

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION**

Woodrow Wilson Bridge
Project Labor Agreement Request

DECISION

The Federal Highway Administration (FHWA) has reviewed the proposed Project Labor Agreement (PLA) submitted to FHWA by the Maryland Department of Transportation (MDOT or Maryland) on August 20, 2001, as well as Maryland's responses to requests for further information pursuant to the Guidance and the Standards and Information Request (these documents shall hereafter collectively be referred to as the PLA Standards) issued by FHWA on October 5, 2001. FHWA has also reviewed materials submitted by the Associated Builders and Contractors (ABC), the Associated General Contractors (AGC) and the Building and Construction Trades Department, AFL-CIO (BCTD). Based upon that review and in consideration of the PLA Standards, FHWA has determined that Maryland has failed to demonstrate that its request for the use of a PLA is justified under the PLA Standards. Therefore, as discussed more fully herein, FHWA cannot concur in the use of the proposed PLA on the superstructure contract for the Woodrow Wilson Memorial Bridge Replacement Project (Project), for which the bids are now scheduled to be opened on December 13, 2001.

INTRODUCTION

The Woodrow Wilson Memorial Bridge (Bridge) is the only part of the Interstate System that is owned by the Federal Government. In the Woodrow Wilson Memorial Bridge Authority Act of 1995, Title IV of National Highway System Designation Act of 1995, Pub. L. 104-59, 109 Stat. 568, (November 25, 1995), as amended by Section 1116 of the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107, 158-160 (June 9, 1998) (Bridge Act), Congress laid out a plan for transferring the Federal government's ownership of the Bridge to a regional authority or one or more of the jurisdictions in the region. An ownership agreement and financial plan setting forth the manner in which this transfer will take place as the Project is being constructed was signed by all parties and approved by the U. S. Secretary of Transportation on September 7, 2001. Under the Bridge Act, Congress has made more than \$1.5 billion of special Federal funding available to Maryland, Virginia, and the District of Columbia toward the construction of a replacement bridge and upgrading four interchanges, two on each side of the Potomac River. The bridge component of the Project, of which the superstructure contract is a part, is eligible for 100% Federal funding.

As part of the ownership agreement, Congress required strict cost controls in the form of a financial plan. FHWA, which is charged by Congress with implementing the Project, has the responsibility of

ensuring that the terms of the ownership agreement and financial plan are carried out and that the new Bridge is constructed as efficiently as possible, especially in light of the progressively deteriorating condition of the existing bridge and the serious capacity and operational deficiencies of the current structure. Specifically, it has been estimated by FHWA engineers that the current bridge may be so deteriorated by 2005 that Maryland and Virginia would need to consider, among other options, restricting access to the bridge by the large number of trucks that regularly utilize the bridge as they move cargo north/ south along Interstate I-95. Under the best scenario the first span of the new bridge will not be operational until 2004. Given these facts and the potential for significant disruptions of interstate trucking commerce and other potential public disruptions, timely and cost efficient completion of the project is of paramount importance to FHWA.

In addition to the above special concerns regarding the Project, Congress also required that the Project be built in accordance with the procedures generally applicable to Federal -aid highway projects under Chapter I of title 23, U. S. C., including, but not limited to, 23 U. S. C. §§ 106 and 112. See §412(b) of the Bridge Act. Thus, in reviewing the Project plans, specifications, estimates, authorizing Federal funds, and providing project oversight, FHWA must apply the regulations and policies that apply to Federal-aid highway projects in general, as well as comply with the mandates of the Bridge Act. Under these regulations, FHWA must approve the bid specifications and a State may not materially change the bid specifications without again obtaining FHWA approval. See 23 C. F. R. §635.112. The required use of a PLA, or an addendum containing such a required PLA, is a bid specification for a federally funded highway construction project that is subject to FHWA approval. *Id.*

A PLA is a "pre-hire" collective bargaining agreement that is negotiated between an employer that has control over a particular construction project and a group of unions in order to meet the specific labor needs of that project. The PLA binds all contractors and subcontractors to a variety of provisions. PLAs are typically justified as a way to promote labor-management peace and stability on large construction projects with substantial financial considerations and long-term construction implications. They are also used to obtain the cooperation of organized labor in retaining the workers needed for the construction project.

The State of Maryland originally submitted a request to the FHWA to require a PLA on the Woodrow Wilson Bridge Project in January 2001. Maryland's request was denied by FHWA following the President's issuance of Executive Order 13202, 66 Fed. Reg. 11225 (February 22, 2001). Executive Order 13202 prohibits federal agencies or recipients of federal funding from requiring or prohibiting PLAs in the bid specifications or other authorizing documents for construction contracts. Because the terms of the Executive

Order precluded approval of Maryland's request to require the PLA, FHWA did not at that time attempt to analyze the PLA under its own pre-existing legal authorities.

Maryland renewed its request to FHWA on August 20, 2001, after the U. S. District Court for the District of Columbia issued a preliminary injunction enjoining the FHWA from enforcing Executive Order 13202, as amended by Executive Order 13208, 66 Fed. Reg. 18717 (April 22, 2001), with respect to construction contracts for the Project. *Building and Construction Trades Department, AFL-CIO, et al. (BCTD) v. Allbaugh, et. al.*, Civ. Action No. 01-0902(EGS) (D. D. C., Aug. 13, 2001). It is this August 20, 2001 Project Labor Agreement that is before the FHWA for its review and approval.

A. BACKGROUND

1. Executive Order 13202

Executive Order 13202, adopted in February 2001, sets forth the President's policy with regard to the use of PLAs on direct federal contracts and federally-assisted contracts administered by States and localities. The prior administration's policy on PLAs, set forth in a Presidential Memorandum, "The Use of Project Labor Agreements for Federal Construction Projects", 1997 WL 309842 (June 5, 1997), expired, by its terms, on January 20, 2001. Likewise, procedures adopted by DOT to implement the Presidential Memorandum expired on that same date. See Department of Transportation (DOT) Guidance on the Use of Public Project Labor Agreements on Federal Construction Projects and DOT-Assisted Construction Projects (March 19, 1999). Section 1 of Executive Order 13202 provides that federal agencies must ensure that direct federal contracts do not "require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or related construction project(s)." 66 Fed. Reg. 11,225(§ 1 (a)). Section 3 of the Executive Order provides that "[t] o the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects" shall ensure that neither the bid specifications nor project agreements for construction projects contain any of the requirements or prohibitions of Section 1 of the Executive Order. In other words, the Executive Order mandated that federal agencies must ensure that their grantees or recipients do not require or prohibit the use of a PLA on any federally funded project. The Woodrow Wilson Bridge Project is a project that was subject to the requirements of the Section 3 of the Executive Order because the funds authorized for its construction are Federal-aid funds, the expenditure of which is authorized by the Bridge Act.

2. The BCTD v. Allbaugh Litigation

On April 26, 2001, the Building and Construction Trades Department, AFL-CIO (BCTD), together with the Contra Costa [California] Building and Construction Trades Council and the City of Richmond, California filed suit in the U. S. District Court for the District of Columbia against various federal agencies, including the Department of Transportation, seeking to enjoin the implementation and enforcement of Executive Order 13202. Plaintiff BCTD is the parent organization for more than 300 local building and construction councils in the United States. In that capacity, BCTD, together with Parsons Constructors, Inc., Maryland's construction manager for the Project, entered into the initial January 2001 PLA for the Woodrow Wilson Bridge Project that was rejected by FHWA in February 2001. Although Maryland was a party to the PLA through its agent, Parsons Constructors, it did not intervene in the litigation, but instead filed an amicus brief in support of BCTD and its claims regarding the Executive Order.

BCTD contended that the President lacked the constitutional and statutory authority to adopt the Executive Order and that the Order was otherwise preempted by provisions of the National Labor Relations Act. On August 13, 2001, the district court issued a preliminary injunction enjoining the FHWA from enforcing Executive Order 13202 with respect to construction contracts for the Project. After further briefing by the parties and a hearing on cross motions for summary judgment, the court,

on November 7, 2001, entered an Order permanently enjoining the application of Executive Order 13202. On November 29, 2001, the government filed a notice of appeal of this decision with the U. S. Court of Appeals for the District of Columbia Circuit.

