

# PUBLIC CONSTRUCTION ADVISORY



***On July 19, 2011 the Fair and Open Competition in Governmental Construction Act became law.***

This new law prohibits the use of government-mandated (including public school, community college and university) project labor agreements (PLAs), Construction Unity Board (CUB) agreements, harmony agreements and any pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project. Also, any discrimination on the basis of labor affiliation is explicitly prohibited.

***Any local ordinances, policies or contract documents in conflict with this new law are now nullified.***

## **What does Michigan's Open Competition in Governmental Construction Act prohibit?**

Any term that requires, prohibits, encourages, or discourages bidders, contractors, or subcontractors from entering into or adhering to agreements with a collective bargaining organization relating to a public construction project or other related construction projects; or any term that discriminates against bidders, contractors, or subcontractors based on their union affiliation.

## **Are government-mandated PLAs, CUB Agreements, Harmony Agreements, etc. prohibited?**

Yes. Any union-only Project Labor Agreement (PLA), Construction Unity Board (CUB) Agreement, Harmony Agreement, Community Workforce Agreement or construction agreement that requires an agreement with a labor organization is illegal. Moreover, any term that discriminates on the basis of labor affiliation (including a contract term that is unique to the unionized construction sector) is illegal.

## **When does the law take effect?**

The law took effect on July 19, 2011 following the governor's signature.

## **Does the law affect contracts already in progress?**

No. It only affects contracts executed after July 19, 2011. Moreover, no subcontract under a prime contract may include any prohibited term.

## **President Obama signed an executive order in 2009 authorizing the use of government-mandated PLAs on federal projects. Is a PLA permissible if federal dollars fund a state or local project?**

No. President Obama's Executive Order simply authorizes government-mandated PLAs on **Federal** projects. But it does not authorize local or state government PLAs. A PLA would only be permissible and mandatory if it is required by the federal government on a federal project. Absent a federal government-mandated PLA, it is illegal to require one on an educational, state or local governmental project.

## **Does the law do more than ban governmental PLAs, Construction Unity Board (CUB) Agreements, Harmony Agreements, etc.?**

Yes. Any discriminatory term unique to the unionized construction sector is strictly prohibited in contracts. The law prohibits any contract term that *"discriminates against bidders, contractors, or subcontractors based on the status as a party or nonparty to or the willingness or refusal to enter into, an agreement with a collective bargaining organization relating to the construction project or other related construction projects."*

## **Does the new law only affect state governmental- or state-funded construction?**

No. The law prohibits government-mandated (non-voluntary) union agreements at all levels of educational, state and local governmental construction, regardless of whether state, local or federal tax dollars are attached to a construction project. The law explicitly affects the state of Michigan, as well as any county, city, township, village, school district, intermediate school district, community college, university or governmental instrumentality construction.

## **May a construction manager, general contractor or other contracting entity require a PLA, CUB Agreement, Harmony Agreement, etc. for a publicly-owned construction project?**

No. The law states that a construction manager or other contracting entity acting on behalf of a governmental unit shall not place any of the terms prohibited in the act into bid specifications, project agreements, or other controlling documents relating to a project. The act also applies to any other discriminatory term that reflects labor affiliation.

## **If adherence to a labor agreement or a labor organization is neither prohibited nor required, can it still be encouraged under law?**

No. The law also says that such actions or requirements shall not be either "encouraged or discouraged."

## **Does the law affect state or local prevailing wage mandates?**

The law says that it shall not interfere with **state** prevailing wage mandates, but it does not address **local** ordinances.

## **May a governmental entity base the awarding of a grant, abatement, tax credit or incentive for a construction project on the stipulation that a labor agreement be attached to that project?**

No. The law prohibits such requirements or discrimination based upon labor status, or based upon the willingness or refusal to enter into an agreement with a labor organization. Moreover, a labor agreement may not be encouraged by a governmental entity in awarding any incentive.

## **What type of public construction is covered by the act?**

State, local governmental and educational construction is covered by the new law. It applies to "any actual physical improvement to real property owned, or leased, directly or through a building authority, by a governmental unit, including, but not limited to, roads, bridges, runways, rails, or a building or structure along with the building's or structure's grounds, approaches, services and appurtenances."