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Via Email

Procurement Law Control Group
Office of the General Counsel
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G. St., N.W.
Washington, D.C. 20548

Re: North Branch Construction, Inc.'s Pre-Award Protest of Solicitation No. DOL099RB20820 (Department of Labor Job Corps Center Construction in Manchester, New Hampshire)

Dear Sir or Madam:

In accordance with 31 U.S.C. §§ 3551-3556 and the Bid Protest Regulations of the Government Accountability Office (GAO), 4 C.F.R. Part 21 (2006), North Branch Construction, Inc. (hereafter "North Branch" or "the Protestor"), located at 76 Old Turnpike Road, Concord, NH 03301, (603) 224-3233, through its undersigned counsel Venable LLP, timely protests the Department of Labor's (DOL's) inclusion of a requirement in its Invitation for Bids No. DOL099RB20820 (the "Solicitation"), that any successful bidder for this project agree to enter into a Project Labor Agreement (PLA). See Exhibit 1, Pertinent Excerpts from the Solicitation, including Amendment 0001.[1] As further set forth below, this requirement unduly restricts competition, is wholly unsupported, and violates the Competition in Contracting Act, Executive Order 13502, the Small Business Act, and numerous procurement regulations. DOL's Solicitation appears to be the first and only federal agency solicitation since the enactment of the Competition in Contracting Act to attempt to impose a PLA requirement as a condition of allowing successful bidders to perform work on a federal construction project. GAO should adhere to its longstanding precedent and disallow DOL's unlawful bid restriction.

[1] The Solicitation does not explain what a PLA is, but the term "PLA" has been defined elsewhere as "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project ...." See Executive Order 13502 (Feb. 6, 2009). As commonly understood in the construction industry, a PLA requires that the successful bidder agree to recognize one or more unions as its employees' exclusive bargaining representative and to require all employees and subcontractors hired onto the project to be bound by the PLA. See Section H of the Solicitation setting forth these conditions as minimum requirements of the PLA on this project. A PLA also generally requires contractors to hire most or all employees for the project exclusively from a union hiring hall, to contribute into union fringe benefit trust funds which will not benefit the contractor's own employees, to obtain apprentices exclusively from union apprenticeship programs, and to obey costly and inefficient union work rules. As further explained below, each of these requirements discriminates against non-union contractors and effectively prevents them from bidding on the project.

The Contracting Officer is Ms. Marissa G. Dela Cerna, U.S. Department of Labor/OASAM/OPS, Division of Job Corps A/E and Construction Services, Room N-4308, 200 Constitution Ave., N.W., Washington, D.C. 20210. Phone: (202) 693-7983, Fax: (202) 693-7966.

I. Interested Party Status Of The Protestor.

Under 31 U.S.C. §§ 3551 and 3552, the Protestor is an "interested party" for purposes of filing this Protest because it is a prospective bidder whose direct economic interests would be affected by the award or failure to award the contract which is the subject of the Solicitation. 4 C.F.R. § 21.0(a). The Protestor is a qualified, small business general contractor who is eligible to bid on this construction project, is fully bonded and capable of performing the work specified in an efficient and economical manner, and desires to do so. But the Protestor is placed at a significant disadvantage in bidding under the Solicitation because of DOL's unprecedented and unjustified inclusion of the restrictive PLA bid requirement as a condition of award.

II. Timeliness Of The Protest.

This protest is timely filed in accordance with 4 C.F.R. § 21.2(a), in that it is being filed prior to the time set for the receipt of bids, which the Solicitation has established as November 5, 2009. Moreover, this protest is being filed within ten days after issuance of the Solicitation on October 1, 2009.

III. Required Suspension Of Contract Award.

DOL is prohibited from awarding a contract under the Solicitation pending resolution of this protest because the protest is being filed with the Comptroller General prior to award and prior to the November 5th due date for the submission of bids. See 31 U.S.C. § 3553(c)(1); FAR 33.104(b)(1).

IV. Background

A. The Solicitation.

The Solicitation at issue seeks to procure the construction of six (6) buildings totaling approximately 160,000 gross square feet. The facility will include a Welcome Center (1,427 GSF), Administrative/Wellness Center (11,735 GSF), Student Services Center (9,658 GSF), Educational/Vocational Center (42,492 GSF), Kitchen/Cafeteria/Warehouse Facility (13,973 GSF), two 2-story Dormitory Buildings (55,282 GSF) and a Recreational/Gymnasium Facility (21,035 GSF); site development of an approximately 25-acre site including grading, utility installations, site/security, lighting, sidewalks/walkways, roadways, parking areas and landscaping, and, site clearing, rock and granite blasting services at the new Manchester Job Corps Center site, Manchester, New Hampshire. Bids are due on November 5, 2009. The Period of Performance is to begin within 14 calendar days from receipt of notice to proceed and is to be completed within 558 calendar days from receipt of Notice to Proceed (NTP), with final completion within 618 calendar days from NTP. The estimated cost range is over $10,000,000. The project is identified as a Total Small Business Set-Aside.

In addition to the above requirements, the Solicitation includes the following additional requirement, which has not appeared in any previous known solicitation issued by a federal agency since enactment of the Competition in Contracting Act of 1984:

> "The US Department of Labor (DOL) is procuring services utilizing a project labor agreement (PLA).... *** Further, non-union contractors with demonstrated project labor agreement (PLA) experience are encouraged to submit a bid on this project."

The Solicitation contains no explanation for its inclusion of the PLA requirement.[2]

[2] The sole explanation offered by DOL for imposing the PLA on the New Hampshire Job Corps Center appeared in a Notice of Request for Sources that preceded issuance of the Solicitation. In that Notice, dated August 26, 2009, the Department merely stated that the project "will require large capital outlays, and will require exacting construction and performance standards, calling for high labor skills for many operations and complex scheduling and managerial organizations." The Department offered no explanation as to how a PLA would address any of these factors or, more importantly, how a PLA would "advance the Government's interest in achieving economy and efficiency in Federal procurement." The Department also made reference to Executive Order 13502 (Feb. 6, 2009), but did not explain how the Executive Order mandated or justified a PLA on this project.

On October 2, 2009, DOL issued Amendment 0001 (Exhibit 1), which specifies that the PLA be executed pre-award. Specifically, Amendment 0001 states:

> At the time bids are submitted, bidders must complete and submit the following form, along with a copy of an executed Project Labor Agreement conforming to the requirements described below:
>
> [Insert name of bidding company and the name of other entities signing the Project Labor Agreement] have entered into a Project Labor Agreement (PLA) that binds my company and [insert name of other entitles signing the Project Labor Agreement], and which will become operative if and when my bid is selected for award of a contract to perform construction work covered by Solicitation No. **DOL0099RB20820.** I further certify that the PLA contains the following required provisions:
>
> 1. All of my construction employees and those of my subcontractors at every tier will be subject to the PLA;
> 2. The PLA will remain in existence for the entire term of the project;
> 3. The PLA will insure that all workers, whether or not members of a labor union, will be eligible for employment by any company performing construction on the project;
> 4. The PLA will contain a "no-strike/no-lock-out" provision;
> 5. The PLA will include grievance procedures in the event there are disputes between any of the construction employers and their employees working on this project, which will be an exclusive forum to hear and decide disputes, and to render final decisions that bind the parties;
> 6. The PLA will include uniform rules related to work hours (including the same start/stop times for all trades); wages; benefits; work rules; and safety rules;
>
> In order to promote the Department of Labor's Office of Apprenticeship's efforts in educating and training workers in the construction trades, I agree to set-aside a certain percentage of work to apprentices in all trades represented in this construction project that have an apprenticeship program in New

> Hampshire authorized by the Department of Labor's Office of Apprenticeship.
>
> Bidders understand that failure to submit this form, along with a copy of a PLA conforming to the above-stated requirements, at the time bids are submitted will result in a finding that their bid is nonresponsive, and any such bid will NOT be evaluated for award as set forth in **SECTION M - EVALUATION FACTORS FOR AWARD, and will** not be eligible for award.

Exhibit 1, Amend. 0001 at 2.

The Solicitation further states that it is issued for sealed bidding, and that the project will be awarded to the low, responsive, and responsible bidder on the basis of price alone. Solicitation at § M-2. Amendment 0001 added the caution that:

> In order for a bid to be considered responsive, a Bidder, among other things, must submit the form in **Section H — Special Contract Provisions — Project Labor Agreement.** Failure to submit this form, along with a copy of a PLA conforming to the requirements set forth in Section H, at the time bids are submitted will result in a finding that the bid is nonresponsive, and any such bid will not be evaluated for award **and will not be eligible for award.**

Id. at 4. The original Solicitation provided that bids were due on November 5, 2009 at 1:00 pm Eastern Standard Time. Amendment 0001 did not enlarge the time in which bidders could respond to the IFB.

B. Adverse Impact of the PLA Requirement On Competition.

The restrictive PLA requirement in the Solicitation discriminates against the Protestor, and other non-union contractors, in the following ways:[3]

[3] Empirical evidence of the adverse impacts of PLAs on full and open competition has been documented in public comments filed by Associated Builders and Contractors, Inc. (ABC), and others, in an ongoing rulemaking proceeding being conducted by the FAR Council concerning proposed amendments to the FAR, further discussed below. See FAR Case 2009-005, Notice of Proposed Rulemaking. ABC provided

1) Non-union contractors who enter into PLAs are likely to have to pay added and duplicative costs for various union benefit programs, while at the same time paying for many of these same benefits through their own company benefit plans. These duplicative costs may include payments for holidays, sick days, and vacation time, as well as apprenticeship training, insurance benefits, profit sharing, and company contributions into employee 401K plans. A study recently performed by Professor McGowan of St. Louis University projects that non-union contractors' labor costs will increase by 25% or more under PLA requirements, over and above the prevailing wage and fringe benefit costs that such contractors already expect to pay under the Davis-Bacon Act.[4]

2) In addition to having to pay these additional costs, non-union contractors who become subject to a PLA are typically not able to use their own employees for the PLA-covered Project. Instead, such contractors are forced to staff the project with journeymen and apprentices referred to them by the union(s), with whom they are completely unfamiliar, or else pay penalties to the union. This requirement will make the contractor, and hence the contracting federal agency, less efficient. PLAs also typically restrict the ability of non-union contractors to schedule their work crews in any manner other than that dictated by the PLA without first receiving "permission" from the designated trade union or the designated Labor Coordinator. This again makes the contractor less efficient and less able to staff the job properly.[5]

3) Another reason why non-union contractors are adversely impacted by the PLA requirement is that non-union employees working on a prevailing wage project under a PLA are penalized monetarily, compared to their earnings on the same federal project covered by the Davis-Bacon Act without a PLA. Under Davis-Bacon, without a PLA, such employees receive

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a copy of its comments to DOL on behalf of its contractor members, including the Protestor herein, prior to issuance of the challenged Solicitation. A copy of the ABC comments is attached hereto as Exhibit 2.

