

# **How To Structure And Fund A Fair Contracting Organization**



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# **HOW TO STRUCTURE AND FUND A FAIR CONTRACTING ORGANIZATION**

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There are a number of options available to structure and fund a fair contracting organization. This paper is intended to describe the types of services which fair contracting groups can offer and provide general guidelines on how to structure and fund a fair contracting organization. Before undertaking any of the steps discussed below, legal counsel must be consulted to determine which, if any, of these structures are available under the facts and law of the state in which the fair contracting group is to be established.

## **I. THE GOALS OF FAIR CONTRACTING**

There are a growing number of organizations across the country trying to bring fairness to the construction industry. Fair contracting organizations (also referred to as compliance organizations) serve workers, fair contractors and the taxpayer by leveling the playing field for all contractors who choose to competitively bid public works projects. The goals of fair contracting organizations include:

- Ensuring compliance with federal, state and local laws pertaining to the construction industry.
- Promoting bidding equity for all contractors.
- Assuring taxpayers and public bodies the best value in the expenditure of public construction contracting dollars.
- Advocating for the contractor and the worker in the construction industry through education and action.
- Assisting workers in obtaining work through fair and equitable bidding practices.
- Educating and informing contractors and workers about their rights and the bidding laws associated with the construction industry as well as the impact of those laws upon them.
- Working with federal and state Departments of Labor on compliance issues involving labor and prevailing wage laws.
- Assisting state and federal public bodies with contract compliance.

## **II. PROMOTING COMPLIANCE WITH LAWS ON FEDERAL, STATE AND LOCAL PUBLIC CONSTRUCTION PROJECTS**

Contractors performing work for federal, state or local public agencies must comply with a host of laws governing the bidding, award and performance of publicly funded construction projects. Fair contracting groups use a variety of tools to promote compliance with the following federal and state laws applicable to public construction contracts, including:

1. **Prevailing Wage Laws** requiring payment of not less than the prevailing wage as determined by the Federal or State Department of Labor to all workers employed on public works, including employer payments for health and welfare, pension, vacation, and apprenticeship or other training programs.

2. **Prequalification and Responsible Contractor Laws** requiring bidders to meet minimum responsibility standards.
3. **State Contractor License Laws** requiring contractors submitting bids to be properly licensed at the time bids are submitted and provides for penalties for contracting without the proper State license.
4. **Bonding** requiring contractors to obtain a bond to perform work on a public contraction project.
5. **Subletting and Subcontracting Laws** requiring the prime contractor to list in the bid proposal the name, location of the business and license number of each subcontractor and prohibiting the substitution of any listed subcontractor without notice and/or consent of the awarding authority.
6. **Certified Weekly Payroll Laws** requiring contractors to report wage and fringe benefit payments to the public agency.
7. **Debarred/suspended Contractor Lists** requiring violating contractors to be barred from bidding.
8. **Overtime Laws** requiring payment of overtime pay for excess work.
9. **Itemized Wage Statement** requiring that all employers provide their employees with an itemized statement of the employees' payroll deductions.
10. **Unemployment Insurance** requiring the payment of unemployment insurance.
11. **Tax/Withholding** requiring employers to withhold taxes and to provide employees with the form W-2.
12. **Anti-Kickback laws** prohibiting the unauthorized taking of any portion of the wages of a worker employed on a public works project.
13. **Workers Compensation Coverage** requiring contractors to maintain workers compensation insurance for construction workers employed on public works jobs and file a statement with the awarding body attesting to such coverage.
14. **Apprenticeship Standards on Public Works** requiring contractors to meet certain apprenticeship standards to bid or perform on public jobs.
15. **Health and Safety Laws** requiring employers to furnish a safe and healthful place of employment; and comply with all applicable occupational safety and health standards.