3. Current Status of the Project

Throughout the course of the litigation, the United States and the FHWA repeatedly advised the court, the parties to the case, and particularly the State of Maryland, that enjoining the Executive Order would require FHWA, in reliance upon its general statutory authority in Title 23, to develop and adopt new standards for evaluating a proposed PLA for the Woodrow Wilson Bridge since FHWA's previous PLA standards, as noted, had expired on January 20, 2001. The court and the parties were also advised, in a sworn affidavit, that once those new standards were developed, which could take considerable time, a further period of time would be required to apply the standards in evaluating any PLA submitted to FHWA. After the district court issued its preliminary injunction, BCTD and Maryland revised their prior PLA and submitted it to FHWA for its review and approval on August 20, 2001. As noted, on October 5, 2001, FHWA adopted its new PLA Standards and Maryland filed an initial response to those Standards on October 25, 2001.

In the meantime, Maryland initially advertised the superstructure contract on August 14, 2001 with a bid opening date of October 18, 2001. No PLA was included in the August 13 bid specifications. After receiving requests from several major contractors for an extension of the bid opening date, Maryland requested and received an extension of the bid opening date until November 29, 2001. Maryland subsequently requested a second extension to December 13, 2001 and FHWA granted Maryland's request.

B. FHWA'S REVIEW AUTHORITY

The Federal Highway Administration's authority to review the State of Maryland's proposed Project Labor Agreement on the Woodrow Wilson Bridge Project is derived from both statutory and regulatory sources that are specifically applicable to the Federal-aid programs of the Federal Highway Administration. The Woodrow Wilson Bridge Act expressly requires the application of these provisions to the Woodrow Wilson Bridge construction project.

1. Generally Applicable Statutory Authority

The Woodrow Wilson Bridge Act directs that the funds authorized for the Project shall be available for obligation in the same manner as if they were apportioned under Title 23 of the United States Code, thereby requiring utilization of the funding approval procedures required on all Federal-aid highway projects as set forth in 23 U. S. C. §§ 106 and 112. See Section 412(a)(2) of the Woodrow Wilson Memorial Bridge Authority Act of 1995, Title IV of National Highway System Designation Act of 1995, Pub. L. 104-59, 109 Stat. 568, 627 (November 25, 1995), as amended by Section 1116 of the Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107, 158-160 (June 9, 1998).

The basic review and approval provision for all Federal-aid highway projects is found in Section 106 of

Title 23 of the United States Code. It provides, in part, as follows:

Sec. 106. Project approval and oversight

(a) In General.

(1) Submission of plans, specifications, and estimates. Except as otherwise provided in this section, each State transportation department shall submit to the Secretary for approval such plans, specifications, and estimates for each proposed project as the Secretary may require.

(2) Project agreement. The Secretary shall act on the plans, specifications, and estimates as soon as practicable after the date of their submission and shall enter into a formal project agreement with the State transportation department formalizing the conditions of the project approval. (3) Contractual obligation. The execution of the project agreement shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project.

(4) Guidance. In taking action under this subsection, the Secretary shall be guided by section 109.

Thus, section 106 requires that each State submit to the FHWA the plans, specifications and estimates for each Federal-aid highway project for which it expects to receive federal funds. The term "project", under FHWA regulations and procedures, can encompass an entire project, such as the Woodrow Wilson Bridge Project, or it may refer to a single contract such as the superstructure contract. A requirement by a State that a PLA be used on the project must be included in the bid specifications for the project. The required use of a PLA also could have an impact on the estimates for the project cost. After receiving the plans, specifications and estimates for the project, the FHWA reviews them and, if they are satisfactory, enters into a formal agreement, known as a project agreement, which "formalizes the conditions of project approval". 23 U. S. C. § 106 (a) (1). If approved, one of those conditions would be a bid specification requiring the use of a project labor agreement.

It is only upon the execution of the project agreement and FHWA's approval of its terms and conditions that the federal government becomes legally obligated to pay the federal share of the costs of the project. 23 U. S. C. § 106 (a) (2). Significantly, nothing in 23 U. S. C. § 106 limits FHWA's authority to review and approve bid specifications to those specifications that deal solely with cost. This is confirmed also by the reference in Section 106 (a) (4) to the directive that the FHWA's review and approval be guided by 23 U. S. C. § 109, encompasses a variety of non-cost considerations.

A second source of statutory authority is contained in 23 U. S. C. § 112. It provides, in part:

Sec. 112. Letting of contracts

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless the Secretary approves some other method. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Bidding Requirements.

(1) In general. Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by

contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

* * * *

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

Thus, unless the State demonstrates that some other method is more cost effective, Section 112 requires the FHWA to withhold approval for a Federal-aid contract unless the contract is awarded through competitive bidding. Section 112 reflects a Congressional judgment that, unless the state demonstrates otherwise, the efficient use of Federal funds afforded by competitive bidding is to be the overriding objective for Federally funded highway projects. FHWA is directed by this section to require such plans and specifications as well as bidding methods so as to be effective in securing competition. Accordingly, FHWA must evaluate all proposed specifications that could affect the interest of bidders to determine if the proposal provides for a competitive environment or if it provides a more cost effective way to complete the project.

Section 112 applies to all highway projects using Federal-aid highway funds "where construction is to be performed by the State transportation department or under its supervision." The current version of section 112(b), which provides that "construction of each project . . . shall be performed by contract awarded by competitive bidding," has governed the process for awarding Federal-aid highway contracts since 1954, when the Federal-aid Highway Act of 1954 was amended to require competitive bidding, "unless the Secretary finds some other method is in the public interest." P. L. 83-350, Sec. 17. The Surface Transportation Assistance Act of 1982, P. L. 97-424 (1983), strengthened the competitive bidding requirement by eliminating the public interest exception and imposing the current requirement that departures from competitive bidding be justified by a demonstration by the State highway agency that the alternative is more cost effective. The legislative report accompanying the amendment reflects the concern of Congress that cost effectiveness be the only criteria by which to award contracts to

responsible bidders for highway projects funded by the Federal government. See H. Rep. 555, 97 th Cong., 2d Sess. 11 (1982). The 1982 amendments therefore make it clear that the efficient use of Federal funds is the touchstone by which the legality of State procurement rules for Federally funded highway projects are to be tested.

2. Regulatory Authority

FHWA has implemented the fundamental statutory authority described above, and a number of other specific statutory authorities, through regulations. Specific statutory authorities and the associated regulations that are relevant to a review of a proposed PLA include: (1) competitive bidding, small businesses, and disadvantaged businesses, 23 U. S. C. § 112 (b)(1), (c); 23 U. S. C. § 140; 23 U. S. C. § 304; 23 C. F. R. § 635.104(a); 23 C. F. R. § 635.107; 23 C. F. R. § 635.110(b); 23 C. F. R. § 635.112(d); (2) employment discrimination, local hiring, and labor, 23 U. S. C. § 140; 23 C. F. R. § 635.117(b) and (c); 23 C. F. R. § 230.109 and Appendix A. 8; (3) health and safety, 23 C. F. R. 635.108; (4) union involvement in the project, including labor referral practices, 23 C. F. R. § 230.409 (e)(4), (5), and (g)(viii); 23 C. F. R. § 230.415(c)(ii); and (5) project costs, including quality assurance and cost effectiveness, 23 U. S. C. § 106(e); 23 U. S. C. § 112(a); 23 C. F. R. § 635.104, 23 C. F. R. Part 627, 23 C. F. R. § 637.205. In addition, FHWA's regulations provide authority to request any necessary information and to fashion the standards it will use in evaluating Maryland's proposed PLA. For example, FHWA's general information regulation, 23 C. F. R. § 1.5, allows FHWA to request any information it deems necessary in administering the Federal-aid highway program, including the Woodrow Wilson Bridge project. As a recipient of federal funds, Maryland is legally required to furnish such information. FHWA also has the authority to require the State to provide whatever information may be necessary to ensure that the use of a PLA would conform to applicable Federal and State law, current FHWA regulations, and FHWA policies and procedures. 23 C. F. R. § 1.9(a).

Thus, FHWA regulations assure that the agency has access to factual evidence that is necessary to conduct a real analysis of the impacts of any proposed PLA on areas specifically addressed in FHWA's statutes and regulations.

C. THE PLA STANDARDS

Utilizing its authority under Title 23 of the United States Code and the implementing regulations cited above, and in accordance with what it had previously advised the court and the parties, FHWA developed standards for evaluating Maryland's proposed PLA, together with an information request and guidance for FHWA officials. This material, referred to herein as the PLA Standards, was sent to Maryland on October 5, 2001. A complete copy of the PLA Standards and the FHWA guidance is attached as Exhibit A.