[4] McGowan, The Discriminatory Impact of Union Fringe Benefit Requirements On Non-Union Workers Under Government-Mandated Project Labor Agreements (Aug. 2009), available at http//abc.org/plastudies.

[5] Although Section H of the Solicitation states that "all workers, whether or not members of a labor union, will be eligible for employment by any company performing construction on the project," this provision does not protect employees from being required to pay dues to a union once employed on the project, as is commonly required under PLAs.

"prevailing" wages and benefits which are equal to those paid to union employees.[6] On projects subject to a PLA, however, the employees must pay dues to the union, which are deducted from their regular take home pay. Such employees also forfeit significant dollar amounts that their employer would be required to pay into union benefit funds. Because of the relatively short duration of most construction projects, those non-union employees would receive no benefits from their pension contributions.

4) Perhaps most importantly, non-union contractors who are required to sign a PLA lose the ability to hire subcontractors of their own choosing, inasmuch as all subcontractors also must adhere to the PLA. Most subcontractors of nonunion contractors are themselves non-union and are reluctant to sign a PLA for the reasons set forth above. The Protestor has already been advised by many of its usual subcontractors that these small businesses will not offer their services on the Department's Job Corps project if a PLA is required.

5) The discriminatory adverse impact on small business, non-union contractors is compounded by the fact that Section H of the present Solicitation requires the successful bidder to negotiate and enter into a PLA with one or more unions prior to submitting its bid less than one month from now. This is an insurmountable requirement for most non-union contractors, including the Protestor, who by definition do not have established relationships with labor organizations. In addition, without knowing the actual terms of the PLA, it is impossible for non-union bidders to properly estimate their labor costs on the project, which is obviously a critical element of the bids that they are being called upon to submit.

It is well documented that PLAs have the effect of reducing the number of bidders for government procurements, for the reasons set forth above, thereby injuring competition. See ABC Comments, Exhibit 2, at 6-10. On the present project as well, in response to an initial Request for Sources published by DOL that made reference to the PLA, numerous qualified small business contractors, including the Protestor, informed DOL that they objected to imposition of the PLA on this project and would be discouraged from bidding if it were imposed. Of equal importance, the Protestor has been informed that numerous subcontractors on whom the company normally relies to perform similar work will be discouraged from bidding on this project if a PLA is imposed.

[6] See 40 U.S.C. § 3141, et seq.

C. The Lack Of Demonstrated Need For A PLA On This Solicitation.

The Solicitation does not contain any proof of need for a restrictive PLA requirement. Certainly, there is nothing particularly complex or unique about the planned construction project described in the Department's Solicitation. Indeed, many projects similar in size and scope to this project have been built in New Hampshire without any restrictive bid requirements forcing bidders to enter into agreements with any labor organizations. Numerous contractors, including the Protestor, informed the Department prior to issuance of the Solicitation that they had successfully constructed projects of similar size and complexity in New Hampshire, without any project labor agreements being required. In addition, more than 90% of the construction workers in New Hampshire do not belong to any labor organization and work for contractors who are not signatory to any union agreements.

It must also be observed that many more projects of equal or ***much greater*** size and complexity have been built by the federal government all over the country over the past decade, again without any need for restrictive PLA bid requirements. According to the official government database published at http://usaspending.gov, the government has contracted for construction of hundreds of projects over the past decade whose cost exceeded $10 million, including several Job Corps Centers constructed by the Department, all without any PLA in the solicitations for bids.[7] There was clearly no need for a PLA on any of those previous federal projects, and the DOL has offered no explanation as to why a PLA is needed on the current Solicitation.

As noted above, the sole explanation offered by DOL for imposing the PLA on the New Hampshire Job Corps Center appeared in a Notice of Request for Sources that preceded issuance of the Solicitation. In that Notice, the Department merely stated that the project "will require

[7] In February 2001, President Bush signed Executive Order 13202, as amended in EO 13208, prohibiting all federal agencies from requiring offerors for federally funded construction projects to enter into project labor agreements as a condition of performing work on such projects. Since that time (and actually for previous years as well), it can be stated with certainty that no federal agency has issued a solicitation for bids that contained restrictive PLA requirements of the sort now being imposed by the Department here. A recent study of construction projects built by the federal government during this period, based upon agency responses to FOIA requests and independent data, confirms that there were no significant labor problems reported on ***any*** of the large federal construction projects that were built during the past decade, demonstrating conclusively the lack of any federal agency's need for a government-mandated project labor agreement. See Tuerck, Glassman and Bachmann, Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem (August 2009), available at http//abc.org/plastudies.

large capital outlays, and will require exacting construction and performance standards, calling for high labor skills for many operations and complex scheduling and managerial organizations." The Department offered no explanation as to how a PLA would address any of these factors or, more importantly, how a PLA would "advance the Government's interest in achieving economy and efficiency in Federal procurement." The Department made reference to Executive Order 13502 (Feb. 6, 2009), but did not explain how the Executive Order mandated or justified a PLA on this project. As will next be discussed, Executive Order 13502 has no application to this project.

D. Executive Order 13502 And The Ongoing FAR Council Rulemaking.

President Obama issued Executive Order 13502 on February 6, 2009. This Executive Order purports to authorize federal agencies to impose PLAs on "large-scale construction projects," defined as costing $25 million or more, provided that such agencies ***first*** determine whether a PLA will:

> (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) be consistent with law.

Nothing in the Executive Order authorizes an agency to impose a PLA in violation of the Competition in Contracting Act, nor would the President be authorized to issue such an order. In addition, Section 5 of the Executive Order expressly states that the Order does not require any agency to use a PLA on any construction project. Section 6 of the Order commands the FAR Councils to amend the FAR to implement the terms of the Executive Order. Section 11 states that the Executive Order shall apply only to those solicitations issued on or after the effective date of the FAR Councils' amendment of the FAR. No such amendment has yet taken place.

On July 14, 2009, the FAR Councils issued a Notice of Proposed Rulemaking in order to amend the FAR to implement the Executive Order. 74 Fed. Reg. 33953 (July 14, 2009). Hundreds of comments were filed in response to the Notice, many of which were highly critical of the Proposed Rule. See, e.g., Exhibit 2, Comments of ABC. On August 23, 2009, the FAR Councils extended the comment period to September 23, 2009. Though the comment period has now

closed, the FAR Council has not yet amended the FAR to permit any federal agency to impose a restrictive PLA bid specification.

DOL's Solicitation appears to be the first and only federal agency solicitation since the issuance of the Executive Order to attempt to impose a PLA requirement as a condition of allowing successful bidders to perform work on a federal construction project. DOL has offered no explanation as to why it is seeking to impose a PLA on the current project without waiting for the proposed amendments to the FAR to become final (i.e., contrary to the instructions of the Executive Order).

GROUNDS OF PROTEST

GROUND 1: THE SOLICITATION'S PLA REQUIREMENT UNNECESSARILY RESTRICTS COMPETITION IN VIOLATION OF THE COMPETITION IN CONTRACTING ACT.

The Competition in Contracting Act of 1984 ("CICA") and Part 6 of the FAR establish that Federal procurements shall employ "full and open competition." 41 U.S.C. § 253(a)(1); 48 C.F.R. § 6.000-6.102. An agency such as the DOL has an affirmative obligation to draft specifications or requirements so as to promote competition to the maximum extent practicable. 41 U.S.C. § 253 (a)(1)(A), (C); The Kohler Company, B-257162, Sept. 2, 1994, 94-2 CPD ¶ 88 at 2; CardioMetrix, B-259736, April 28, 1995, 95-1 CPD ¶ 223; University Research Corporation, B-216461, Feb. 19, 1985, 85-1 CPD ¶ 210.

"A procuring agency is required to specify its needs in a manner designed to promote full and open competition, and may only include restrictive provisions in a solicitation to the extent necessary to meet the agency's minimum needs." Omega World Travel, B-258374, Jan. 13, 1995, 95-1 CPD ¶ 20 at 1 (protest sustained where the agency's established requirements unjustifiably limited competition). By imposing requirements that effectively restrict competition to only a few potential bidders, the government's obligation to achieve "full and open competition" among small businesses is defeated. [8]

[8] "[W]here a small business set-aside is called for, the law generally provides for full and open competition among eligible small business concerns." Department of the Army—Request for Modification of Recommendation, B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23 at 4. Other than the total small business set-aside nature of the Solicitation, none of the FAR Part 6 exceptions to CICA exist to justify DOL's further restriction of competition by imposing a preference for unionized contractors (e.g., only one responsible source, unusual and

1. The PLA Requirement Unduly Restricts Competition.

In the present case, as shown above, DOL's PLA requirement plainly does not promote full and open competition among small businesses, but instead discriminates in favor of a select few unionized contractors at the expense of the majority of contractors and subcontractors in New Hampshire who are not unionized. Non-union contractors are discriminated against and discouraged from bidding, inter alia, because their costs of complying with the PLA are significantly greater than those of union contractors, and because they will be unable to utilize their own employees and subcontractors on the project, and because those employees who they do hire will have to pay dues to a union and will lose compensation in the form of payments made to union benefit plans which will not benefit the employees.

The GAO has long recognized that agency-imposed requirements to comply with project labor agreements not supported by statute are unduly restrictive of competition. See To the Secretary of Defense, 42 Comp. Gen. 1, B-148930, Jul. 2, 1962, 1962 CPD ¶ 41. In 42 Comp. Gen. 1, the Department of Defense and NASA sought to incorporate the wage terms of Project Labor Agreements into a contract clause in construction solicitations. The agencies argued that imposition of the terms of the PLA "will result directly in lower construction costs, will permit economies arising from the standardization of shifts, holidays and overtime arrangements, and will facilitate construction operations by providing more uniform conditions on a project of extended duration." Id. The GAO rejected this argument, finding that "inclusion of such terms and conditions in government contracts normally tends to restrict competition and increase costs." Id. The GAO held:

> The inclusion in missile construction contracts of a clause providing employee wage, hour and fringe benefits resulting from a labor-management agreement, which benefits are not authorized by statute, would restrict competition and increase the cost to the government; therefore, such a labor clause as a condition precedent would be contrary to the laws of government contracting.

Id. at 1. In holding that imposition of terms and conditions from the PLA was unduly restrictive of competition and violated procurement statutes, the GAO relied on prior decisions, which embodied "the proposition that where the Congress has specifically authorized the inclusion in

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compelling urgency, industrial mobilization, precluded by international agreement, 8(a) or HUBZone sole source awards, national security, or public interest).

government contracts of conditions or restrictions of the same general character, the administrative agencies are not authorized to impose further or additional requirements." Id.

Similarly, in Comptroller General Warren to the Architect of the Capitol, B-109270, May 2, 1952, 31 Comp. Gen. 561 (1952), the GAO sustained a protest where the agency had rejected a bid from an awardee who did not employ union labor because "no statute requires the employment of union labor by government contractors, and generally there would be no legal justification for the rejection of the lowest bid received solely because of the fact that the low bidder may not employ union labor."