### III. THE TOOLS OF FAIR CONTRACTING

Fair contracting organizations provide a variety of services for workers, contractors, public awarding bodies and the public to promote compliance with the foregoing laws which regulate publicly funded construction. Some of the tools of fair contracting include:

- Review project-tracking materials, Dodge Reports and other sources, to identify bidders on projects.
- Provide verifiable background information in the prequalification process.
- Review contract documents and specifications, wage determinations and bid results.
- Verify proper bidding procedures.
- Verify the apparent low bidders references, license and bonding for evidence of non-responsibility as shown by low bidders history of past violations or poor performances.
- Attend bid openings to monitor responsible bidder laws. Verify proper bonding and licensing of contractors

- Monitor the project if awarded to ensure compliance with all Local, State and Federal laws.
- Determine whether there are violations involving prevailing wage/fringe benefit payments, misclassification of workers , wage violations, the hours of work and overtime, apprenticeship compliance and other related problems such as safety
- Investigate possible violations of public works laws by requesting contract documents, obtaining and reviewing certified payroll records, gathering evidence and interviewing witnesses and making job-site visits; interview workers, monitor actual working hours and manpower counts to compare with certified payroll records
- Filing of complaint with the appropriate State or federal agency, or private action when violations are found
- Complaints may come from referrals from contractors, affected workers or other sources.
- Coordinate with the appropriate regulatory agency such as DOL, BAT, OSHA, IRS, Employment Security, EEOC, etc. Detailed information from monitoring will aid these agencies in investigating and prosecuting violators.
- Provide advice to workers on rights under the prevailing wage and labor standards laws and provide guidance in dealing with compliance agencies.
- Help workers with related employment issues and assist workers in negotiating settlements with their employers.
- Filing stop notices with awarding agencies.
- Serve as repository for information about projects and provide information to contractors about state prevailing wage and Davis-Bacon requirements.
- Assist contractors in obtaining information on the competitive bidding process, prevailing wage compliance and with state and local pre-qualification requirements.
- Work closely with public agencies to ensure compliance with labor standards.
- Monitor compliance efforts and conduct seminars on public construction.
- Review agency compliance with public contracting laws governing bidding, award and performance of public works projects.
- Initiate legal action against public awarding agencies when administrative remedies are either unavailable or ineffective.
- Broaden and expand public understanding of the issues in publicly funded construction.
- Conduct regular discussions with governmental officials on the federal, state and local level to educate the public and to further public understanding of the issues involved in public construction.
- Increase governmental oversight of contractual compliance of publicly funded construction projects.
- Educate the public to better understand the function of government in publicly funded construction.
- Teach seminars on government oversight responsibilities to trade organizations, community groups and local law enforcement.
- Support legislation which encourages fairness in public construction
- Monitor and analyze pending legislation and alert constituents to legislative developments
- Provide expert testimony on legislation that will strengthen public construction law.

## **IV. ESTABLISHING A FAIR CONTRACTING ORGANIZATION**

### **A. As A Labor-Management Committee**

One option for structuring and funding a fair contracting organization is to establish it as a Taft-Hartley Section 302(c)(9) “labor-management cooperation committee”, which is authorized by the Labor Management Cooperation Act of 1978. That law permits labor-management cooperation committees to be funded by employer contributions and used for the purposes stated in the law. Many of these purposes include the customary activities of a fair contracting organization which are listed above. Many, but not all, fair contracting organizations are established as a labor-management organization.

Fair contracting groups organized as “labor-management cooperation” organizations are normally administered by a joint labor-management board, consisting of representatives of the respective union and signatory contractors (they may or may not be equal in number) (see attachment 1 for an example of a joint labor-management Trust Agreement). Usually, contributions are required in a written collective bargaining agreement. The 1978 law specifically amended the Taft-Hartley Act to add Section 302(c)(9) which states that employer contributions can be made to “a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in ...the Labor Management Cooperation Act of 1978”.