Maryland was asked to provide a response demonstrating compliance with criteria in the PLA Standards as follows:

1. The PLA that Maryland seeks to use must include the following provisions or requirements:

- a. The PLA must allow all contractors and subcontractors, including small and disadvantaged businesses, wishing to compete for contracts and subcontracts on the project to do so, without discrimination against contractors, subcontractors, or employees based on union or nonunion status.
 - b. The PLA must require that the selection of labor to be employed by any contractor or subcontractor shall be made without regard to race, color, religion, sex, national origin, age or disability.
 - c. The PLA may not impede free and open competition in the bidding process or have a potential to decrease competition in bidding for any construction work on the Project.
 - d. The PLA may not limit a contractor's or subcontractor's selection of labor to union only members nor impose a local hiring requirement. The contractor or subcontractor must be able to select the employees who work on the job.
 - e. The PLA must conform to all applicable Federal, State and local statutes, regulations, and ordinances in all jurisdictions where the PLA might be utilized. This includes not only Maryland requirements, but also laws and ordinances in Virginia and the District of Columbia, to the extent that such laws and ordinances apply.
2. In order to ensure that the Maryland PLA is an effective vehicle to achieve the delivery of a quality work product on time and within budget, Maryland must provide adequate information, including specific reference to its past experience or other convincing evidence, regarding the following factors:
- a. Consideration and analysis of the makeup of the current work force in the area to determine if it can continuously provide, when required, a reliable source of skilled, experienced workers in all crafts needed on the job site for the duration of the Project.
 - b. The potential for a benefit to the Project from uniform work rules and working conditions and established procedures for resolving labor disputes with no strike - no lockout protections.
 - c. Whether the PLA provides prompt and mutually binding procedures for resolving labor disputes arising during the Project.
 - d. Whether the PLA provides other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety and health.
 - e. Whether the PLA now being proposed might interfere with, delay, or otherwise disrupt any Project contract or subcontract not subject to the PLA.

- f. How and to what degree the PLA will advance the recipient's procurement interest and DOT's interest in cost, efficiency, and quality.
3. Maryland must submit the following documentation and information in support of its request to add the PLA to the Bridge superstructure contract:
 - a. The proposed PLA.
 - b. A memorandum showing how the PLA complies with each of the conditions in paragraph 1(a)-(e) above.
 - c. A report and analysis that provides the additional information required in paragraphs 2 (a)-(f) above. The report must include data about the benefits and possible problems of using a PLA on the Project in Maryland. As part of this report, Maryland DOT should examine all large or complex construction contracts (over \$10,000,000 or a construction period greater than two years) it has let over the last five years, whether Federally funded or not, and provide the following information with regard to those contracts:
 - i. How many of these contracts included a PLA imposed by State specifications or involved a voluntary PLA (that is, a PLA based on an agreement between contractor or subcontractor and a labor union).
 - ii. Identify any costs overruns caused by the presence or absence of a PLA on these contracts or projects.
 - iii. Identify any cost savings resulting from the presence or absence of a PLA on these contracts or projects.
 - iv. Identify any instances of labor unrest that the State has experienced in connection with any of these contracts or projects and the benefits that the use of PLA on those projects may have provided to the State.
 - v. Describe the similarities and differences, if any, between the PLAs utilized by the State on prior projects and the PLA that has been submitted to FHWA for its review and approval on the Woodrow Wilson Bridge Project.

The PLA Standards direct Maryland to demonstrate that the PLA it proposes to use will not be contrary to the important policy considerations that Congress set forth in Title 23 U. S. C., i. e., protecting the competitive bidding process, encouraging open access to all potential bidders and workers seeking to participate in Federal-aid highway work, and ensuring the efficient and cost effective use of Federal-aid highway funds. These concerns are amplified and reinforced by the clear emphasis on cost control in the Bridge Act. The governing law and the PLA Standards therefore seek factual evidence that these concerns will be met, rather than unsupported argument. Among other things, the PLA Standards request that MDOT provide specific information regarding its experience with the use of PLAs on

MDOT or other State of Maryland construction projects and specific information that supports the assertion that the use of a PLA would not jeopardize the estimated cost or the completion schedule of the Project.

In summary, under the statutory authorities governing federal-aid projects and the PLA Standards, FHWA must determine whether MDOT has demonstrated that (1) the proposed PLA contains no provisions contrary to Federal law and regulations, (2) the proposed PLA promotes competition and cost-effective bidding, and (3) the proposed PLA is consistent with FHWA's responsibility to ensure the timely and economic completion of the overall Project.

D. MARYLAND'S RESPONSE TO THE PLA STANDARDS

As noted above, FHWA issued the PLA Standards on October 5, 2001. Maryland responded to the specific Standards in a letter dated October 25, 2001 (" Maryland Response"). That response addressed each of the enumerated standards set forth above and also relied upon three studies performed by Parsons Constructors for the state: (1) the " Evaluation and Analysis of the Labor Relations Strategy for the Woodrow Wilson Bridge Project" (" WWB PLA Study"), dated November 2000; (2) the "Woodrow Wilson Bridge Project Labor Agreement 'Final Report and Recommendation' ", dated January 19, 2001 and submitted by the State to FHWA with its initial PLA in January 2001; and (3) an update of the January study entitled " Evaluation of A Labor Relations Strategy For the Woodrow Wilson Bridge Construction, 2001 Report and Recommendations Update" (" Update"). Maryland's Response also contended that FHWA already had sufficient information with which to evaluate the PLA. Maryland provided three additional submissions to FHWA, an initial letter dated October 13, 2001 and two additional responses subsequent to its October 25 th response, one dated November 13, 2001 and the other dated December 4, 2001. In these subsequent submissions to FHWA, Maryland provided supplemental information to FHWA and it also challenged FHWA's authority under Title 23 to review the PLA. Maryland's responses are discussed below.

E. THIRD PARTY SUBMISSIONS

In addition to the responses submitted by the State of Maryland, FHWA has also received information from other interested parties. On November 2, 2001, FHWA officials met with representatives of the Associated Builders and Contractors (ABC) who had requested a meeting with the agency in order to express their views on the subject of PLAs. They provided FHWA with a written submission on November 16, 2001. (" ABC Letter").

FHWA met with BCTD on November 14, 2001 and invited them to address the same issues discussed with ABC. BCTD responded on November 19, 2001. (" BCTD Letter"). Finally, FHWA also asked the Associated General Contractors (AGC) to address these same issues, which it did in a letter dated November 26, 2001. (" AGC Letter"). ABC and AGC have opposed the use of a PLA on the Woodrow Wilson Bridge whereas the BCTD offers views and arguments in support of the use of a PLA. FHWA had a telephone conference call with officials from the State of Maryland on November 27, 2001. Maryland sent FHWA a written response as a result of that call on December 4, 2001. All of these written submissions have been reviewed as part of the FHWA's decision in this matter.

F. FHWA'S DECISION

General Overview

It is well-settled that Congress, pursuant to its taxing and spending powers under Article I, section 8, of the Constitution, is authorized to disburse Federal funds to the States for particular programs and to "fix the terms on which it shall disburse federal money." *Pennhurst State School and Hospital v. Halderman*, 451 U. S. 1, 17 (1981). Accordingly, when Congress elects to distribute Federal funds to States, it may attach conditions to their distribution. So long as the conditions are valid and clearly expressed, "[r] equiring States to honor their obligations voluntarily assumed as a condition of federal funding ... simply does not intrude on their sovereignty." *Bell v. New Jersey*, 461 U. S. 773, 790 (1983). "If the conditions [are] valid, the State [has] no sovereign right to retain [federal] funds without complying with those conditions,". *Id.* at 791. In *Oklahoma v. U. S. Civil Service Commission*, 330 U. S. 127 (1947), the Court stated "[w] hile the United States is not concerned with, and has no power to regulate, local political activities of State officials, it does have the power to fix the terms upon which its money allotments to States shall be disbursed." *Id.* at 143. The Supreme Court has specifically upheld Congress' attachment of conditions to the distribution of Federal-aid highway funds. See *South Dakota v. Dole*, 483 U. S. 203 (1987). Congress thus has well-settled authority to enact provisions such as Sections 106 and 112 of Title 23 of the United States Code and to thereby impose upon the recipients of federal funds the requirement that the FHWA review and approve the plans, specifications and estimates for the expenditure of federal funds as well as the requirement to ensure that the procurement process promotes competitive bidding. As we have described above, Congress gave the FHWA wide latitude in its review and approval process, vesting in the agency the discretion to determine what specifications should be approved, bearing in mind not only cost considerations and the impact on competition, but also non-cost factors such as those set forth in 23 U. S. C. § 109.

