that individual project.

(c) Nothing in this clause shall limit the right of bidders, offerors, contractors, or subcontractors to voluntarily enter into project labor agreements.