In a fair contracting group established as a labor-management cooperation committee, the employer and union representatives do not have to be equal in number, although both must play a role in the organization. A fair contracting organization established as a labor-management committee does not require a trust agreement. Unlike contributions for health and welfare or training, which require the existence of a written agreement and funds to be held in trust, etc., no such requirements were set forth by Congress in the Labor Management Cooperation Act. This is not to say that fair contracting groups should not use written trust agreements or that they should ignore other forms of due diligence or other checks and balances designed to protect the integrity of their funds. In all cases, legal counsel must advise fair contracting groups about these choices.

The labor-management cooperation committee structure is necessary if employer contributions are used, at least in part, to finance the fair contracting group. Funding can come through collective bargaining agreements (which can also come from more than one union) (see attachment 2 for exemplary language to the CBA).

The purposes in the Labor Management Cooperation Act of 1978 are ones which many fair contracting groups are established to pursue; including to:

- improve communication between representatives of labor and management;
- provide workers and employers with opportunities to study and explore new innovative joint approaches to achieving organizational effectiveness;
- assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;

- study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;
- enhance the involvement of workers in making decisions that affect their working lives;
- expand and improve working relationships between workers and managers; and
- encourage free collective bargaining by establishing continuing mechanisms for communication between employees and their employers through federal assistance to the formation and operation of labor management committees.

Most fair contracting organizations can meet at least some of these purposes, making the labor-management cooperation committee structure possible for such groups.

### **B. Fair Contracting Organizations Established Solely By Unions**

There is no requirement that a fair contracting organization be jointly-established or funded through employer contributions or through collective bargaining agreements. This may be the most common approach to secure sufficient funding for a fair contracting group, but it is not the only way. An alternative approach is for one union (or several unions) to establish and fund a fair contracting organization using direct funds from the union or unions.

Another alternative structure is for unions to pursue fair contracting programs and not establish a separate organizational entity for those types of services. Legal counsel must advise the union if it pursues this choice which fair contracting services are allowable and any legal ramifications such a program has for the union.

## **V. FUNDING A FAIR CONTRACTING ORGANIZATION**

The funding of a fair contracting group will be dictated in part by the type of organizational structure it uses. For example, if there are to be employer contributions, the fair contracting organization must be established under the Taft-Hartley Act as a “labor-management committee” as described above. Union-only fair contracting groups cannot receive employer funds.

### **A. Funding From Employers Or Through Collective Bargaining**

Fair contracting organizations can be jointly established by unions and signatory employers, allowing them to be funded through cents-per-hour contributions under collective bargaining agreements. This is permitted by § 302(c)(9) and allows the fair contracting groups to be used for a wide variety of activities that further the common interests of unions and their contractors permitted by § 302(c)(9) and listed above.

### **B. Federal Mediation and Conciliation Service Grants (FMCS)**

FMCS operates an annual grant funding program for labor-management committees. [www.fmcs.gov](http://www.fmcs.gov). FMCS grants typically last for one year and generally are awarded on a one-time basis to assist organizations in getting established. The maximum grant is \$125,000.00. A number of fair contracting organizations at both the local and national level have received FMCS grants, including the National Alliance for Fair Contracting (NAFC).

### **C. Funding From A Participating Union (Or Unions)**

Fair contracting groups can be funded directly by unions or several unions working together. If this is the structure, no employer contributions can be received.

## **VII. THE “CORPORATE” STRUCTURE OF A FAIR CONTRACTING ORGANIZATION: TRUST, NON-PROFIT CORPORATION OR ASSOCIATION**

A fair contracting organization which is established as a labor-management cooperation committee may be a trust fund, an unincorporated association, or a non-profit corporation. A union-only established fair contracting organization cannot be a trust. Its “corporate” form will be established pursuant to the state law where it is situated.

### **A. Trust**

The legal structures of many fair contracting organizations are similar to standard Taft-Hartley funds for pensions, health and welfare and other fringe benefits. A trust agreement is prepared to create the fund, identifying its purposes and setting forth general terms under which the trust shall be required to operate. Even if a fair contracting group is established as a trust, it may also be able to establish itself under the “non-profit” corporation laws of the state in which it is located. Having legal entity status may provide the group with important legal protections under state law.