These holdings have been given even greater force by the enactment of the Competition in Contracting Act. Under CICA, in Navajo Nation Oil & Gas Co., B-261329, Sept. 14, 1995, 95-2 CPD ¶ 133, GAO sustained a protest challenging a clause contained in the solicitation as unduly restrictive of competition because it imposed unjustified experience requirements on offerors to qualify for award. See also Prisoner Transportation Servs., LLC; V1 Aviation, LLC; AAR Aircraft Servs., B-292179, June 27, 2003, 2003 CPD ¶ 121.

The GAO has also consistently rejected requirements for memberships in certain organizations as unduly restrictive of competition. See James LaMantia, B-245287, Dec. 23, 1991, 91-2 CPD ¶ 574 ("[T]he absence of an endorsement by a particular private organization should not automatically exclude offers that might otherwise equally meet a procuring agency's needs."); SMS Data Products, Inc., B-205360, Apr. 27, 1982, 82-1 CPD ¶ 390; Precision Piping, Inc.; M&S Mechanical Corp., B- 204024, B- 204024.2(1), Mar. 9, 1982, 82-1 CPD ¶ 215 ("Our decisions hold that requirements for approval or certification by specific organizations without recognizing equivalents are unduly restrictive."). For this reason as well, the imposition of a PLA containing the requirement that the successful bidder agree to force its employees to become union members, must be rejected.

2. DOL Cannot Meet Its Burden Of Proving Need For The Restrictive PLA Requirement.

Once a restrictive procurement is challenged, the burden shifts to the agency to demonstrate that the restriction is reasonably necessary to meet the agency's needs. Pipeliner Sys., Inc., B-254481, Dec. 21, 1993, 94-2 CPD ¶ 204 at 3; see also American Material Handling, B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 at 3 (when a protestor challenges a specification as unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specifications are reasonably necessary to meet its minimum needs). Here, the DOL has not

demonstrated that a PLA is necessary to meet the Department's minimum needs for construction of the New Hampshire Job Corps Center.

Indeed, the DOL cannot possibly make a showing of need in light of the fact that the DOL has successfully built similar Job Corps Centers around the country over the past decade without any need for a PLA, and in light of the further fact that the federal government as a whole has contracted for hundreds of construction projects of similar and greater size and complexity over the past decade, again without any need for PLAs. Moreover, even if the DOL could show that PLAs might be somehow needed in some parts of the country where unions control the skilled work force performing a significant share of the construction work, no such showing can be made in the present Solicitation, because the Job Corps Center at issue is located in a part of the country, Manchester New Hampshire, where construction unions represent fewer than 10% of the area's workers.

Far from furthering the alleged need to employ highly skilled workers on this project, the PLA restriction, by discouraging bids from 90% of the work force employers who are non-union, will significantly *narrow* the pool of such skilled workers. Likewise, the PLA will do nothing to improve scheduling or managerial operations or capital outlays on this project. The Protestor and other non-union contractors have all the capital, scheduling, and managerial skill necessary to construct this project without a PLA, as they have proven by their experience on similar sized projects.

Decisional law also makes clear that it is not sufficient for the DOL to assert that more than one offeror could meet the restrictive specification so that "some" competition between offerors would remain despite a restrictive solicitation term. Instead, full and open competition prohibits restriction beyond the agency's minimum needs. Kohler Co., B-257162, Sept. 2, 1994, 94-2 CPD ¶ 88 (requirement of 4-cycle diesel generator exceeded minimum needs, which could also be met by 2-cycle diesel generators, even though at least two offerors could compete by offering 4-cycle generators). Numerous published studies have shown, and the agency record in this case will confirm, that a government-mandated PLA injures competition by discriminating against and discouraging significant numbers of non-union contractors from bidding on government construction projects. For this reason as well, the GAO should find that the Department's solicitation violates CICA.

For each of these reasons, the Solicitation plainly violates CICA's full and open competition requirement.[9] There is simply no logical or rational basis for DOL to mandate that qualified small businesses utilize a union workforce to construct DOL's Job Corps Center in New Hampshire. DOL has not and cannot explain why directing the required construction work to union shops instead of non-union workers is related at all (much less reasonably related) to DOL's need to construct the Job Center. It is plain that the PLA requirement is nothing but a political payback to labor organizations who campaigned to elect the current administration and to whom the new Secretary of Labor has made numerous expressions of intended favoritism. This is not a permissible basis for infringing on the Congressional mandate of full and open competition.

3. The Requirement That a PLA Be Entered Into Prior To Submission of Bids Further Unduly Restricts Competition.

The requirement that the PLA between the union and offeror be executed prior to bid submission effectively precludes competition from any offeror, such as the Protestor, who does not already have established relationships with unions and has not already executed PLAs with them. Absent such relationships and experience, 34 days is simply insufficient time in which to negotiate and execute an agreement with a union who is a stranger to the contractor's business and its employees. Moreover, the PLA must flow down to subcontractors at all tiers. Since many subcontractors will refuse to work under a PLA, non-union prime contractors will have to locate and obtain quotes from union subcontractors willing to a sign a PLA. Again, none of this is necessary to build the Job Corps Center. The Protestor and its non-union subcontractors are fully capable of completing the project economically and efficiently, and there is no basis for discriminating against them on the basis of their lack of union experience, which should have no basis on DOL's responsibility determination.

[9] It should also be noted that DOL's original reliance on assertions of project complexity and need for skill and "exacting construction and performance standards" have been rendered moot by the agency's decision to compete this as a technically acceptable, "low bid wins" procurement.

GROUND TWO: THE SOLICITATION VIOLATES EXECUTIVE ORDER 13502, THE FAR, AND THE APA; ALTERNATIVELY, EXECUTIVE ORDER 13502 ITSELF VIOLATES CICA.

As noted above, the DOL has made reference to Executive Order 13502 in attempting to justify imposition of the restrictive PLA in the challenged Solicitation. See DOL's Request for Sources dated August 26, 2009. However, Executive Order 13502 has no application to the present Solicitation because the Executive Order states that it covers only projects whose solicitations issue after implementing amendments are made to the FAR. See EO Section 11.[10] Nothing in the Executive Order requires or authorizes DOL to impose a PLA in the current Solicitation before allowing the FAR Councils to amend the FAR in accordance with the Executive Order. The fact that hundreds of comments were received by the FAR Council, many of them critical of the Notice of Proposed Rule (see Exhibit 2), further shows that the FAR Council should be allowed to complete its work and presumably arrive at a Final Rule that will amend the FAR in harmony with CICA, unlike DOL's rash action in the present case.

Even if the Executive Order did apply, however, the Solicitation would violate its terms. The Executive Order requires the agency to make a determination, prior to imposing a PLA on a large construction project, that such a requirement will "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and ...be consistent with law." The DOL has made no such findings in this case. Nor is it possible for DOL to make any such findings in light of the fact that the PLA is being imposed on a type of project and in an area of the country where a union-only restriction is unheard of due to the dearth of union contractors and union workers. Reducing the number of non-union bidders will only serve to increase the costs of the project and reduce the efficiency of the construction, in direct contradiction to the terms of the Executive Order and the Federal Administrative Property and Procurement Act.

By rushing to become the first federal agency to impose a PLA on a construction project, without waiting for amendments to the FAR and without complying with the Executive Order, DOL has violated the Administrative Procedure Act by creating a new ad hoc policy of its own, without notice or comment. For this reason as well, the Solicitation must be rejected.

[10] The Executive Order also applies only to projects whose costs exceed $25 million, whereas the current Solicitation states that the project only exceeds $10 million.

Finally, even if the Solicitation were authorized by the Executive Order, which it is not, it would be necessary to find that the Executive Order itself violates the Competition in Contracting Act by authorizing agencies to restrict competition in violation of the governing statute. The President does not have authority by Executive Order to override the expressed will of Congress. Indeed, the Executive Order declares its intent to comply with all applicable laws. Therefore, at a minimum, the Executive Order must be harmonized with CICA's mandate of full and open competition, something that DOL has manifestly failed to do. For each of these reasons, the Executive Order offers no support for the DOL's unlawful imposition of a PLA in the current Solicitation.

GROUND THREE: THE REQUIREMENT TO ENTER INTO AGREEMENT WITH A UNION RESULTS IN AN UNJUSTIFIED SOLE SOURCE, GOVERNMENT DESIGNATED SUBCONTRACT.

A PLA effectively requires the awardee to subcontract the representation of its employees to a particular entity, which constitutes an unjustified sole source contract. The Protestor in this case is prejudiced by this sole source requirement, because, as described in Ground One, infra., it causes the Protestor to subcontract a function that is normally performed in-house. Moreover, the PLA will likely require the Protestor to pay added and duplicative costs directly to the union or to union trust funds for various "benefits and fringes," while at the same time paying for many of these same benefits through the Protestor's own company benefit plans. Interposing a government-mandated subcontractor between the contractor and its employees impermissibly interferes with the employer and employee relationship and imposes restrictions on the flexibility of Protestor to ask their employees to adjust their work to suit the needs of the contract. DOL has not justified an award to the union of the right to represent North Branch's employees.

Where the agency has directed that a prime contractor enter into a contractual relationship with a specified subcontractor, such as here, it must justify such a mandate as it would any other sole source arrangement. See Nat'l Data Corp., B-202953, 61 Comp. Gen. 328, 82-1 CPD ¶ 313; See also Ms. Margaret A. Willis, FAR Secretariat, General Services Administration, B-236742, B-236743, Jan. 23, 1990, 1990 WL 277693 (Comp. Gen.) ("We believe that an agency should be required to justify directing the use of a particular subcontractor.").

DOL cannot justify the PLA requirement that the Protestor contract with a union on a sole source basis. The Protestor is as capable of dealing directly with its own employees as is any union; indeed, the Protestor is *more* capable since its employees have chosen to work on a non-union

basis. As further noted above, New Hampshire workers are more than 90% non-union (i.e., they have no interest in union representation). DOL has not justified a sole source award to a union, nor can it.

GROUND FOUR: THE SOLICITATION FAILS TO PROVIDE SUFFICIENT INFORMATION ABOUT THE REQUIREMENTS FOR A PLA TO ALLOW BIDDERS TO COMPETE INTELLIGENTLY ON A COMMON BASIS.

As noted above, the Solicitation fails to provide sufficient information about the nature of the PLA to elicit a meaningful response from bidders. Consequently, the Solicitation's requirement of a PLA is inherently ambiguous and will not allow bidders to compete intelligently.

The GAO has recognized that "[a]s a general rule, a procuring agency must give sufficient detailed information in its IFB to enable bidders to compete intelligently and on a relatively equal basis. Harris Sys. Int'l, Inc., B-224230, Jan. 9, 1987, 87-1 CPD ¶ 41 at 2. In Harris, the IFB stated that a performance requirements summary, which reflected the method of inspection and deductions for nonperformance, would be incorporated into the contract after award at no increase in price. The GAO sustained a protest that the agency should have included more detailed information.