The Supreme Court has consistently held that "the formulation of procedures [is] basically to be left to the discretion of the agencies to which Congress has confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978). "Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 544. In enunciating the PLA Standards, FHWA considered its prior experience with PLAs and the standards adopted during the prior administration as well as its belief that, in the past, PLAs had been justified on the basis of unsupported arguments or assumptions, and that more detailed factual information was necessary in order to properly evaluate PLAs in the future. In these circumstances, FHWA has broad discretion to determine what information is needed as well as the best methods to obtain this information. None of the Standards adopted by FHWA raise any constitutional issues nor has Maryland pointed to any "compelling circumstances" that would undermine the use of these standards.

The PLA Standards were designed to elicit information from Maryland that FHWA needs to evaluate whether Maryland's proposed requirement to use a PLA will, among other things, promote competition, be cost effective, promote non-discrimination and otherwise comply with FHWA policies. Given the lack of hard data in the various reports prepared by Parsons Constructors and submitted or referenced by Maryland in its August 20, 2001, submission of the PLA, FHWA's requests for supporting evidence are wholly appropriate in determining whether the PLA, as Maryland claims, will in fact " promote

competition, be cost effective, and otherwise serve the State's objectives."

Moreover, FHWA's request for factual information concerning Maryland's past experience in utilizing PLAs is both reasonable and necessary in evaluating the potential efficacy of a PLA on the Project. MDOT and others have made various assertions about the alleged benefits of the proposed PLA without providing any concrete evidence to support those assertions. Unsupported assertions should not be, and are not sufficient for the FHWA to carry out its statutory responsibilities.

In various submissions, MDOT has suggested that the current PLA Standards constitute a departure from prior practices. However, the current PLA Standards do nothing more than make explicit FHWA's view of the factual information that must be provided in order for FHWA to properly carry out its duties in reviewing a proposed PLA. We believe that factual information, as opposed to conclusory arguments, provides a sound basis for making a decision on a request to require the use of a PLA. In most respects, the current standards are entirely consistent with prior standards that MDOT has not challenged. For example, the former DOT standards issued under the 1997 Presidential Memorandum required a recipient of federal funds to demonstrate "[w] hether past experience with construction projects in the location where the project will be performed indicates that a PLA will be effective." Department of Transportation (DOT) Guidance on the Use of Public Project Labor Agreements on Federal Construction Projects and DOT-Assisted Construction Projects at ¶ 5. A.(1). (March 19, 1999). The current PLA Standards seek information regarding labor disputes, labor management relations, and labor unrest, all of which are consistent with and similar to information sought under the prior standards. Compare PLA Standards ¶¶ 2. b, c, d, and 3. c. iv, supra, with March, 1999 DOT Guidance at ¶ ¶ 5.(2), (4) and (5). Indeed, the initial Parsons report submitted by Maryland in January 2001, was prepared explicitly because Maryland understood that it must submit factual information to support its application for FHWA's approval. Thus, the current PLA Standards merely explain in more detail the former standards used in evaluating PLAs, and set forth information, evidence and data that FHWA believes is necessary to evaluate the assertions regarding the potential benefits of the PLA.

Because of the statutory emphasis on fiscal responsibility and the integrity of competitive bidding process, FHWA concluded that it must test the assertions made in support of PLA's by requiring MDOT to provide factual evidence. Without attempting to obtain and consider such information, FHWA would fail to fulfill its statutory duties and the PLA review process would be a meaningless formality.

Maryland's first study, the WWB PLA Study, and a "2001 Update" contain a considerable amount of anecdotal information about PLAs used on other construction projects in the region and in other parts of the country. While this information may provide some pieces of the historical data FHWA has requested, the report does not purport to cover all of the topics and information that FHWA needs. For example, many of the PLAs considered in the report involved privately funded projects. The terms and the requirements applicable to those private PLAs were different from those proposed in this federally funded project. Also, the "comparison" provided in the WWB PLA Study looks at the terms of the various PLAs as compared to each other, rather than comparing the experience of MDOT or the project owner in working with and without a PLA. Indeed, in many places, the WWB PLA Study appears to rely on intuitive assumptions, rather than hard data and analysis, and does not answer the questions it poses. The WWB PLA Study, in setting forth examples, does not relate those examples to the specific differences between the labor markets in the areas of the cited examples and the Washington Metropolitan Area where the Project is being built.

The WWB PLA Study candidly admits that it is difficult to predict the effect of a PLA in advance. See, II. Executive Summary Report at page 3 ("reliable predictions of the impact of a PLA on competitive bidding, contractor participation, and bottom line project costs cannot be determined with any precision"); V. Cost Impact of a Project Labor Agreement Report at page 13 ("As stated at the outset, there is no way in advance of construction to reliably predict what the cost consequences of a PLA will be for the bridge. The economic analysis exercises undertaken to date for other projects are unsophisticated, anecdotal and too often biased. They offer little that would be of use as a precedent."). Because it is difficult to predict the effect on costs in advance, evidence of costs attributable to particular PLAs on similar prior projects is an important tool in evaluating the potential effects of the proposed PLA in this case. Given the State's lack of concrete information on the cost impact of a required PLA, FHWA suggested in its October 5, 2001 PLA Standards that Maryland utilize an alternative or dual bidding process that would elicit information from bidders as to the respective costs of the project with and without the use of a PLA. FHWA reiterated this suggestion in a November 1, 2001 letter to State Highway Administrator Parker Williams, specifically noting that this approach could result in the State obtaining "clear information about the cost impacts of this PLA". Letter from N. Castellanos to P. Williams, dated November 1, 2001 at 3. The State repeatedly rejected FHWA's suggestion and declined to use the one method that would have provided concrete evidence of how the free market evaluated the comparative costs of a PLA versus non-PLA project. The State's refusal to obtain that evidence appears to raise an inference that it would have been unfavorable.

It is telling that Maryland's request to use a PLA is not based on experience with such agreements on its major projects either as a matter of bidding requirements or on a voluntary basis. Indeed, Maryland concedes that it has no such experience in recent years and is only able to cite to a project constructed more than 20 years ago as its most recent usage of an agreement similar to the PLA proposed here. Maryland Response at 21. On the important question of whether there have been any instances of cost savings or cost overruns resulting from the presence or absence of PLAs on its projects, it has no evidence. *Id.* Even though the PLA is purportedly intended to address and prevent labor unrest on the Woodrow Wilson Bridge Project, Maryland is unable to cite to a single instance of such unrest on its projects in recent years, save for one occurrence on that same project 20 years ago. *Id.* Maryland also fails to cite such instances of labor unrest on significant highway projects in the nearby jurisdictions of Virginia and the District of Columbia. None of the voluminous studies prepared by Parsons Constructors for the State in support of its PLA request contradicts these concessions. As we describe below, Maryland's responses to a significant number of the individual standards prescribed by FHWA have failed to justify its request to require a PLA on the Woodrow Wilson Bridge Project.

Analysis of Maryland's Responses to the Individual Standards

Section 1

Section 1 lists a number of provisions or requirements that an approvable PLA must contain. These are:

- a. The PLA must allow all contractors and subcontractors, including small and disadvantaged businesses, wishing to compete for contracts and subcontracts on the project to do so, without

discrimination against contractors, subcontractors, or employees based on union or nonunion status.

- b. The PLA must require that the selection of labor to be employed by any contractor or subcontractor shall be made without regard to race, color, religion, sex, national origin, age or disability.
- c. The PLA may not impede free and open competition in the bidding process or have a significant potential to decrease competition in bidding for any construction work on the Project.
- d. The PLA may not limit a contractor's or subcontractor's selection of labor to union only members nor impose a local hiring requirement. The contractor or subcontractor must be able to select the employees who work on the job.
- e. The PLA must conform to all applicable Federal, State and local statutes, regulations, and ordinances in all jurisdictions where the PLA might be utilized. This includes not only MDOT requirements, but also laws and ordinances in Virginia and the District of Columbia, to the extent that such laws and ordinances apply.

Maryland's Response asserts that the PLA satisfies each of the provisions set forth in Paragraph 1. a-e. In response to Standard 1. a., Maryland cites several provisions of the PLA as evidence that the PLA will allow contractors and subcontractors, including small and disadvantaged businesses, to compete without discrimination based on union or nonunion status. Maryland cites the following sections of the PLA in support of this claim: (1) The Preamble to the PLA that provides that a successful bidder on this project can still perform union or non-union work at other locations regardless of whether their employees are union or non-union; (2) Article 1 which states the parties to the PLA are committed to providing open access to bidding opportunities for all contractors; and (3) Article II, section 3(a) that there is an absolute right to award contracts or subcontracts on the Project notwithstanding the existence or non-existence of any agreements between the contractor and a union. Maryland Response at 1 -2. These sections satisfy the provisions for Section 1. a.