### **B. Non-Profit Corporation**

If state law permits, a fair contracting organization can be established as a non-profit corporation under the laws of the state in which it is situated. This structure would require the drafting of bylaws, articles of incorporation, etc. Corporate status will also involve compliance with State filing requirements and other state law requirements.

A corporation is recognized in all states as a legal entity authorized to bring suit on its own behalf and may be desirable for that reason.

### **C. Unincorporated Association**

A fair contracting organization can be an unincorporated association. However, legal counsel should be consulted to determine if the fair contracting group which is organized as an unincorporated association could expose the members of the association to potential liability risks. Moreover, an unincorporated association may not constitute a legal entity for purposes of bringing suit. Corporate status may offer the most protection from liability exposure to the members of the fair contracting organization.

## **VII. TAX STATUS UNDER THE INTERNAL REVENUE CODE**

As with the other decisions involving establishing a fair contracting group, legal counsel must carefully review the group's structure, purposes and activities to decide on the correct tax status. Fair contracting organizations are usually tax-exempt organizations. A fair contracting organization must file an application with the Internal Revenue Service to achieve tax-exempt status.

Legal counsel will advise the fair contracting group as to its proper tax status and if it has the option of registering with the Internal Revenue Service under Sections 501(c)(3), (5) or (6). The decision as to which section to file under is important because it may affect the deductibility of contributions made to the fair contracting group and its ability to engage in certain activities, such as lobbying.

### **A. Section 501(c)(5) "Labor Organization"**

A fair contracting organization may have as an option to establish itself as a tax-exempt organization under IRS Code § 501(c)(5) (labor organization) of the Internal Revenue Code. IRS Code § 501(c)(5) and its regulations require:

1. That a labor organization have as its "objects" the betterment of the conditions of workers, the improvement of their products, and the development of a higher degree of efficiency in their respective occupations.
2. The purposes may be accomplished by a single labor organization acting alone or by several organizations acting together through a separate organization.
3. An organization may be a labor organization even though it is established, in part, by employers as long as the organization's activities are appropriate labor organization functions.
4. An organization may be a labor organization even though it is funded, in whole or in part, by employers.
5. Regulations prohibit inurement of earnings to the benefit of any member of the § 501(c)(5) organization.
6. Labor organizations are subject to taxation on unrelated business income on profit-making enterprises not related to the exempt purposes of the organization.
7. Labor organizations are required to file a Form 990 (or 990-EZ) with the IRS.

### **B. Section 501(c)(6) "Business League"**

A fair contracting group may have as an option to establish itself as a "business league" under Section 501(c)(6). A "business league", in general, is an association of persons having

some “common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit.” IRS Code § 501(c)(6) of the IRS requires:

1. Business leagues are exempt from taxation if they are not organized for profit and no part of their net earnings inures to the benefit of any private shareholder or individual.
2. Regulations define a business league as an association of persons (i.e., includes legal entities such as trusts and corporations) having a common business interest whose purpose is to promote the common business interest and not to engage in a regular business of a kind ordinarily carried on for profit.
3. Its activities must be directed to the improvement of one or more lines of businesses, rather than the performance of particular services for individual persons. The following are examples of what may constitute particular services: (a) advertising which carries the names of members; (b) facilitation of the purchase of supplies and equipment for members; (c) furnishing of information and services to members through publications and other means to effect economies in the operation of the members’ individual businesses; (d) research results available only to members; etc.
4. Most business leagues rely, at least in part, on membership dues as a source of revenue.
5. Business leagues may receive income from non-member sources without incurring unrelated business income as long as the activity producing the income is related to the organization’s exempt purpose.
6. Business leagues are subject to taxation on unrelated business income or profit-making enterprises not related to the exempt purposes of the league.
7. Business leagues are required to file a Form 990 (or 990-EZ) with the IRS.

**C. Section 501(c)(3) “Non-profit Organization”**

A fair contracting organization may have as an option to establish itself under Section 501(c)(3) as a “non-profit organization”. A “non-profit organization” is formed for one or more of the following purposes, such as charitable, religious, educational, scientific and literary purposes.