There are different versions of PLAs which could be imposed on the project. All PLAs which force bidders to enter into union agreements discriminate against non-union contractors and increase their costs; but some PLAs are clearly more expensive than others. It is impossible to tell from the Solicitation exactly how high the additional costs will be on this project that are likely to be imposed on the Protestor, due to the lack of sufficient information regarding the restrictive nature of the bid specification. For this reason as well, the Solicitation should be disallowed.

GROUND FIVE: THE PLA REQUIREMENT UNREASONABLY RESTRICTS SMALL BUSINESS PARTICIPATION.

The Solicitation's requirement that bidders enter into a PLA and utilize a union workforce interferes with the Congressional mandate that federal agencies should encourage and give preference to small and disadvantaged businesses in the procurement of government contracts. The requirement is also inconsistent with the spirit of the total small business set aside nature of

the instant Solicitation, which is set aside for the purpose of increasing federal contracting opportunities to qualified small businesses.

GAO will sustain a protest where the agency imposes unreasonably restrictive terms in a solicitation set aside for small businesses. For example, in TFab Mfg., LLC, B-401190, June 18, 2009, 2009 CPD ¶ 127, the challenged solicitation required small businesses to comply with both the Limitation on Subcontracting Clause's minimum percentages for costs incurred for personnel and the costs incurred for manufacturing the supplies. In sustaining the protest, GAO noted that the subcontracting terms "will have the practical effect of restricting competition" because "small business firms that can only perform either a majority of the services work or a majority of the supply work will not be able to compete" and that the "pool of potential competitors will be limited to small businesses that can satisfy [both] requirements . . ." TFab at 4. Thus, GAO will sustain a protest challenging the terms of a small business set aside solicitation where the pool of potential small business competitors is unreasonably and irrationally limited or restricted.

Here, DOL's requirement that small business offerors utilize PLAs will unreasonably limit the pool of potential competitors on the Job Corps Centers project. The PLA requirement obligates otherwise qualified non-union small businesses to fundamentally adjust their business models to accommodate costly, restrictive and inefficient union work rules. Non-union small businesses, like the Protestor, are reluctant to participate in the competition because the PLA would require, among other things, that they recognize unions as the representatives of their employees on that job, use the union hiring hall to obtain workers, obtain apprentices exclusively from union apprenticeship programs, and pay into union benefit plans. Such burdensome, unnecessary, and unjustified requirements discourage broad small business participation and limit the pool of potential small business competitors to the much smaller number of union businesses.

The PLA requirement also discriminates against minority-owned and women-owned small businesses who are supposed to be given preferences in contracting and subcontracting. The vast majority of such businesses are non-union and will be discouraged from bidding for this project due to the PLA. The long history of union discrimination against minorities and women also serves to discourage minority and women-owned contractors and their employees from seeking to perform work under a PLA. See ABC Comments, Exhibit 2.

Thus, the adverse economic impact of PLAs on small businesses in the construction industry directly contravenes Congress's expressed intent to promote and encourage federal procurement to small businesses under the Small Business Act. Despite the fact that the Solicitation is set

aside for small businesses, the Solicitation's PLA requirement actually discourages broad small business participation by both prospective prime offerors and potential subcontractors. Accordingly, the Solicitation's PLA requirement is inherently unreasonable.

REQUEST FOR DOCUMENTS

In accordance with 4 C.F.R. §§ 21.1(d) and 21.3, the Protestor requests that DOL produce the following documents. All of the requested documents are relevant to the Protestor's grounds of protest as they relate directly to DOL's actions or inactions in this procurement. Counsel for the Protestor requests that these documents be produced at the earliest practicable time. To the extent that the documents contain proprietary, or source selection information, counsel for the Protestor requests the issuance of an appropriate Protective Order restricting release of such information and under which counsel for the Protestor is prepared to submit applications for access to such information.

The requested documents include the following:

1. Any and all documents relating to the DOL's purported justification for soliciting a contract without full and open competition.

2. Any and all documents relating to the DOL's consideration of whether it may exercise any authority to award a contract without full and open competition.

3. Any and all documents relating to any communications between the DOL and any labor organization or other third party relating to the DOL's determination to impose a PLA as part of the Solicitation.

4. Any and all documents relating to the DOL's consideration of whether its actions relating to this procurement complied with law, including the Federal Acquisition Regulation.

5. Any and all documents relating to the DOL's determination that a PLA was needed to meet the Department's minimum requirements for this project.

6. Any and all market research conducted by DOL prior to issuance of the Solicitation.

7. All documents indicating the DOL's advanced planning in issuing the Solicitation.

8. Any and all documents indicating that DOL made a determination that a PLA was needed to advance the federal government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and that a PLA is consistent with law.

9. Any and all documents relating to DOL's determination regarding the expected cost of the project.

10. Any and all documents relating to the DOL's determination that a sufficient number of small businesses were likely to submit qualifying offers subject to the PLA requirement in response to the Solicitation so as to justify a Total Small Business Set-Aside.

11. Any and all documents identifying any DOL projects since 2001 with costs exceeding $10 million on which costs and/or delays in construction were significantly increased due to the absence of a PLA on the project.

12. Any and all documents explaining the manner in which a PLA would assist construction contractors in making large capital outlays, and meeting exacting construction and performance standards, calling for high labor skills for many operations and complex scheduling and managerial organizations.

13. Any and all documents identifying any DOL projects since 2001 with costs exceeding $10 million on which costs and/or delays in construction were significantly increased due to labor disputes, problems in labor coordination, or the absence of labor dispute mechanisms.

14. All computer files, records and iterations (drafts) regarding the information sought in the requests set forth above, including electronic mail communications.

15. E-mails reflecting or relating to all of the above.

16. All objections to the PLA received by DOL, including objections to PLAs received in response to the sources sought synopsis, the pre-solicitation notice, and this Solicitation.

17. All protests, whether at the agency, the GAO, or the U.S. Court of Federal Claims, filed as a result of the imposition of the requirement for PLAs and DOL's response thereto.

18. All documents that reflect a listing of any hardcopy and/or electronic files relevant in any way to this procurement that have been destroyed or deleted since July 31, 2009.

19. All documents generated by or within DOL reflecting or influencing the issues raised in this Protest not elsewhere specified in this request.

RESERVATION OF RIGHT TO REQUEST A PROTECTIVE ORDER

Protestor reserves its right to request that a protective order be issued in this protest. We do not believe that the instant filing contains information that should be protected, nor do we believe that the government's rationale for requiring the use of PLAs should be protected. However, in the event that DOL's record contains relevant documents that should be included in the Agency Report, and these documents are deemed to contain confidential source selection information, Protestor will request that a protective order be issued.

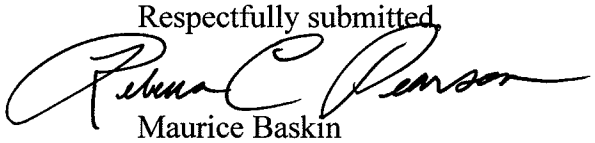
CONCLUSION AND REQUEST FOR RELIEF

As set forth above, the Department's Solicitation on its face and as applied violates CICA. The Solicitation also violates Executive Order 13502 by imposing a PLA on a project costing less than $25 million and by failing to meet the criteria established by the Executive Order for imposing a PLA. The Solicitation also violates the Executive Order and the as yet unamended FAR by imposing a PLA without waiting for the FAR Councils to amend the FAR. Consequently, the Protestor requests the following action:

(a) A ruling sustaining this protest, as contemplated by FAR § 33.103(d)(2)(v);
(b) Removal by the DOL of any PLA requirement from the Solicitation;
(c) Suspension of the deadline for submission of bids until a minimum of 45 days after resolution of this protest;
(d) That the Protestor be reimbursed for the costs of filing and pursuing this protest, including attorneys' fees;

(e) The production of documents by the government; and
(f) Such other and further relief as is deemed just and proper.

Respectfully submitted,



Maurice Baskin
Rebecca E. Pearson
James Y. Boland
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Washington, D.C. 20004
Telephone: 202.344.4823
Regular Facsimile: 202.344.8300
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Email: mbaskin@venable.com;
repearson@venable.com;
jyboland@venable.com
Firm Website: www.venable.com

Counsel for North Branch Construction, Inc.

Enclosures

cc (via overnight mail):

Mrs. Marissa G. Dela Cerna
Contracting Officer/Division Chief
U.S. Department of Labor/OASAM/OPS
Division of Job Corps A/E and Construction Services — N-4308
200 Constitution Avenue, N.W
Telephone: (202) 693-7983, Fax: (202) 693-7966

cc (via email):

Olivia Thorpe, Contract Specialist
(thorpe.olivia@dol.gov)

Exhibit 1

NOTICE: Total SET-ASIDE

SOLICITATION, OFFER AND AWARD (Construction, Alteration, or Repair)	1. SOLICITATION NO.	2. TYPE OF SOLICITATION	3. DATE ISSUED	PAGE OF PAGES
	DOL099RB20820	[X] SEALED BID (IFB) [ ] NEGOTIATED (RFP)	10-01-2009	1

IMPORTANT - The "offer" section on the reverse must be fully completed by offeror.

4. CONTRACT NO. / CODE	5. REQUISITION/PURCHASE REQUEST NO	6. PROJECT NO
	94-0991-1352/347356 Thorpe	

7. ISSUED BY	8. ADDRESS OFFER TO
U.S. Department of Labor/OASAM/OPS Division of Job Corps A/E and Construction Services - N-4308 200 Constitution Ave., NW Washington DC 20210	U.S. Department of Labor/OASAM/OPS Miller, Dyer and Spears/A/E Attn: Olivia J. Thorpe, DOL CS 99 Chauncy Street Boston MA 02111

9. FOR INFORMATION CALL:	A. NAME	B. TELEPHONE NO. (Include area code) (NO COLLECT CALLS)
	Ms. Olivia J. Thorpe	(202) 693-7983

SOLICITATION

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

10. THE GOVERNMENT REQUIRES PERFORMANCE OF THE WORK DESCRIBED IN THESE DOCUMENTS (Title, identifying no., date):

Project Title: "New Job Corps Center", Manchester, New Hampshire

Estimated Cost: Over $10,000,000

Drawings and Specifications are available at: http://www.solicitationattachments.com/newhampshire

The US Department of Labor (DOL) is procuring services utilizing a Project Labor Agreement (PLA) for the construction of six (6) building totaling approximately 160,000 gross square feet. The facility will include a Welcome Center (1,427 GSF), Administrative/Wellness Center (11,735 GSF), Student Services Center (9,658 GSF), Educational/Vocational Center (42,492 GSF), Kitchen/Cafeteria/ Warehouse Facility (21,035 GSF); site development of an approximately 25-acre site including grading, utility installations, site/security, lighting, sidewalks/walkways, roadways, parking areas and landscaping, and site clearing, rock and granite blasting services.

Further, non-union contractors with demonstrated Project Labor Agreement (PLA) experience are encouraged to submit a bid on this project.