With respect to Standard 1. b., Maryland contends that the PLA addresses the non-discrimination requirement in Section 1. b. in Article XIV, Section 1 and Article IV, Section 3. Id. at 2-3. These provisions prohibit discrimination on the basis of the enumerated categories in the standard and also prohibit discrimination in the operation of the job referral system. They meet the requirements of Standard 1. b.

In response to Standard 1. c., Maryland claims that the standard would require it to guarantee that the PLA will neither impede nor have the potential to decrease competition. The State maintains that no such guarantee can or should be given. Rather, Maryland argues, without providing any factual support, that the issue is simply whether the bid specifications unreasonably or impermissibly restrict competition and that the proposed PLA will not have the effect of reducing competition. Even if the PLA does have the effect of reducing competition, Maryland believes this would not occur in such a way as to disqualify the PLA as a lawful bid specification. Id. at 3-4.

On the other hand, FHWA has received a number of submissions, particularly from the Associated Builders and Contractors (ABC) and the Associated General Contractors (AGC), that take issue with the Maryland's claims that the PLA will not reduce competition. For instance, ABC, in its November 16, 2001, submission, attached letters from several contractors that ABC claims are capable of bidding on the Project but will not bid if a PLA is included as a bid specification. AGC, in its November 26, 2001, submission, also questions the effectiveness of a PLA. AGC states, as did ABC, that several of its members will not bid on a project with a PLA bid specification. AGC Letter at 2. Both organizations cite to several provisions in the PLA that they believe are discriminatory or otherwise will have an adverse impact on their ability to carry out the project. As discussed in connection with the Section 2 Standards, FHWA has concluded that Maryland has not shown that the PLA will promote competition. In fact, the submissions of ABC and AGC tend to show that it will limit competition. However, we are not prepared to conclude that this is the result of any specific provision or requirement in the PLA. Rather, it stems from the overall approach of the PLA and Maryland's desire to require the PLA in circumstances where there is no history of labor unrest and no clear evidence of cost savings or benefits to be achieved from the use of the PLA on this Project.

In addressing Standard 1. d., Maryland claims that the PLA does allow contractors to select the employees who work on the job, citing to Article IV, Sections 2 and 3 of the Agreement. Under these sections the contractor has the right to determine the number and competency of the required workers and has the sole responsibility for selecting employees to be laid off and may reject any referral for any reason. Id. at 4. Accordingly, Standard 1. d. is met by the PLA.

Maryland states that, to its knowledge, the PLA does conform to all applicable Federal, State, and local statutes, regulations and ordinances in all jurisdictions where it will be utilized as required by Standard 1. e. Among other provisions to support this assertion, Maryland points to a "Savings and Separability" clause that enables the parties to comply with any determination of its legality or, if the determination is fundamental to the entire agreement, the party may withdraw and cease to give effect to the Agreement. Maryland has also agreed that it will comply with Virginia's "Right to Work" law for any bridge work in the State of Virginia and further, to not require union membership for any work carried out in Virginia. For purposes of this analysis, we will assume that the PLA would satisfy the requirements of Standard 1. e.

Standard 2

FHWA's inquiry cannot stop at the facial conditions of the PLA itself. FHWA needs to consider Maryland's request more specifically, focusing on the benefits and costs of using a PLA. FHWA must consider not only the facial provisions of the PLA, but their actual impact on competition and on the competitive bidding process. Hence, in order to ensure that the Woodrow Wilson Bridge PLA is an effective vehicle to achieve the delivery of a quality work product on time and within budget, Standard 2 directs that Maryland must provide adequate information, including its past experience or other convincing evidence, regarding the following factors. This analysis addresses each element of Standard 2 separately:

Standard 2. a.

Consideration and analysis of the makeup of the current work force in the area to determine if it can continuously provide, when required, a reliable source of skilled, experienced workers in all crafts needed on the job site for the duration of the Project.

Discussion:

Maryland's October 25 response to the Standard 2. a. consists of three related contentions. The first is that the construction industry confronts a severe shortage of skilled labor. The second is that the Project's demand for labor will further strain the Washington area labor market and this could ultimately jeopardize economic, efficient and timely completion of the Project. The third contention is that the proposed PLA is the best way of assuring a reliable source of skilled labor for the Project.

To support the contention that there is a severe shortage of skilled workers, Maryland cites to the 1982 and 1996 Business Roundtable Construction Industry Cost Effectiveness Taskforce studies. Maryland Response at 6-7. Although this research provides important background information for considering labor supply issues, the empirical conclusions reported in the response are dated and not necessarily descriptive of current labor market conditions in the Washington area. The Business Roundtable studies were primarily a national level assessment of skilled construction industry workforce needs. To the extent data and analysis available in the technical research reports for these efforts provides information relevant to the Washington area, that information has not been submitted.

Maryland also notes "[a] repeat survey this year showed that 82% of owners had (labor) shortages and one in three reported increased costs, schedule delays and project cancellations due to (labor) shortages." Id. While this is a much more contemporary reference, it is unclear from the citation (" Meeting Workforce Demands: Owner Urges Users to Give Work to Contractors Who Train", Cockshaw's Construction Labor News & Opinion, September 2001, pp. 1-2.) who performed the repeat survey, if these results reflect the opinions of Washington area contractors, or whether a research report is available for inspection. Since we have no specific knowledge of the study, and have not reviewed the research design, respondent selection criteria, research instrument, geographic coverage, or analytical techniques, we cannot judge the validity of the findings. Nevertheless, we accept the Cockshaw citation for what it is--anecdotal evidence of the existence and nature of the effects of labor shortages in general on the construction industry.

Maryland's response also directs FHWA's attention to previously submitted materials, especially the Parsons Constructors report referred to as the WWB PLA Study done in November 2000. The WWB PLA Study is said to indicate that the anticipated volume of construction work in the Metro DC area will place significant strain on the general availability of workers and that "[t] he most severe shortages are likely in specialized crafts such as bridge builders (iron workers), dock builders and caisson trades, and specialized craft welders." WWB PLA Study - IV. Public Policy Considerations at 5. The WWB PLA Study provides little forecasting as to future trends and their impacts on labor supply. Some projections are provided in Part IX. Labor Relations Survey, but these do little more than project prior trend lines. The November 2000 Parsons study, the 2001 update of that report and Maryland's October 25 submission do not deal with recent economic changes and their potential impacts on the labor market in the Metro DC area.

The WWB PLA Study in Part IX. Labor Relations Survey, contains several labor market statistical exhibits. That Part and an accompanying chart indicate Washington Metropolitan Statistical Area (MSA) construction employment has grown from 102,700 workers in 1992 to 139,000 in 1999, an increase of 36 percent. However, general construction employment data are not necessarily informative about labor supply conditions in the specialized crafts that the Maryland response contends are of critical importance to the Project. We also note that MDOT did not take advantage of the opportunity in responding to the Standard to update any of their previous statistical submissions. For example, the Bureau of Labor Statistics (BLS) reports that in September 2001, 167,500 people worked in all categories of construction in the Washington area and this is a 5.6 percent increase from the previous year. (See Washington Post, 11/ 26/ 01, p. E3)

Another exhibit designated as "Local Labor Availability (union)", found in the unnumbered pages in Part IX. of the WWB PLA Study, shows the number of union members (roster) and their availability by craft for various locations (e. g. Philadelphia, Richmond, Baltimore, and the District of Columbia). The table indicates membership totals of 67,796, of which 2,612 or 4.5% are available. Clearly this exhibit refers to a particular point in time, but we can find no indication of what that point in time is. Another table in Part IX, " Construction Employment Union/ Nonunion" reports combined union and non-union construction employment in the Washington MSA for "selected trades" in 1998. The source of this information is the Bureau of Labor Statistics. Arguably, this is the most relevant labor market statistic provided, but it would be much more useful if this information had been updated, presented in a historical context (i. e. as time series data), and perhaps used to produce simple extrapolation forecasts for craft labor supply, as well as the craft labor supply specifically needed for the Woodrow Wilson Bridge Project. Maryland failed to do this and thus the data is of limited value.