## **VIII. REPORTING**

### **A. LMRDA**

The Department of Labor (DOL) recently issued new rules which dramatically change the financial reporting requirements labor organizations must meet concerning their affiliated

organizations (including but not limited to trust funds). The new Form Trust-1 (called “Form T-1”) and the full instructions are available on the Department of Labor website ([www.dol.gov](http://www.dol.gov)).

It is imperative for labor organizations participating in fair contracting groups and fair contracting organizations themselves to discuss the following questions with their accountants and/or legal counsel to determine how and if they are impacted by the new requirements.

**Is the fair contracting organization responsible for filing the new Form T-1 with the United States Department of Labor?**

No. However, the fair contracting group does have to complete the form and provide it to the labor organization, which then will file the Form T-1 along with its other required reports with the US DOL.

**What is the first question a labor organization must answer to determine if it has to file a Form T-1 for a trust (or other affiliated organization such as a fair contracting group)?**

A labor organizations must file a new Form T-1 for any trust (or other organization) in which the union has an “interest”.

**How does the labor organization determine if it has a significant “interest” in the fair contracting organization so as to trigger the filing of a Form T-1?**

A Form T-1 is required if the fair contracting organization:

\*\*was created or established by a labor organization

**or**

\*\*one or more of the trustees (or one or more members of the governing body) is selected or appointed by a labor organization

and

\*\*a primary purpose of the fair contracting organization is to provide benefits for the labor organization’s members or their beneficiaries.

**What income thresholds trigger the filing of a Form T-1?**

The Form T-1 is required if the fair contracting organization has \$250,000 or more in annual receipts **and** the labor organization contributed \$10,000 or more to (or on behalf of) the fair contracting organization during the reporting year.

**Does the annual \$10,000 contribution have to be contributed directly to the fair contracting organization by the labor organization?**

No. The \$10,000 or more can be contributed to the fair contracting group on the labor organization’s behalf. For example, it can be contributed to the fair contracting organization pursuant to a collective bargaining agreement in which the union is a party.

**What is the effective date of the new reporting requirements?**

The effective date of the rule is July 1, 2004. For unions with a fiscal year beginning on July 1, 2004, they will conform their reporting practices during 2004 and the first reports to be governed by the new rules will be filed on September 30, 2005. A different fiscal year will trigger a different reporting date. If the union’s fiscal year ends on December 31, 2004, the new forms will be submitted by March 31, 2006.

**Even if all the requirements listed above are met, are there situations when no form T-1 will be required?**

Yes. The labor organization will not need to file a T-1 if the fair contracting organization:

\*\* already files a Form LM-2, LM-3 or LM-4

\*\* is an employee benefit plan which files complete and timely annual reports under ERISA

\*\* files IRS reports under 26 USC 527

\*\* is a PAC which files periodically available reports with a federal or state agency as a political action committee

\*\* conducts an independent audit that meets ERISA standards or standards in the instructions to the Form T-1 (and completes and submits to the union the audited financial statement within 90 days from the end of the labor union's fiscal year so that the union may file it in place of the Form T-1).

**What are some examples of the types of organizations which trigger the filing of a T-1?**

DOL has provided some examples of the type of groups which may trigger the filing of a Form T-1 by a labor organization. More examples are available on the DOL website:

**Example : Educational Institute** – Five reporting labor organizations form the Educational Institute to provide educational services primarily for the benefit of their members. Similar services are also provided to the general public. Each labor organization contributes funds to start the Educational Institute, which will then offer various educational programs that will generate revenue. Each labor organization that participated in forming the Institute, or that appoints a member to its governing body, must report the Educational Institute as a trust in which it is interested.

**Example : Joint Fund** – A reporting labor organization that forms a “joint fund” with a large national manufacturer to offer a variety of training and jobs skills programs for members of the labor organization, or appoints a member to the governing body of such a fund, must report the joint fund as a trust in which the labor organization has an interest.