A pre-bid walk-thru is scheduled for October 15, 2009, at 11:00 am. Questions resulting from the pre-bid walk-through, or explanation, or interpertation of the solicitation, drawings, specifications, etc., must request it in writing no later than October 21, 2009, COB. This is necessary to allow a reply to reach all prospective bidders before the submission of bids. Bidders unable to comply by October 21, 2009 should bid the contract according to your best interpreation of the plans, specifications, and amendments. All comments should be mailed to: thorpe.olivia@dol.gov.

The US Department of Labor/OASAM/OPS will not accept questions after 10/21/09, COB. The Bid Opening is 11/5/09, 1:00 pm, at Miller Dyer Spears, A/E, 99 Chauncy Street, Boston, MA 02111.

All mailed bids should be in the offices of Miller Dyer Spears by 10:00 am on 11/5/09.

All hand-carried bids should be in the offices of Miller Dyer Spears by 1:00 pm on 11/5/09.

11. The Contractor shall begin performance within 14 calendar days and complete it within 618 calendar days after receiving [ ] award, [X] notice to proceed. This performance period is [X] mandatory, [X] negotiable. (See 52.211-10 .)

12A. THE CONTRACTOR MUST FURNISH ANY REQUIRED PERFORMANCE AND PAYMENT BONDS? (If "YES," indicate within how many calendar days after award in Item 12B.)	12B. CALENDAR DAYS
[X] YES [ ] NO	10

13 ADDITIONAL SOLICITATION REQUIREMENTS:

A. Sealed offers in original and 2*** copies to perform the work required are due at the place specified in Item 8 by 1:00 pm (hour) local time 11-05-2009 (date). If this is a sealed bid solicitation, offers must be publicly opened at that time. Sealed envelopes containing offers shall be marked to show the offeror's name and address, the solicitation number, the date and time offers are due

B. An offer guarantee [X] is, [ ] is not required.

C. All offers are subject to the (1) work requirements, and (2) other provisions and clauses incorporated in the solicitation in full text or by reference

D. Offers providing less than 60 calendar days for Government acceptance after the date offers are due will not be considered and will be rejected.

OFFER(Must be fully completed by offeror)

14. NAME AND ADDRESS OF OFFEROR (Include ZIP Code)	15. TELEPHONE NO. (Include area code) 16. REMITTANCE ADDRESS (Include only if different than Item 14)
CODE FACILITY CODE	

17. The offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of the solicitation, if this offer is accepted by the Government in writing within _____ calendar days after the date offers are due. (Insert any number equal to or greater than the minimum requirement stated in Item 13D. Failure to insert any number means the offeror accepts the minimum in Item 13D.)

AMOUNTS	

18. The offeror agrees to furnish any required performance and payment bonds.

19. ACKNOWLEDGMENT OF AMENDMENTS
(The offeror acknowledges receipt of amendments to the solicitation - give number and date of each)

AMENDMENT NO.										
DATE										

20A. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)	20B. SIGNATURE	20C. OFFER DATE

AWARD (To be completed by Government)

21. ITEMS ACCEPTED:

22. AMOUNT	23. ACCOUNTING AND APPROPRIATION DATA

24. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified)	ITEM	25. OTHER THAN FULL AND OPEN COMPETITION PURSUANT TO ☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c) ( ) ☐
26. ADMINISTERED BY CODE U.S. Department of Labor/OASAM/OPS Division of Job Corps A/E and Construction Services - N- 4308 200 Constitution Ave., NW Washington DC 20210		27. PAYMENT WILL BE MADE BY OASAM BRANCH OF INVOICE PAYMENTS RM: S-5526 US DEPARTMENT OF LABOR 200 CONSTITUTION AVENUE, NW WASHINGTON DC 20210

CONTRACTING OFFICER WILL COMPLETE ITEM 28 OR 29 AS APPLICABLE

☐ 28. NEGOTIATED AGREEMENT (Contractor is required to sign this document and return _____ copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all work, requisitions identified on this form and any continuation sheets for the consideration stated in this contract. The rights and obligations of the parties to this contract shall be governed by (a) this contract award, (b) the solicitation, and (c) the clauses, representations, certifications, and specifications incorporated by reference in or attached to this contract.	☐ 29. AWARD (Contractor is not required to sign this document.) Your offer on this solicitation, is hereby accepted as to the items listed. This award consummates the contract. which consists of (a) the Government solicitation and your offer, and (b) this contract award. No further contractual document is necessary.
30A. NAME AND TITLE OF CONTRACTOR OR PERSON AUTHORIZED TO SIGN (Type or print)	31A. NAME OF CONTRACTING OFFICER (Type or print) MARISSA G. DELA CERNA Contracting Officer
30B. SIGNATURE / 30C. DATE	31B. UNITED STATES OF AMERICA BY /

STANDARD FORM 1442(REV. 4-85)BACK

Table of Contents

SECTION M - EVALUATION FACTORS FOR AWARD

Section M
EVALUATION FACTORS FOR AWARD

M.1. **Base Bid.**

The Government intends to award a contract to the low, responsive and responsible bidder for the base price provided on Block 17, Standard Form (SF-1442) SOLICITATION, OFFER AND AWARD (Construction, Alteration or Repair) and in accordance with the Option(s) indicated below

M.2 **Alternates.**

A) The low bidder for purposes of award shall be the responsive, responsible bidder offering the low aggregate amount for the base bid plus the Alternate(s) listed in the order of priority in Section 012300 of the Project Specification within the funds determined by the Government to be available before the bids are opened.

B) If addition of a bid alternate item would make the award exceed available funds bid by all bidders, it shall be skipped, and the next subsequent alternate bid item in a lower amount shall be added if award thereof can be made within such funds.

C) In any case, all bids shall be evaluated on the basis of the same bid items, determined as provided above.

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

9PA NO	1 CONTRACT ID CODE	PAGE	OF PAGES
		1	4

2. AMENDMENT/MODIFICATION NO	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO	5. PROJECT NO.(If applicable)
0001	10/02/2009	94-0991-1352/347356 OLIVIA THORPE	

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than Item 6)	CODE
OASAM Office of Procurement Services U. S. Department of Labor RM N4308 200 Constitution Ave., NW Washington DC 20210			

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(X)	9A. AMENDMENT OF SOLICITATION NO.
To all Offerors/Bidders		DOL099RB20820
	X	9B. DATED (SEE ITEM 11) 10-01-2009
		10A. MODIFICATION OF CONTRACT/ORDER NO.
		10B. DATED (SEE ITEM 13)
CODE / FACILITY CODE		

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

[X] The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers [ ] is extended, [X] is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning 2 copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(X)	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b)
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor [ ] is not, [X] is required to sign this document and return two (2) copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

a. Solicitation No. DOL099RB20820, titled "NEW JOB CORPS CENTER", Manchester, New Hampshire is amended to incorporate the following into the IFB documents:

1) REVISED: **Standard Form (SF) 1442 BACK**
2) SECTION – H = **Special Contract Provisions – Project Labor Agreement**
3) SECTION – M = **EVALUATION FACTORS FOR AWARD**

In addition the Pre-Bid walk-through will be held on October 15, 2009 at 10:00 a.m. (local time) at MILLER DYER SPEARS(A/E), Dunbarton Road and Lianne Street, Manchester, New Hampshire 03102

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
		MARISSA G. DELA CERNA Division Chief, Contracting Officer	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
(Signature of person authorized to sign)		BY Marissa G. dela Cerna (Signature of Contracting Officer)	OCT – 2 2009

OFFER(Must be fully completed by offeror)

14. NAME AND ADDRESS OF OFFEROR (Include ZIP Code)	15. TELEPHONE NO. (Include area code)
	16. REMITTANCE ADDRESS (Include only if different than Item 14)
CODE FACILITY CODE	

17. The offeror agrees to perform the work required at the prices specified below in strict accordance with the terms of the solicitation, if this offer is accepted by the Government in writing within _____ calendar days after the date offers are due (Insert any number equal to or greater than the minimum requirement stated in Item 13D. Failure to insert any number means the offeror accepts the minimum in Item 13D.)

AMOUNTS

1) BASE BID: _____ ($_____)

2) ALTERNATE: Add Emergency Generator System per Section 012300

PRICE: _____ ($_____)

18. The offeror agrees to furnish any required performance and payment bonds

19. ACKNOWLEDGMENT OF AMENDMENTS

(The offeror acknowledges receipt of amendments to the solicitation - give number and date of each)

AMENDMENT NO.										
DATE										

20A. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)	20B. SIGNATURE	20C. OFFER DATE

AWARD (To be completed by Government)

21. ITEMS ACCEPTED:

22. AMOUNT	23. ACCOUNTING AND APPROPRIATION DATA

24. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified)	ITEM	25. OTHER THAN FULL AND OPEN COMPETITION PURSUANT TO ☐ 10 U.S.C. 2304(c)( ) ☐ 41 U.S.C. 253(c) ( ) ☐
26. ADMINISTERED BY CODE U.S. Department of Labor/OASAM/OPS Division of Job Corps A/E and Construction Services - N- 4308 200 Constitution Ave., NW Washington DC 20210		27. PAYMENT WILL BE MADE BY OASAM BRANCH OF INVOICE PAYMENTS RM: S-5526 US DEPARTMENT OF LABOR 200 CONSTITUTION AVENUE, NW WASHINGTON DC 20210

CONTRACTING OFFICER WILL COMPLETE ITEM 28 OR 29 AS APPLICABLE

☐ 28. NEGOTIATED AGREEMENT (Contractor is required to sign this document and return _____ copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all work, requisitions identified on this form and any continuation sheets for the consideration stated in this contract. The rights and obligations of the parties to this contract shall be governed by (a) this contract award, (b) the solicitation, and (c) the clauses, representations, certifications, and specifications incorporated by reference in or attached to this contract.	☐ 29. AWARD (Contractor is not required to sign this document.) Your offer on this solicitation, is hereby accepted as to the items listed. This award consummates the contract, which consists of (a) the Government solicitation and your offer, and (b) this contract award. No further contractual document is necessary.
30A. NAME AND TITLE OF CONTRACTOR OR PERSON AUTHORIZED TO SIGN (Type or print)	31A. NAME OF CONTRACTING OFFICER (Type or print) MARISSA G. DELA CERNA Contracting Officer
30B. SIGNATURE / 30C. DATE	31B. UNITED STATES OF AMERICA / BY

Section H – Special Contract Provisions – Project Labor Agreement

At the time bids are submitted, bidders must complete and submit the following form, along with a copy of an executed Project Labor Agreement conforming to the requirements described below:

[Insert name of bidding company and the name of other entities signing the Project Labor Agreement] have entered into a Project Labor Agreement (PLA) that binds my company and [insert name of other entitles signing the Project Labor Agreement], and which will become operative if and when my bid is selected for award of a contract to perform construction work covered by Solicitation No. **DOL0099RB20820**. I further certify that the PLA contains the following required provisions:

1. All of my construction employees and those of my subcontractors at every tier will be subject to the PLA;
2. The PLA will remain in existence for the entire term of the project;
3. The PLA will insure that all workers, whether or not members of a labor union, will be eligible for employment by any company performing construction on the project;
4. The PLA will contain a "no-strike/no-lock-out" provision;
5. The PLA will include grievance procedures in the event there are disputes between any of the construction employers and their employees working on this project, which will be an exclusive forum to hear and decide disputes, and to render final decisions that bind the parties;
6. The PLA will include uniform rules related to work hours (including the same start/stop times for all trades); wages; benefits; work rules; and safety rules;
7. In order to promote the Department of Labor's Office of Apprenticeship's efforts in educating and training workers in the construction trades, I agree to set-aside a certain percentage of work to apprentices in all trades represented in this construction project that have an apprenticeship program in New Hampshire authorized by the Department of Labor's Office of Apprenticeship.