Also absent from the Maryland response are economic statistics that might reflect the level of labor utilization in the Washington area. That is, if construction labor is an increasingly scarce commodity relative to demand, economic theory suggests generally available government data would be expected to reveal abnormal (relative to other sectors of the economy) changes in wage rates, hours worked, overtime hours, unemployment levels, personal incomes, value of benefit packages, or distances traveled to employment location, *inter alia*. There are many such statistical indicators generally available, but we find no such data or evidence of this type included or explored in the Maryland response.

The Maryland response is incomplete in another important respect. It does not contain sufficient information to determine whether the Project's demand for labor will further strain the labor market and thus jeopardize economic, efficient and timely completion of the Project. The response contains no estimates of the magnitude, incidence or duration of labor requirements for the Project. In fact, Maryland states, "... there are no manpower projections available [w] hile contractors use such projections to develop their bids, the State uses unit prices derived from past contracting experience to develop cost estimates". Maryland Response at 19. Without Project manpower estimates, it is impossible to judge whether labor demand is large relative to market supply or to reasonably assess whether Project labor needs are likely to precipitate construction cost increases or completion delays of the Project or other project in the area. We further note that the lack of Project manpower forecasts also affects MDOT's ability to fully respond to Standard 2. f, considered below.

The final contention in Maryland's response to Standard 2. a is that "[t] his PLA assures the State that

its manpower needs will be met". Maryland Response at 7. Assuring the availability of skilled workers to perform the work over the six-year life of the Project is a key issue. MDOT states "[t] he Unions have committed their 'Utmost efforts to recruit sufficient numbers of skilled craft workers to fulfill the manpower requirements' for the Project through its referral network of resources and to give the Project 'first call' on available workers. These provisions assure this Project a ready supply of workers" Id. Of course, this commitment is not independent of the magnitudes of labor required and there is no showing as to how such a promise can be monitored or enforced.

Maryland also implies that a cooperative agreement with organized labor is preferable to market or economic incentives that may be required to attract labor. It notes (in other submissions) that contractors are in a "bidding war" for available labor and frequently use promises of overtime, per-diem allowances, benefit coverage, and travel reimbursements to attract non-union workers. It appears that the PLA also contains such incentives, although no mention is made of this possibility. For example, the effect of 4-10 (4 day-10 hour) work schedule proposed in the PLA may be to increase the likelihood of overtime earnings for workers, especially in an industry where the norm is a 5-day work week (and often 6 days, weather permitting).

Both Maryland and the BCTD, in their submissions to us, argue in some detail the benefits of union-driven recruiting that will result from the PLA. We are unconvinced. First, the union recruiting mechanisms would seem to be available irrespective of the presence or absence of a PLA, particularly if the winning bidder (or any of the subcontractors) is a union contractor. Presumably, providing adequate labor is a key element of any bid. The Maryland submission freely acknowledges that point. Hence, it would seem that it is not enough to show that a PLA could result in providing additional labor resources. The State has failed show that other mechanisms available even without a PLA are not as effective. Maryland's claim that union-driven recruiting will be beneficial also appears to be undercut by the observations of both contractors' associations that the Washington labor market is primarily nonunion, that the majority of construction work performed is open shop and that the majority of hiring is not done through union hiring halls as is proposed in the PLA. See ABC Letter at 4 and AGC Letter at 3 and 5.

FHWA's conclusion is that Maryland has failed to adequately address Standard 2. a. First, the claims that the State makes regarding labor shortages are very generalized, not specific with regard to the anticipated needs in the various crafts over time on the Project and there are no updated statistics for the purported labor shortages. Thus one cannot reach an informed conclusion about the potential for the local labor force to meet the needs of the Project when the current statistics are inadequate. The inadequacy of Maryland's response is underscored by its admission that it has no manpower projections available to it. Without such projections, Maryland has not provided reliable information to FHWA, much less demonstrated that the PLA guarantees an adequate supply of labor to meet the needs of the project.

Standard 2. b.

The potential for a benefit to the Project from uniform work rules and working conditions and established procedures for resolving labor disputes with no strike - no lockout protections.

Discussion:

The WWB PLA Study and other submissions by MDOT assume that there are benefits (efficiencies gained) from the establishment of uniform work rules and working conditions. The WWB PLA Study in Part II. Executive Summary states that a PLA provides the most stable work environment and that a PLA eliminates small labor relations issues that impact work efficiency. In Part IX. Labor Relations Survey, the "Labor Relation Synopsis" section (pages not numbered), sets forth a partial listing of the trades and information regarding the work rules for each trade. Both the initial WWB PLA Study and the 2001 Update specifically emphasize the benefit of the no strike/ no lockout procedures. They contend that the only way to effect that benefit is with the use of a PLA coupled with the State's proactive management of the project that will take reasonable steps to prevent labor disruptions. 2001 Update at 12. The WWB PLA Study cited examples in California and Nevada regarding the benefits of a no-strike clause.

The proposed PLA provides for uniform work rules for the definition of a workday and workweek, overtime, shift work, holidays, and reporting pay. The PLA does not provide uniform wage rates and benefits since it allows non-union contractors to conform with the minimum requirements of Davis-Bacon and it requires union contractors to honor wage rates and benefits established in the collective bargaining agreements.

Absent from the report are: data regarding Washington, D. C. area labor issues and the potential for labor unrest or disruption in the area; data to support the assumption that there are efficiencies to be gained with uniform work rules and working conditions; and data to support that there are specific efficiencies to be gained through the use of uniform work rules and the use of a no strike-no lockout clause on the Project. This may be due, in part, to Maryland's concession in response to Standard 3 and its subparts, that the State has no experience with the use of PLAs on any of its projects for the last five years and likely not for the last 20 years. Maryland Response at 21. Moreover, Maryland concedes that it has no information about labor unrest in connection with any of its projects for the last five to 20 years. *Id.* It cites no other examples of labor unrest in the local Washington Metropolitan area that could or needed to be addressed by a PLA. Its claims about labor unrest appear to be based upon nothing more than sheer speculation. Considering that the avoidance of labor unrest was a principal objective of the PLA, this is, in FHWA's view, a fundamental flaw in Maryland's claim that the PLA is needed on the Woodrow Wilson Bridge Project.

Hence, FHWA finds that MDOT has not provided data to establish (1) the benefits of uniform work rules on the Project, (2) the need for a PLA to resolve work disputes, in that no evidence is provided of potential current or future work related disputes of sufficient frequency or magnitude to require special dispute resolving mechanism, or (3) that existing mechanisms and practices do not provide adequate processes for dealing with these matters should they arise.

Standard 2. c.

Whether the PLA provides prompt and mutually binding procedures for resolving labor disputes arising during the Project.

Discussion:

Maryland asserts that provisions of the PLA easily meet Standard 2. c. Maryland asserts that the PLA has "a sophisticated tiered grievance procedure to resolve any disputes over any question "arising out of and during the term of this Agreement." Maryland Response at 11. Maryland notes that the PLA contains in Article VIII, Section 3, short time limits to resolve procedures and Article VII, Section 3(b) places limits on the authority of the arbitrator. In addition, there is a provision for the resolution of trade jurisdictional disputes in Article IX that refers such disputes to an industry panel. Article VII also contains a broad no-strike clause with expedited arbitration procedures. Finally, Maryland states that the no-strike pledge assures that the unions will not disrupt any Maryland work that is not covered by the PLA such as the foundation contract that is currently ongoing and any of the other contracts that are expressly excluded from the PLA scope.

A review of the provisions cited by Maryland indicates that the PLA provides for prompt and mutual binding resolution procedures. Therefore, FHWA finds that Maryland has complied with Standard 2. c.

Standard 2. d.

Whether the PLA provides other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety and health.

Discussion:

Maryland maintains that utilization of the PLA's sophisticated administrative structure will enhance the contracting and employment opportunities for disadvantaged contractors and employees. MDOT also states that this same administrative structure will help to raise safety awareness among workers and will provide a channel for the prompt and effective resolution of any safety issues that may be raised. Finally, the State claims that the PLA's comprehensive substance abuse program will be applicable to all workers covered by the PLA, facilitating the administration of that program. Maryland Response at 12-14.