**Example : Job Targeting Fund** – A reporting labor organization creates an entity for the purpose of making targeted disbursements to increase employment opportunities for its members. The fund must be reported as a trust in which the labor organization is interested.

**B. ERISA**

Fair contracting organizations established as a “labor-management committee” have generally not been considered to be ERISA funds unless they provide the types of “benefits” defined by ERISA (such as “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services”). However, it must be emphasized that legal counsel should be consulted on any possible ERISA issues for a fair contracting group. This is even more important because the new LMRDA reporting rules discussed above provide alternative reporting requirements for plans which file ERISA reports.

**ASSISTANCE TO PLANT, AREA,  
AND  
INDUSTRY-WIDE LABOR-MANAGEMENT  
COMMITTEES**

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**Labor  
Act of Management  
Cooperation Act  
of 1978.  
29 USC 175a  
note.**

Sec. 6. (a) This section may be cited as the "Labor-Management Cooperation Act of 1978."  
(b) It is the purpose of this section--  
(1) to improve communication between representatives of labor and management;  
(2) to provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;  
(3) to assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;  
(4) to study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;  
(5) to enhance the involvement of workers in making decisions that affect their working lives;  
(6) to expand and improve working relationships between workers and managers; and  
(7) to encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through Federal assistance to the formation and operation of labor-management committees.

**29 USC 173.**

(c) (1) Section 203 of the Labor-Management Relations Act, 1947, is amended by adding at the end thereof the following new subsection:  
" (e) The Service is authorized and directed to encourage and support the establishment and operation of joint labor-management activities conducted by plant, area, and industrywide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with provisions of Section 205A."  
(2) Title II of the Labor-Management Relations Act, 1947, is amended by adding after section 205 the following new section:

**29 USC 175a.**

"Sec. 205A. (a) (1) The Service is authorized and directed to provide assistance in the establishment and operation of plant, area and industrywide labor-management committees which--  
" (A) Have been organized jointly by employers and labor organizations representing employees in that plant, area, or industry: and  
" (B) are established for the purpose of improving labor-management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern.

**Grants and  
contracts**

"(2) The Service is authorized and directed to enter into contracts and to make grants, where necessary or appropriate, to fulfill its responsibilities under this section.

- “(b) (1) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to a plant labor-management committee unless the employees in that plant are represented by a labor organization and there is in effect at that plant a collective bargaining agreement.
- “(2) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to an area or industrywide labor-management committee unless its participants include any labor organizations certified or recognized as the representative of the employees of an employer participating in such committee. Nothing in this clause shall prohibit participation in an area or industrywide committee by an employer whose employees are not represented by a labor organization.
- “(3) No grant may be made under the provisions of this section to any labor-management committee which the Service finds to have as one of its purposes the discouragement of the exercise of rights contained in section 7 of the National Labor Relations Act (29 U.S.C.157), or the interference with collective bargaining in any plant, or industry.
- “(c) The Service shall carry out the provisions of this section through an office established for that purpose.
- “(d) There are authorized to be appropriated to carry out the provisions of this section \$10,000,000 for the fiscal year 1979, and such sums as may be necessary thereafter.” **Appropriation authorization.**
- (d) Section 302 (c) of the Labor-Management Relations Act, 1947, is amended by striking the word “or” after the semicolon at the end of subparagraph (7) thereof and by inserting the following before the period at the end thereof: “;or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor-management committee established for one or more of the purposes set forth in section 5(b) of the Labor-Management Cooperation Act of 1978”. **Ante, p. 2020. 29 USC 175a note.**
- “(e) Nothing in this section or the amendments made by this section shall affect the terms and conditions of any collective bargaining agreement whether in effect prior to or entered into after the date of enactment of this section.

**REPEALER**

Sec. 7. Section 104 of the Emergency Jobs and Unemployment Assistance Act of 1974 (Public Law 93-567) is hereby repealed.

**38 USC 2002 Note.**

**Approved October 27, 1978**