_____ Date:

[Insert name of Corporate Officer]

Bidders understand that failure to submit this form, along with a copy of a PLA conforming to the above-stated requirements, at the time bids are submitted will result in a finding that their bid is nonresponsive, and any such bid will NOT be evaluated for award as set forth in **SECTION M - EVALUATION FACTORS FOR AWARD, and will** not be eligible for award. The Department of Labor will select the next lowest responsive and responsible bidder as set forth in **SECTION M - EVALUATION FACTORS FOR AWARD.**

SECTION M - EVALUATION FACTORS FOR AWARD

M.1. **Base Bid.**

The Government intends to award a contract to the lowest-price, responsive and responsible bidder with the amount noted on Block 17, Standard Form (SF- 1442) SOLICITATION, OFFER AND AWARD (Construction, Alteration or Repair) and in accordance with Section M.2 Responsiveness determination.

M.2 **Responsiveness determination**

In order for a bid to be considered responsive, a Bidder, among other things, must submit the form in **Section H – Special Contract Provisions – Project Labor Agreement**. Failure to submit this form, along with a copy of a PLA conforming to the requirements set forth in Section H, at the time bids are submitted will result in a finding that the bid is nonresponsive, and any such bid will not be evaluated for award **and will not be eligible for award.**

Exhibit 2

BEFORE THE CIVILIAN AGENCY ACQUISITION COUNCIL AND THE DEFENSE ACQUISITION REGULATIONS COUNCIL

Notice of Proposed Rule: Federal Acquisition Regulation
FAR Case 2009-005
Use of Project Labor Agreements For Federal Construction Projects

RIN 9000-AL31

Comments of Associated Builders and Contractors, Inc.

Associated Builders and Contractors, Inc. (ABC), hereby comments in opposition to the Notice of Proposed Rule issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) in the above referenced matter. The Proposed Rule purports to implement the President's Executive Order No. 13502 (Feb. 6, 2009), which for the first time establishes a policy of "encouraging" federal agencies to consider imposing union-only project labor agreements (PLAs) on federal construction projects whose total costs exceed $25 million dollars.[1]

[1] *See* 74 Fed. Reg. 33953 (July 14, 2009). In accordance with the NPR, *id.* at 33954, ABC is this same date filing separate comments challenging the Councils' failure to conduct an Initial Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act, 5 U.S.C. § 601. There is no statutory requirement for the filing of such separate comments, however, and ABC objects to this process. The Councils are required to consider all comments filed in this proceeding in both its aspects, and ABC hereby incorporates its separately filed RFA comments by reference.

1. ABC's Interest In The Proposed Rule

ABC is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are "merit shop" companies, whether unionized or non-union, who support and practice full and open competition without regard to labor affiliation. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollars.

Conservatively, ABC's members employ more than 2.5 million skilled construction workers whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. The Bureau of Labor Statistics (BLS) most recent report states that the non-union private sector workforce in the construction industry comprises more than eighty four (84) percent of the total industry workforce.[2]

The great majority of ABC's contractor members are classified as small businesses by the Small Business Administration. This is consistent with the findings of the Small Business Administration that the construction industry has one of the highest concentrations of small business participation (more than 86 percent).[3] At the same time, ABC includes among its members many larger construction companies who have contracted directly with the federal government for many years in the successful construction of large projects of the type that will be covered by the Proposed Rule.[4]

ABC and its members, large and small, are greatly concerned that the Proposed Rule seeks to implement a Presidential Executive Order which is itself an unlawful exercise of power that violates numerous federal laws and the Constitutional rights of government contractors and their employees. Specifically, as further explained below, the Proposed Rule should be rescinded or greatly modified for the following reasons:

- The Proposed Rule, and the Executive Order on which it is based, interferes with the Congressional mandate that federal agencies should strive to "obtain full and open competition" in procurement of government contracts, as set forth in the Competition in Contracting Act (CICA).[5] The Proposed Rule instead injures competition by discriminating against and discouraging bids from non-union contractors and by showing blatant favoritism toward a small class of unionized contractors on large federal construction projects.

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[2] *See* bls.gov *"Union Members Summary"* (Jan. 2009).

[3] *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, Office of Advocacy (2009), at 8.

[4] All of the top 10 companies on Engineering News-Record's 2009 Top 400 Contractors list, and 21 of the top 25, are ABC member firms.

[5] 41 U.S.C. § 253.

- The past decade of experience under President Bush's Executive Order *prohibiting* PLAs proves that PLAs are unnecessary to achieve any legitimate federal procurement goals. None of the labor-related "challenges" cited in the Proposed Rule as purported justifications for PLAs have in fact caused any significant delays or overruns on any of the thousands of large federal construction projects built during the past decade.

- The Proposed Rule will not increase the economy or efficiency of the federal government's procurement of construction, but will instead achieve only the opposite results by increasing costs and delaying construction. The Proposed Rule, and the Executive Order on which it is based, therefore exceed the authority of the Executive Branch under the Federal Property and Administrative Services Act.[6]

- The Proposed Rule establishes a new regulatory policy that interferes with and discriminates against rights of construction contractors and their employees that are protected by the National Labor Relations Act, ERISA, the National Apprenticeship Act, and the U.S. Constitution, including the forced taking of non-union workers' pay for the benefit of union pension plans, without just compensation.

- The Proposed Rule interferes with the Congressional mandate that federal agencies should encourage and give preference to small and disadvantaged businesses in procurement of government contracts. The Proposed Rule and the Executive Order therefore violate the Small Business Act.[7]

- The Proposed Rule promotes discrimination against minority contractors and employees, the vast majority of whom are non-union. The Proposed Rule and the Executive Order therefore violate the affirmative action principles set forth in Executive Order 11246.

- The Proposed Rule improperly declares that "this rule is not a major rule under 5 U.S.C. § 804" and thereby violates the Congressional Review Act codified therein.

- The Proposed Rule fails to include an Initial Regulatory Flexibility Analysis and therefore violates the Regulatory Flexibility Act.[8]

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[6] 40 U.S.C. § 101.

[7] 15 U.S.C. § 637(d).

[8] 5 U.S.C. § 601.

- The Proposed Rule establishes no meaningful criteria for federal agencies to follow in considering whether to impose PLAs on large federal construction projects. The findings purporting to support the Proposed Rule are also inadequate to meet the standards set forth in the Data Quality Act. The resulting agency decisions will be inherently arbitrary and capricious and will delay construction projects.

For each of these reasons, and as further explained below, the Proposed Rule should be rescinded or at least significantly modified in order to mitigate the irreparable harm otherwise likely to be caused by the President's Executive Order.

2. The Proposed Rule Violates CICA's Mandate Of "Full and Open Competition" In The Award Of Federal Construction Contracts.

The foundation for the federal government's procurement requirements is the Competition In Contracting Act of 1984 (CICA).[9] CICA was enacted to assure that all interested and responsible parties have an equal opportunity for the Government's business. CICA not only reaffirmed the intent that all procurements be "open", but required "full and open" competition. Full and open competition means that all responsible sources are permitted to submit competitive proposals on a procurement action. CICA requires, with certain limited exceptions, that the Government promote full and open competition in awarding contracts.[10]

Of particular significance to the Proposed Rule, CICA expressly bars federal agencies from using restrictive bid specifications in such a way as to effectively discourage or exclude contractors from the pool of potential bidders or offerors. As the Act states, agencies must solicit bids and offers "in a manner designed to achieve full and open competition" and "develop specifications in such a manner as is necessary to obtain full and open competition."[11]

Since the enactment of CICA, no President has previously adopted a rule or executive order authorizing, let alone encouraging, any federal agency to require contractors or subcontractors to sign union labor agreements as a condition of performing federal construction projects.[12] Nor has any federal court authorized federal agencies to

[9] 40 U.S.C. §471 *et seq.* and 41 U.S.C. §251 *et seq.*

[10] For a full and recent discussion of CICA's requirements, *see* Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements* (Congressional Research Service April 2009).

[11] *Id.* at 18, citing 10 U.S.C. § 2305(a)(1)(A) and 41 U.S.C. § 253a(a)(1)(A-C); *see also* Cohen, *The Competition in Contracting Act*, 14 Pub. Con. L. J. 19 (1983/1984).

[12] The first President Bush issued Executive Order 12818 in 1992 prohibiting the use of PLAs by any parties to federal or federally funded construction projects. Though President Clinton revoked Bush's Executive Order in 1993, he never issued a contrary Order authorizing federal PLAs during his term. Instead, he issued only a "guidance memorandum" encouraging the use of PLAs, which did not have the force of law and was not tested in court prior to the end of Clinton's term. In 2001, President George W.

impose PLAs on federal construction contracts under CICA.[13] Indeed, to ABC's knowledge no federal agency has imposed a PLA over the objection of construction contractor offerors since CICA's enactment in 1984.[14]

As is further explained below and in hundreds of comments filed by contractors in this proceeding, the Proposed Rule conflicts directly with CICA by encouraging federal agencies to impose PLAs which discriminate against and discourage competition from potential bidders, *i.e.*, those contractors who are not signatory to any union agreements.[15] By showing favoritism towards a narrow class of unionized contractors, government-mandated PLAs clearly do not "obtain full and open competition" and are therefore unlawful under CICA.

a. How Government-Mandated PLAs Under The Proposed Rule Discriminate Against Non-Union Contractors and Their Employees.

As defined in the Executive Order and the Proposed Rule, imposition of a PLA on a federal construction project would have the following effects:

First, non-union employees working on a prevailing wage project under a PLA would be penalized monetarily, compared to their earnings on the same federal project covered by

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Bush issued Executive Order No. 13202, prohibiting any government mandate of PLAs on federal or federally funded construction projects.

[13] In the only case involving a PLA on a federal project where the CICA issue was previously raised, the Court of Appeals for the Sixth Circuit found that the agency involved, the Department of Energy, was not a party to the PLA, and was not responsible for the actions of the D&O Contractor who was the responsible party. The court therefore found that subcontractor plaintiffs lacked standing to challenge the PLA under CICA. *Phoenix Engineering, Inc. v. M-K Ferguson of Oak Ridge Co.*, 966 F. 2d 1513 (6th Cir. 1992). This case is wrongly reported in an oft-cited GAO Study on PLAs as authorizing DOE to impose PLAs notwithstanding CICA, when in fact the merits of that issue were never addressed. *See Project Labor Agreements: The Extent of Their Use and Related Information*, at 5 (GAO 1998).