Maryland has provided no analysis of the work environment of the Project that justifies the need for a PLA to cover DBE, safety, and substance abuse programs in any manner differently than those programs are dealt with by an open shop employer. There is no record to indicate that the Washington, D. C. area is in need of "sophisticated" administrative procedures to ensure compliance with these Federal and State mandated programs that apply to all federally funded projects. There have been no reports of unusual problems in these areas on the dredging or foundations contracts for the Project or on the Springfield (Virginia) Interchange (Mixing Bowl) project, which are non-PLA projects. Maryland, Virginia and the District of Columbia all operate DBE programs, and we are unaware of any difficulties in their administration. Finally, Maryland does not explain how these programs would be administered differently or better under a PLA. ABC, for example, maintains that these same areas are addressed by both union and non-union contractors without the use of a PLA. ABC Letter at 4-5. To be sure, the PLA contains the other mechanisms described in Standard 2. d., but without an explanation as to how these mechanisms are better than existing mechanisms, it is questionable whether the benefits of the

PLA cited by Maryland in response to 2. d are necessary, advantageous, or even desirable.

Standard 2. e.

Whether the PLA now being proposed might interfere with, delay, or otherwise disrupt any Project contract or subcontract not subject to the PLA.

Discussion:

Maryland maintains that the PLA will provide the maximum protection that the PLA will not interfere with, delay, or otherwise disrupt any Project contractor or subcontractor not subject to the PLA. Breaches of these provisions are enforced through binding and expedited procedures. The State notes that this provision was specifically revised in August 2001 in recognition of the contractor performing work on the foundations contract that is not subject to the PLA. Maryland Response at 14-15. The specific provision states:

Article VII
Work Stoppages and Lockouts

Section 1. There shall be no strikes, sympathy strikes, picketing, work stoppages, slowdowns, or other disruptive activity for any reason by the Union(s) or employees against any Contractor covered by this agreement and there shall be no lockout by the Contractor. Prohibited forms of disruption include, but are not limited to: disputes relating to the negotiations or renegotiation of local collective bargaining agreements, disputes directed at non-construction services companies or suppliers, or disputes directed at the work on the Bridge Foundations and I-295/ 95 Interchange bid packages excluded in Section 2(f), or disputes directed at contractors performing work on the Virginia portion of this Project that is not covered by this Agreement if it has any impact, direct or indirect, on work covered by this Agreement. Failure of any Union or employee to cross any picket line established by any Union or signatory or non-signatory to the Agreement, or by any other organization or individual at or in proximity to the Project construction site is a violation of this Article. (Emphasis added)

While the revised PLA purports to give the benefits of the PLA to the open-shop superstructure contractor and even the potential Virginia open shop contactors, whether these contactors will be inclined to take advantage of the disputes mechanism of the PLA is not known. These open shop contractors are not parties to the PLA, and it is the parties to the PLA that assign representatives to the Project and agree to resolve disputes in accordance with the arbitration provisions of Articles VII and VIII of the PLA.

Section 5 of Article VII states that any party, including the State and Parsons Constructors, Inc., whom the parties agree are parties-in-interest for purposes of this Article, may institute the dispute procedures. Thus, while the foundations contractor could be a party-in-interest, that contractor might not want to be bound by the arbitrator's decision but rather may determine that it is in his best interest to proceed via the courts or some other mechanism to resolve a dispute with a union, or to seek relief

for problems caused by a dispute on the superstructure contract that affects his work on the foundation contract. Therefore, while this revised PLA might theoretically contribute to maintaining labor peace on the foundation contract if utilized by the contractor, it is at least as likely that it could be ignored or even actively resisted by this contractor.

Without further information from the foundation contractor concerning these procedures it is difficult to determine or measure the extent of the benefits of this revised PLA procedure. Maryland has not provided any such information. For this reason, we have not been able to conclude that the presence of the PLA on the superstructure contract is unlikely to interfere with the operations of other, non-PLA contracts.

Standard 2. f.

How and to what degree the PLA will advance the recipient's procurement interest and DOT's interest in cost, efficiency, and quality.

Discussion:

Maryland's response contends that the PLA contains provisions that ensure fair and open competition. Maryland Response at 15-17. It reiterates that position in its December 4, 2001 Supplemental Submission. Maryland notes in its response that the PLA could operate to exclude bidders by setting disqualifying criteria such as the requirement that a contractor be a union contractor in order to bid. Secondly, it observes that the agreement could have the effect, by its terms, of causing contractors not to elect to bid on the Project. The State contends that provisions of the agreement ensure that these results will not occur. First, it argues that the concern about exclusion of bidders is addressed by Article II, section 3(a), which provides that contracts and subcontracts must be awarded without regard to the existence of any agreements between a contractor and any union party. *Id.*

As to the second point, the State describes several reasons that in its view may lead a contractor to make a "self-imposed decision" not to bid. These reasons include the claim that the PLA will prevent contractors from operating in customary ways, that the contractors will be unable to utilize their own employees, and that there would be additional costs imposed upon the contractor by virtue of the need to pay union wages as well as union benefits to union employees hired by the contractor. Maryland contends that each of these points is addressed by the terms of the agreement. First, the PLA in Article IV permits a contractor to utilize its own "core" employees, together with union workers selected from the union hiring hall. Second, Maryland maintains that there are no added costs imposed with regard to wage and benefit issues because the agreement, in Article X, ensures that contractors must only pay the prevailing wage rate, not the union scale. As to benefits, contractors need only pay the same benefits as are required under the prevailing wage law, although the State concedes that if the company's fringe benefit contributions are less than those under the prevailing wage law the contractor must pay the additional amount into a special fund. *Id.*

On its face, Article II would appear to preserve the right to award contracts without regard to existing contractor-union relationships. However, with regard to the question of the impact of the PLA on the manner in which contractors conduct their operations and the costs that may be associated with the

use of a PLA, FHWA does not agree that the PLA adequately addresses these issues. As discussed below, it is FHWA's conclusion, based on the record, that there may be increased costs arising from the use of a PLA and that the "core" employee arrangement likely will have an impact on the way that a contractor selects and utilizes employees for the job, with a resultant increase in cost to the contractor.

Significantly, contradicting the claims made by the State that the use of a PLA will not impact competition, both the ABC and the AGC contend that a number of major contractors who would otherwise bid on the Woodrow Wilson Bridge Project will not do so if the bid specifications contain a PLA. ABC Letter at 1 and Addendum at 5; AGC Letter at 2-3. ABC attached copies of letters sent to FHWA by three major contractors indicating that they will not bid on the Woodrow Wilson Project if it contains a PLA bid specification. The letters state that, absent a PLA bid specification, each planned to bid on the Project. Obviously, a reduction in the number of potential bidders can have an impact on competition and FHWA so concludes.

We also note that Maryland has failed to offer any evidence that contractors support its proposal to utilize a PLA on the project. Given the size of the project, Maryland's claim of the potential for labor unrest, and the argued benefit of cost savings from the use of a PLA, it is telling that the State does not appear to have the support of the contracting community for its proposed use of a PLA. In fact, the letters from the contractors and the contractors' associations indicate that all potential bidders are not willing to bid on a potential contract with a PLA. Maryland's submissions contain no evidence rebutting the inference raised by those letters and the factual assertions of the contractors' associations. Thus, we cannot accept Maryland's contention in its December 4 submission that "for purposes of the current FHWA consideration of this PLA, there is every reason to believe that all potential bidders will be willing to bid on the Superstructure contract with the PLA in place." Maryland Supplemental Submission at 2. Hence, FHWA has concluded that Maryland has failed to demonstrate that the proposed PLA will not have an adverse effect upon competition.

Maryland's response further asserts, "[o] n the wage and benefit issues, the PLA imposes no added costs". Maryland Response at 17. This conclusion is based on the fact that nonunion contractors are required to pay only the applicable prevailing wage rate (Davis-Bacon rate) to nonunion workers, not the union wage rate which is presumed to be higher. A similar comparative but more complicated condition is imposed to resolve union versus nonunion fringe benefits differentials. However, we observe that under the terms of the proposed PLA nonunion contractors are entitled to use only a limited number of their "core" employees. Thus, while the actual wage rate and benefit cost per worker does not change under the PLA compared to what it would be without a PLA, the number of workers receiving different levels of compensation does change. Since the number of union and nonunion workers is influenced (but not fully determined) by the PLA, and is not solely the result of market forces that would define the contra-positive or base case wage cost, we do not agree that the PLA has no effect on wage and benefit cost for the project as a whole. The MDOT argument that there is no effect on labor cost has not been substantiated by the State's submissions.

