QUESTION AND ANSWER SUMMARY
FOR SMACNA CHAPTERS
REGARDING RECOGNITION

Recognition language has been incorporated into the labor agreements of some local areas. Questions continue to arise concerning the effect of this language. The following is a summary of the more significant questions and answers.

Question: What exactly is meant by "recognition language?"

Answer: Such language typically provides that the contractor has recognized the union as the collective bargaining representative of employees, based upon actual proof that the union represents a majority of those employees. An example of language found in the Sheet Metal Industry provides:

> The employer executing this contract has, on the basis of objective and reliable information, confirmed that a clear majority of sheet metal workers in its employ desire representation by the Sheet Metal Workers' International Association, Local No. _____, AFL-CIO, for purposes of collective bargaining. The employer therefore unconditionally acknowledges that Local No. _____ is the exclusive collective bargaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act.

Another form of recognition language does not provide for the immediate recognition of the union. Instead, it obligates the contractor to recognize the union at some future point in time, if the union provides proof that it represents a majority of employees. This latter type of language presents more complicated issues concerning its enforceability, discussed later in this summary.

Question: Why does the union want recognition language in the contract?

Answer: The reason is the decision of the National Labor Relations Board in John Deklewa & Sons, decided in 1987. In that case, the NLRB held that upon the expiration of many collective bargaining agreements in the construction industry, both the contractor and the union are free to refuse to negotiate a new agreement. However, that is the situation only if the contract is what is known as a Section "8(f) prehire agreement." An 8(f) prehire agreement is a labor contract that was entered into without any proof that the union represented a majority of the employees of the employer.

In contrast, if the contract is the result of a "Section 9(a)" bargaining relationship, the rules are very different. Generally, in a Section 9(a) relationship, both parties must negotiate a new labor agreement upon expiration of the contract. The contractor cannot simply decide to go non-union. A Section 9(a) bargaining relationship may exist in only two situations:

- where the union has been certified as the collective bargaining representative of employees, after an NLRB election, or

- where the contractor has voluntarily recognized the union as bargaining representative, at the time the union demanded recognition and simultaneously provided proof that it represents a majority of employees.

Collective bargaining agreements in the construction industry will be presumed to be an 8(f) prehire agreement, absent proof of an election or voluntary recognition.

Question: Can the union legally request such language?

Answer: Yes. There is nothing prohibiting the union from requesting recognition language in the contract. In like respect, there is also nothing that would require that the employer agree to recognition language.

Question: Is such language enforceable?

Answer: If the contractor has recognized the union as the bargaining representative, based upon actual proof that it represents a majority of employees, and the contract states that recognition has been granted based on that proof, that recognition will be binding.

If recognition is granted without proof, such a grant of recognition may not be binding. However, the contractor may have only a very limited period of time to challenge the granting of recognition, and once that period of time elapses, the recognition may become binding even if there was no proof that the union actually represented a majority of employees.

Language providing that the contractor will recognize the union in the future, based upon subsequent proof that the union has majority support, presents a more difficult issue. While the National Labor Relations Board has held that such language is enforceable during the term of the contract, one Circuit Court of Appeals has, as a practical matter, made it very difficult for the union to enforce such "future" recognition language.

Question: How may the union establish that it represents a majority of employees?

Answer: Generally, that is done by submitting union "authorization cards" that are signed by a majority of employees, for verification by the employer. If a majority of the employees has signed such cards, that would be sufficient proof that the union represents a majority.

Other things, standing alone, are generally not sufficient proof of majority status. For example, the fact that employees have observed the union security requirements of the contract by paying dues, or the fact that all employees have been obtained through the union hiring hall, is insufficient.

Question: Is recognition language a mandatory topic of bargaining?

Answer: In a previous memorandum, SMACNA legal counsel expressed the opinion that recognition language is a non-mandatory topic of negotiations. That means that neither party is under a legal obligation to bargain over that issue. There has been no NLRB decision since that memorandum that would compel any different conclusion.

The classification of such a proposal as mandatory or permissive may not be all that important. Even where an issue is a mandatory topic of bargaining, the contractor is still not under any legal obligation to actually agree to the union's proposal. It is only obligated to discuss it. If the contractor refuses to discuss or agree to such a proposal, the union may file an election petition, as discussed below, which makes the contractor's willingness to grant recognition irrelevant.

Question: What happens if a contractor does not agree to the union's request for recognition language?

Answer: The union could file a petition for an election with the NLRB. If a majority of employees eligible to vote in the election (i.e., those performing sheet metal work) vote in favor of the union, then the union will become certified as the exclusive bargaining representative of the contractor's employees. That would convert the bargaining relationship from an 8(f) prehire, to a Section 9(a) relationship.

It is important to understand how this procedure works. While the contractor is free to make its own decision on whether or not to agree to recognition language, the union also has a legal right to file an election petition with the NLRB. The contractor does not have the option of

refusing to permit such an election, or refusing to recognize the union's certification following such an election.
These realities must be kept in mind in making a decision on whether or not to agree to such recognition language. If the contractor rejects the union's request, it may have accomplished little except to strain the bargaining relationship, as the union may obtain certification by filing an election petition.

Question: Can the Association grant recognition on behalf of those contractors that have given it their bargaining authorization?

Answer: Generally, it may, except in the rare instance where there is something in the Association's bargaining authorization or bylaws that would prohibit it from doing so.

Such a grant of recognition will be binding upon the individual contractors, so long as the union actually represented a majority of the employees that worked for the contractors that are part of the multi-employer group, as well as a majority of those employed by individual contractor members. For example, if 200 employees worked for all employers in the multi-employer group, and 50 worked for one particular contractor, that contractor would be bound if the union proved that it represented 150 employees of the group, and 30 employees of that particular contractor.

The recognition may not be effective as to a contractor if the union did not actually represent a majority of employees of that particular contractor. In that situation, that contractor might be able to request an NLRB election, to determine whether the union represents a majority of its employees. Once again, however, any request for such an election would have to be made quickly, or the right to do so would be waived.

Question: Does it make any difference if the union is recognized as bargaining representative, in terms of whether Article X, Section 8 is enforceable?

Answer: No. It is well established that Article X, Section 8 is an enforceable obligation, regardless of whether it is in an 8(f) prehire agreement, or in a contract negotiated in a Section 9(a) bargaining relationship. The contractor will be obligated to proceed under Article X, Section 8 at contract expiration, and to abide by any decision of the National Joint Adjustment Board concerning terms for new agreement.

Question: What is the disadvantage of agreeing to recognition language?

Answer: From some contractors' perspective, the primary disadvantage is that it may make it more difficult for them to become non-union contractors in the future. Under the Deklewa case, a contractor could simply walk away from the bargaining relationship at the expiration of an 8(f) agreement (assuming that it did not include Article X, Section 8). That is not the case if there is recognition language in the contract. In that situation, the contractor will have a legal obligation to negotiate a new contract.

Question: Is there some advantage in agreeing to recognition language?

Answer: Since recognition language will result in a Section 9(a) bargaining relationship, contractors will not be able to simply walk away at contract expiration. From the standpoint of the multi-employer group, that may be an advantage, in that it will be more difficult for contractors to pull out of the multi-employer group in the future, and go non-union.

Furthermore, if it is a foregone conclusion that the union would win any subsequent election, one must assess what has been gained by denying the union's request for recognition language. Denying the union's request could adversely affect the bargaining relationship, and the union will be able to file a representation petition anyway, and obtain certification from the NLRB.