[14] The above cited GAO study erroneously conflated both government-mandated and purely voluntary PLAs in concluding that 26 PLAs were performed on federal construction work in the 1990's. *Id.* at 2. Voluntary PLAs are expressly authorized by the National Labor Relations Act so long as they are entered into without coercion by "employers in the construction industry" and "in the context of collective bargaining." See 29 U.S.C. § 158(e) and (f). At issue in the present Proposed Rule and the Executive Order are *government-mandated* PLAs which federal agencies are for the first time being authorized to impose over the objection of bidding contractors.

[15] As noted above, more than 84% of the construction industry now consists of contractors who are not signatory to any union agreements. http://bls.gov. This represents a total transformation of what was once, but certainly is no longer, a union-dominated industry. As described in numerous publications by the late Dr. Herbert Northrup, unions represented 87% of the industry's workforce after World War II, a period in which the industry was notorious for strikes, featherbedding inefficiencies, and discrimination against minorities. *See* Northrup, OPEN SHOP CONSTRUCTION REVISITED (Wharton School 1984). Thanks largely to the benefits of increased competition for construction services, strikes have become rare, work rules have become much more efficient, and minority participation is at its highest levels.

the Davis-Bacon Act without a PLA. Under Davis-Bacon, without a PLA, such employees receive "prevailing" wages and benefits which are equal to those paid to union employees.[16] On projects subject to a PLA, however, the employees must pay dues to the union, which are deducted from their regular take home pay. Such employees would also forfeit significant dollar amounts that their employer would be required to pay into union benefit funds. Because of the relatively short duration of most construction projects, however, those non-union employees would receive no benefits from their pension contributions.

Numerous comments from experienced government contractors filed in this proceeding testify to this discriminatory impact on their employees. The comments of Ron Fedrick, President of Nova Group, a large and sophisticated Defense Department contractor, are representative, and explain the impact as follows:

> [O]ur craft workers will experience a decrease in take home pay if the projects upon which they work are subject to a PLA. Nova's health and welfare, which includes employee and dependent, and pension plans cost less than the union programs. The excess fringe rate is added to the employee's base rate in the form of additional wages. One Navy and one Corps of Engineers projects illustrate this point. On a Navy project at the Naval Station in San Diego, California there were a total of 147,923 crew hours. The total Davis Bacon combined fringe benefit was $2,175,657.19. The cost of Nova's medical and mental insurance for these hours was $338,197.62 while the costs of its retirement plan for these hours were $521,532.80. The excess fringe of $1,315,926.77 was paid to the employees. On the Corps of Engineers project in Hawaii, there were a total of 74,513.5 crew hours. The total Davis Bacon combined fringe benefit was $1,739,399.71. The cost of Nova's medical and mental insurance for these hours was $122,029.93 while the costs of its retirement plan for these hours were $773,725.87. The excess fringe of $843,643.91 was paid to the employees. Under PLA's, on these two (2) projects alone, Nova craft workers would lose some $2,159,570.68 in income.

Many other contractor comments testify to the same impact of PLAs on non-union workers on federal construction projects.[17] The contractors have rightly noted that their employees generally cannot work long enough on any of the particular federal projects likely to be covered by PLAs to receive any benefit from the union pension funds, due to the multi-year vesting requirements that all multi-employer funds impose. Thus, the PLAs necessarily cause employee fringe benefits to be taken from non-union workers without any just compensation.[18]

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[16] *See* 40 U.S.C. § 3141, *et seq.*

[17] *See, e.g.,* Comments filed by Hensel Phelps Construction, Facchina Construction, Miller & Long Concrete Construction, and hth Construction, among others.

[18] *See also* Contractor Responses to ABC Survey (July 2009), attached hereto and incorporated by reference.

These and other facts have been recently analyzed by Professor John McGowan of St. Louis University in a study that is hereby incorporated by reference.[19] McGowan projects that hundreds of millions of dollars will be lost by non-union employees due to an estimated 20% reduction in their take home pay on federal construction projects subject to PLAs under the Proposed Rule.[20]

Professor McGowan has further analyzed the discriminatory cost to contractors in the form of increased and/or duplicative benefit payments that will be required as a result of PLAs. He has found that non-union contractors who enter into PLAs would have to pay added and duplicative costs directly to the Union for various "benefits and fringes," while at the same time paying for many of these same benefits through their own company benefit plans. These duplicative costs may include payments for holidays, sick days, and vacation time, as well as apprenticeship training, insurance benefits, profit sharing, and company contributions into employee 401K plans. Professor McGowan projects that non-union contractors' labor costs will increase by 25% or more under PLA requirements, over and above the prevailing wage and fringe benefit costs that such contractors already expect to pay under the Davis-Bacon Act. As a result of these (wholly unjustified) cost increases, non-union contractors will either be discouraged from bidding or will pass on their increased costs to the taxpayers.

In addition to having to pay these draconian costs, non-union contractors who become subject to a PLA are typically not able to use their own employees for the PLA-covered Project. Instead, such contractors are forced to staff the project with union journeymen and apprentices with whom they are completely unfamiliar, or else pay penalties to the union. Contrary to the Executive Order's stated intent, this requirement will make the contractor, and hence the contracting federal agency, less efficient. PLAs also typically restrict the ability of non-union contractors to schedule their work crews in any manner other than that dictated by the PLA without first receiving "permission" from the designated trade union or the designated Labor Coordinator. This again makes the contractor less efficient and less able to staff the job properly.[21]

The Proposed Rule also discriminates against non-union apprenticeship training programs that are supposed to be protected from such discrimination by ERISA and the National Apprenticeship Act. In particular, employees of non-union contractors who are

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[19] McGowan, *The Discriminatory Impact of Union Fringe Benefit Requirements On Non-Union Workers Under Government-Mandated Project Labor Agreements* (Aug. 2009), available at http//abc.org/plastudies.

[20] The action of a federal agency in redirecting part of non-union workers' compensation into union pension plans from which they receive no benefits constitutes a form of government "taking" without just compensation in violation of the Fifth Amendment to the Constitution. At a minimum, the Councils are required to comply with Executive Order 12630 and to address the takings implications of the Proposed Rule, which has apparently not been done in the current rulemaking to date. The new government mandate also violates employee rights under ERISA, as is further discussed below.

[21] As noted above, non-union employees working under PLAs are forced by government mandate to pay dues to labor unions who they have not selected as their bargaining representative. Such a requirement, where imposed by a federal agency, will violate the First Amendment right of such employees to Freedom of Association.

forced by federal agencies to sign PLAs will no longer receive credit towards their existing apprenticeship programs, and such employees will be forced to enroll in union apprenticeship programs (or alternatively, the non-union contractors will be forced to hire existing union apprentices instead of their own).

Finally, non-union contractors who are required to sign the PLA lose the ability to hire subcontractors of their own choosing, inasmuch as all subcontractors also must adhere to the PLA. Most subcontractors of nonunion contractors are themselves non-union and are reluctant to sign a PLA for the reasons set forth above. Numerous contractor comments being filed in this proceeding testify to this impact on subcontractors.

b. PLAs Under the Proposed Rule Will Injure Competition, And Will Certainly Not "Obtain Full And Open Competition."

Because of the significant adverse impact of PLAs on non-union contractors and subcontractors described above, the inevitable result of the Proposed Rule will be to injure competition for federal construction projects by significantly reducing the number of bidders for such projects in direct violation of CICA's mandate. ABC has recently conducted a survey of its members as to whether they would be discouraged from bidding by a PLA requirement on federal construction projects. In an overwhelming response of hundreds of respondents, 98% of these contractors indicated that they would be less likely to bid on such work if a project labor agreement were imposed as a condition of performing the work.[22]

Previous surveys of non-union contractors (who it must be recalled constitute more than 84% of the industry) have reached similar results. Thus, in a study of infrastructure contractors in the Washington, D.C. area conducted by the Weber-Merritt Research Firm, more than 70% of the surveyed contractors stated that they would be "less likely" to bid on a public construction project containing a union-only PLA.[23] Across the country in Washington State, another survey of contractors revealed that 86% of open shop contractors would decline to bid on a project under a union-only PLA.[24] Government-mandated PLAs clearly have an adverse impact on competition by discouraging such contractors from bidding for government construction work.[25]

These survey findings have been repeatedly supported by evidence gathered on actual government construction projects where PLAs have been mandated. In March 1995, a study analyzed the effects of project labor agreements on bids for construction

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[22] *Newsline* (July 22, 2009), available at http://abc.org.

[23] *The Impact of Union-Only Project Labor Agreements On Bidding By Public Works Contractors in the Washington, D.C. Area* (Weber-Merritt 2000), available at http://abc.org/plastudies.

[24] Lange, *Perceptions and Influence of Project Labor Agreements on Merit Shop Contractors, Independent Research Report* (Winter 1997), available at http://abc.org/plastudies.

[25] Recent PLA apologists have either ignored or overlooked these studies. *See* Kotler, *Project Labor Agreements in New York State: In The Public Interest* (Cornell ILR School 2009), at 14.

work on the Roswell Park Cancer Institute, where the same contracts had been bid both with and without PLAs. The study concluded that, "union-only project labor agreements ... reduce the number of companies bidding on the projects."[26] A follow-up study conducted on behalf of the Jefferson County Board of Legislators by engineering consultant Paul G. Carr found that there was a statistically significant relationship between the number of bidders and the cost of projects, concluding that the relationship between these two factors does not occur by chance. Professor Carr further concluded that a PLA requirement would adversely impact the number of bidders and would thereby increase project costs.[27]

Ernst & Young agreed with these findings in connection with a study of PLAs in Erie County, Pennsylvania, concluding that "the use of PLAs adversely affects competition for publicly bid projects. This is to the likely detriment of cost effective construction. Our research revealed that the use of PLAs strongly inhibits participation in public building by non-union contractors and may result in those projects having artificially inflated costs."[28] Similar conclusions were reached by the Clark County, Nevada School District, which recommended against adoption of any union-only requirements on Clark County schools.[29]

Apart from these surveys and studies, specific adverse impacts on competition for actual construction projects have been publicly reported on numerous state and local government PLAs. These include a sewer project in Oswego, NY,[30] the Central Artery/Tunnel project in Boston,[31] schools projects in Fall River, MA,[32] Middletown, CT,[33] Hartford, CT,[34] and Wyoming County, WVA, [35] the Wilson Bridge project near

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[26] Analysis of Bids and costs to Taxpayers in Roswell Park, New York (ABC 1995), available at http://abc.org/plastudies. As further discussed below, the study found a direct correlation between the reduced number of bids and increased costs on the project.

[27] Carr, *PLA Analysis for the Jefferson County Courthouse Complex* (Submitted to Jefferson County Board of Legislators, Sept. 14, 2000), available at http://abc.org/plastudies. *See also* Thieblot, *Review of the Guidance for a Union-Only Project Labor Agreement for Construction of the Wilson Bridge* (Md. Foundation for Research and Economic Education Nov. 2000), available at http://abc.org/plastudies.