Maryland further states "[t] here are a number of provisions of the PLA that serve to reduce or contain costs, either as a reduction from the cost that union contractors would otherwise face or the opportunity for nonunion contractors to take advantage of lower costs that would not otherwise be allowed" Id. Examples of the former are a 4 day 10 hour week, relief from travel pay, makeup days

paid at straight time, and flexibility regarding shifts and starting times. An example of the latter is lower wage rates for apprentices, who would ordinarily be paid at the journeyman wage level. Maryland Response at 18. Elsewhere in the submission, possible cost savings are alluded to from workmen's compensation insurance premium reductions, a workmen's compensation "carve out," and the adoption of more efficient work rules. However, none of the potential cost savings are quantitatively evaluated and no mention is made of any possible cost increases caused by the need to administer the PLA or as a result of provisions that may encourage overtime. MDOT provides no empirical assessments or evidence about the magnitude or likelihood that any of the provisions it has identified serving "to reduce or contain costs" will actually apply.

To the contrary, Maryland concedes that "[a] n estimate of the tangible cost savings or burdens of a PLA before the work begins is highly speculative" Id. MDOT further states, "[o] ther terms, such as the no-strike clause and bona fide benefits of an efficiently and well-administered PLA yield benefits that are real but difficult to measure". Id. at 17. Finally, the State concludes its response to Standard 2. f by saying: "While we cannot, therefore, conveniently offer up a number of dollars to be saved, we are confident the PLA will yield significant positive economic results". Id. at 19. Maryland's concession that it cannot estimate the number of dollars to be saved is confirmed by its own construction manager for the Woodrow Wilson Bridge Project, Parsons Constructors, which observed in its Final Report and Recommendation to the State that "[t] he cost impact of a PLA is a matter about which there is much said, but little that can be concretely demonstrated." Final Report and Recommendation, January 19, 2001 at 12. Despite this admission about the lack of evidence on cost savings, Maryland refused to use FHWA's suggested alternative bid approach in an attempt to gain comparative cost data on the required use or non-use of a PLA. For this reason, among others, we cannot conclude that the use of a PLA as a bid specification would not result in higher bids than if the PLA were not required. In fact, ABC asserts that its members have reported "if they were to bid on the Project under the PLA, they would increase their bid prices significantly." ABC Letter at 2. Maryland may dispute that contention, but Maryland rejected one means of resolving the issue when it refused to use the alternative bid procedure suggested by FHWA. The Maryland submission, in FHWA's view, contains no evidence of cost savings and we find that Maryland has not demonstrated that there will be cost savings from the use of a PLA. Thus we conclude that Maryland has failed to provide adequate information to support its contention the PLA will yield positive economic results.

Standard 3

Standard 3. a. and 3. b. only require the submission of the PLA itself and a report responding to Standard 1. Maryland has complied with this requirement.

Standard 3. c.

A report and analysis that provides the additional information required in paragraph 2(a)-(f) above. The report must include data about the benefits and possible problems of using a PLA on the Project in Maryland. As part of this report, Maryland DOT should examine all large or complex construction contracts (over \$10,000,000 or a construction period greater than two years) it has let over the last five years, whether Federally funded or not, and provide the following information with regard to those contracts:

- i. How many of these contracts included a PLA imposed by State specifications or involved a voluntary PLA (that is, a PLA based on an agreement between contractor or subcontractor and a labor union).
- ii. Identify any costs overruns caused by the presence or absence of a PLA on these contracts or projects.
- iii. Identify any cost savings resulting from the presence or absence of a PLA on these contracts or projects.
- iv. Identify any instances of labor unrest that the State has experienced in connection with any of these contracts or projects and the benefits that the use of PLA on those projects may have provided to the State.
- v. Describe the similarities and differences, if any, between the PLAs utilized by the State on prior projects and the PLA that has been submitted to FHWA for its review and approval on the Woodrow Wilson Bridge Project.

Discussion:

Maryland's response addresses each of the sub-categories of Standard 3, as well as the general request in Standard 3. c, that the State provide FHWA with a list of all large or complex construction contracts that it has let over the last five years, whether federally funded or not, that may have utilized a PLA. What is significant about Maryland's response to this series of questions is that the State concedes that it has no experience with the use of a Project Labor Agreement on any of these projects during the last five years. Thus, it also concedes that it has no information concerning cost savings or cost over-runs that might have occurred on any of these projects with or without the use of a PLA.

Finally, and most significantly, the State admits that it is not aware of any instances of labor unrest associated with any of these contracts or projects, regardless of whether the project utilized a PLA. Thus, the State has no recent experience with the use of PLAs upon which to base its current request to FHWA and it has no evidence of labor unrest to support its claim that a PLA is needed, or would be useful in avoiding labor unrest on the critical Woodrow Wilson Bridge Project. The most recent experience that the State can draw upon for its use of a PLA is a project constructed 20 years ago for the Fort McHenry Tunnel. No other experiences are cited by the State. Moreover, the State fails to describe any instances of labor unrest in local construction projects that would give support to its claim that the PLA is necessary in order to avoid such unrest. To the contrary, the one instance of labor unrest cited by the State occurred on the Fort McHenry Tunnel Project, which was a PLA project. Maryland's concession about the absence of labor unrest is confirmed by AGC's submission, which maintains that there has been no history of labor unrest in the Washington area, and further points to the ongoing foundations contract on the Wilson Bridge as having had no labor unrest even though the contract is being conducted on an open shop basis. AGC Letter at 5.

G. CONCLUSION

FHWA has carefully considered all of the materials submitted by the State of Maryland in response to the PLA Standards and in support of its request that FHWA approve the use of a PLA as a bid specification on the Woodrow Wilson Bridge Project. We have also reviewed materials and information submitted to FHWA by the Associated Builders and Contractors, the Associated General Contractors and the Building and Trades Department, AFL-CIO. The PLA proposed by Maryland meets some of the factors set forth in the PLA Standards that FHWA has issued. For example, the PLA includes the basic provisions that are required by Section 1 of the Standards. The PLA also provides for prompt and mutually binding procedures for resolving labor disputes. However, in more fundamental and significant respects Maryland has failed to adequately justify its request for that the Project Labor Agreement be included as a bid specification for the Woodrow Wilson Bridge Project under the PLA Standards. Maryland has not satisfied the critical objective that the PLA further competition and cost-effective bidding and otherwise ensure the timely and economic completion of the Project.

As an initial matter, the State has conceded in its submissions that it has had no real experience in the last twenty years with the use of a PLA on any of its highway projects. It readily acknowledges that it has no information on potential cost savings or cost overruns that might have arisen from the use or absence of a PLA on one of its projects. It expressly rejected FHWA's suggestion of alternative or dual bids as a way to obtain cost comparison information on bids with or without a PLA. On the important issue of the potential effect of the PLA on labor unrest, Maryland candidly admits that it has no evidence of labor unrest in the Washington area. Furthermore, it concedes that any estimate of cost savings resulting from the use of a PLA would be highly speculative and would have to await completion of the project. Maryland also did not adequately justify its claim that there would be labor shortages on the Project and that the proposed PLA would be a superior way to assure an adequate supply of labor for the Project. Furthermore, Maryland failed to demonstrate that the requirement to use a PLA on the Project would not have an adverse effect upon competition. Indeed, it appears that the use of a required PLA will diminish the number of major contractors bidding on the Project, thereby lessening competition. Maryland offered no contrary evidence to support its contention that "all potential bidders" are willing to bid on the Project if a PLA is one of the required bid specifications. Although the PLA proposed by Maryland contained extensive provisions relating to uniform work rules, working conditions and procedures for the resolution of labor disputes, FHWA also found that Maryland had failed to demonstrate that existing mechanisms and practices were inadequate to address such issues. Finally, FHWA also concluded that Maryland had been unable to show concretely that there would be cost savings from the use of a PLA.

In the end, Maryland's request is primarily supported with speculation and conjecture about the potential benefits of a PLA, without any real evidence from the local market or its own experience to support its request. That is not enough to satisfy the PLA Standards and FHWA's underlying statutory authority and obligations. Considering all of the evidence submitted by the State, Maryland has failed to justify its request for approval of a PLA on the Woodrow Wilson Bridge Project.

ACCORDINGLY, for all of the reasons stated in this decision, the State of Maryland's request to add a Project Labor Agreement to the superstructure contract for the Woodrow Wilson Bridge Project is DENIED, and the Maryland Division of the Federal Highway Administration does not have my prior concurrence to agree to Maryland's request. This is a final decision of the Federal Highway Administration and not subject to further administrative review by the Department of Transportation.

DATED this 7th day of December 2001.

King W. Gee
Program Manager,
Infrastructure Core Business Unit
Federal Highway Administration

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