[28] Ernst & Young, Erie County Courthouse Construction Projects: Project Labor Agreements Study (2001), available at: http://abc.org/plastudiess/Erie.pdf.

[29] *School District Should Heed Conclusions of Report*, Las Vegas Journal, Sept. 11, 2000.

[30] *Sewer Project Phase Attracts No Bids*, Syracuse Post-Standard, Aug. 20, 1997, E-1.

[31] *Big Boston bids in 1996*, ENR Nov. 20, 1995, at 26; *Low Bid $22 Million Over Estimate*, ENR Jan. 13, 1997, at 1, 5.

[32] The City initially bid three school construction projects under a PLA in 2004. When the projects attracted a low number of bidders, the city cancelled the PLA and reopened bidding without the PLA, receiving many more bidders and saving millions of dollars. *See* Beacon Hill Institute, *Project Labor Agreements and Financing School Construction in Massachusetts* (Dec. 2006), available at www.beaconhill.org.

[33] *State's Dubious Labor Policy*, Hartford Courant, Aug. 20, 1998, 3.

Washington, D.C., [36] and the San Francisco International Airport project.[37] These and other incidents of government-mandated PLAs depressing the number of bidders dramatically below project managers' expectations are too wide spread to be ignored. They have been compiled and described in detail in a comprehensive Report that is incorporated by reference and made a part of these comments.[38]

Proponents of union-only PLAs have attempted to rebut the overwhelming proof of reduced bidding on public PLA projects by claiming that a significant number of non-union contractors bid for work on the union-only Boston Harbor project and/or on the Southern Nevada Water District project, two large state PLA projects built in the 1990s.[39] In each case, however, the claims of significant non-union participation on these PLA projects turned out to be grossly exaggerated.[40] Moreover, the fact that some non-union contractors may be so in need of work at a given time that they accept and comply with discriminatory PLA bid specifications in an effort to obtain jobs does not constitute "full and open competition" within the meaning of CICA.

It therefore remains clear that government-mandated PLAs injure competition, and certainly do not "obtain full and open competition" as required by the Competition in Contracting Act. As the Supreme Court of Rhode Island held upon consideration of a PLA in that state: "PLAs deter a particular class of bidders, namely, nonunion bidders, from participating in the bid process for reasons essentially unrelated to their ability to

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[34] *School Project Back in Limbo*, Hartford Courant, April 7, 2004.

[35] *New Wyoming County School to be Rebid*, Associated Press, Dec. 20, 2000.

[36] *Lone Wilson Bridge Bid Comes in 70% Above Estimate*, Engineering News Record, Dec. 24, 2001; *see also* Baltimore Sun, March 2, 2002.

[37] *Labor Protests Fly, Bids Are High*, ENR, July 22, 1996, at 16.

[38] *See* Baskin, *Government-Mandated Union-Only PLAs: The Public Record Of Poor Performance* (2009), available at http://abc.org/plastudies.

[39] *See, e.g.*, Kotler, *supra* n. 20.

[40] The Boston Harbor claim was based upon a letter from the project's construction manager asserting that 16 open shop general contractors and 102 open shop subcontractors performed work under the union-only requirement. However, a further study of the facts underlying the construction manager's letter by a Fitchburg State professor concluded that most of the contractors and subcontractors who had been identified as open shop, were in fact union contractors or had not actually worked on the project. Others were mere suppliers or professionals who were not covered by the PLA. *See New Study of Boston Harbor Project Shows How PLA Hurt Competition*, ABC Today, June 4, 1999, available at http//abc.org/plastudies. A similar follow-up study by professors at the University of Nevada Las Vegas found that the earlier report of non-union participation on the Nevada Water Project included as non-union bidders numerous firms that were actually unionized prior to bidding on the PLA. *See* Opfer, Son, and Gambatese, *Project Labor Agreements Research Study: Focus On Southern Nevada Water Authority* (UNLV 2000), available at http//abc.org/plastudies.

competently complete the substantive work of the project."[41] For this reason alone, the Proposed Rule must be rescinded or must take strong steps to mitigate the harm to competition that will otherwise be caused by encouraging federal agencies to impose PLAs on federal construction projects.

3. The Proposed Rule And Executive Order Exceed The President's Authority Under The Federal Property Administrative Services Act.

The sole statutory authority for the Proposed Rule, and for the President's Executive Order cited therein, is the Federal Property and Administrative Services Act (FPASA) of 1949.[42] That Act is intended to "provide the Federal Government with an economical and efficient system" of government procurement. The Act gives the President the authority to "prescribe policies and directives that [he] considers necessary to carry out" the Act, only so long as such policies are "consistent with" the Act and with other laws (such as CICA). Unless the President has acted in a manner consistent with this statutory authority, neither the Proposed Rule nor Executive Order 13502 is valid.[43]

In the present instance, the President's Executive Order and the Proposed Rule have offered no fact-based justification for their claim that PLAs are necessary to allow federal agencies to achieve "economy or efficiency" in the federal procurement of construction services. Rather, as discussed next below, the known facts regarding the federal government's prohibition of PLAs during the past decade show that none of the asserted justifications for federal PLAs have any basis in actual experience on federal construction projects in recent decades. As a result, the Executive Order and Proposed Rule cannot be found to be authorized by the FPASA.[44]

a. The Asserted Justifications For The Proposed Rule Have No Basis In Fact.

Section 1 of the Executive Order, mirrored in the Proposed Rule, asserts the following justifications, and *only* these justifications, for believing that PLAs will achieve greater "economy and efficiency" in federal construction procurement. As stated in the Proposed Rule:[45]

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[41] *Associated Builders & Contractors of Rhode Island, Inc. v. Department of Admin.*, 787 A.2d 1179, 1188-89 (R.I. 2002).

[42] 40 U.S.C. § 101, *et seq.*

[43] *See Liberty Mut. Ins. Co. v. Friedman*, 639 F. 2d 164, 169-171 (4th Cir. 1981) ("[A] court must reasonably be able to conclude that the grant of [legislative] authority contemplates the regulations issued.").

[44] Because of the President's failure to justify his Executive Order with facts demonstrating a close nexus between government-mandated PLAs and increase economy and efficiency of federal procurement, such cases as *AFL-CIO v. Kahn*, 618 F. 2d 784 (D.C. Cir. 1979) are distinguishable.

[45] 74 Fed. Reg. at 33954

> The E.O. explains that a "lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, can create friction and disputes in the absence of an agreed-upon resolution and mechanism". The use of project labor agreements may "prevent these problems from developing by providing structure and stability to large-scale construction projects thereby promoting the efficient and expeditious completion of Federal construction contracts."

However, neither the Proposed Rule nor the Executive Order offer any factual basis for the above assertions in the current construction environment on federal projects. Indeed, the known facts refute any such claims. Specifically, the investigations of ABC and others indicates there have been no significant labor-related problems on any large federal construction projects since President Bush issued his Executive Order barring government-mandated PLAs on federal projects. There have been no publicly reported delays or cost overruns resulting from any "lack of coordination" among employers on labor issues, nor any reported labor disputes that have caused significant delays or cost overruns. In other words, none of the claimed labor problems, which again are the sole stated justifications for federal PLAs referenced in the Proposed Rule, have arisen on any of the thousands of large federal projects built since 2001, despite the outright prohibition of any PLAs on any large (or small) federal construction.

The Office of Management and Budget has essentially admitted the complete absence of any factual support for the Executive Order and Proposed Rule in response to a Freedom of Information Act request filed by ABC which asked for all documents identifying any federal construction projects suffering from delays or overruns as a result of labor-related problems of the sort identified in Section 1 of the Executive Order. OMB produced no such documents, citing only to the Clinton Memorandum, the GAO study, and other studies of state and local PLAs. None of these studies identify any federal project that has suffered from any labor "challenge" due to the lack of a PLA.

ABC submitted similar FOIA requests to every federal agency that has engaged in significant amounts of construction since 2001, and *no* agency identified in response any large federal construction project suffering significant cost overruns or delays as a result of any of the labor-related issues cited in the Executive Order or the Proposed Rule. ABC also surveyed its own members, receiving responses from contractors who have performed billions of dollars worth of large federal construction projects during the past decade. These contractors have uniformly confirmed that the absence of any of the labor "challenges" which were identified in the President's Executive Order as the sole justification for encouraging federal agencies to impose PLAs on future federal construction projects. Finally, a study of this issue conducted by the Beacon Hill Institute has also turned up no evidence of any significant labor problems on federal construction

projects in the absence of PLAs. That study is hereby incorporated by reference and made part of these comments.[46]

Thus, the entire factual premise underlying the President's Executive Order and the Proposed Rule is demonstrably false. ***There have been no labor problems on recent federal construction projects that justify imposition of PLA restrictions on future federal projects.***[47]

b. PLAs Will Not Achieve "Economy" But Will Instead Increase Costs

Neither the Executive Order nor the Proposed Rule identifies any factual basis to support the claim that government-mandated PLAs will cause any reduction in the costs of construction on large federal projects. Therefore, the Councils are not entitled to rely on any such claim in support of the Rule they have proposed. In any event, there is no factual basis for claiming that PLAs will reduce costs on federal construction projects, and the overwhelming weight of the evidence establishes that PLAs will cause increased costs to taxpayers.

Incorporated by reference in these comments is the new study issued by the Beacon Hill Institute (BHI), referenced above, which estimates that PLAs on federal construction projects will increase the costs to taxpayers by millions of dollars, *i.e.*, between 12% and 18% of the total costs of construction.[48] BHI has performed a series of cost studies on public construction projects under PLAs based upon rigorous comparisons of similar projects built in various jurisdictions with and without PLAs. The studies have adjusted the data for inflation and controlled for such factors as the size and types of the projects, and whether new construction was involved. Each of these studies has demonstrated that government-mandated PLAs increase the costs of public construction projects in the 12-18% range. According to BHI, such increased costs result from the decreased competition for PLA-covered work, described above, and from the increased costs to non-union bidders of being subjected to union hiring and work rules.

BHI's findings have been corroborated in many ways by both empirical and anecdotal evidence. Thus, a 2001 study published by the nonpartisan Worcester Regional Research Bureau estimated that PLAs increase project costs by approximately 15 %.[49] As

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[46] *See* Tuerck, Glassman and Bachmann, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem.* (August 2009), available at http//abc.org/plastudies.

[47] For the same reasons, the discriminatory impact of the Executive Order and Proposed Rule violate the rights of non-union contractors and employees to Equal Protection under the laws. As shown above, there is no rational basis for federal agencies to impose PLAs on construction projects, given the absence of any factual justification for such actions in the Executive Order itself.

[48] *Ibid.*

[49] Worchester Regional Research Bureau, Project Labor Agreements (2001), available at http://abc.org/plastudies.

further noted above, the Roswell Park Cancer Institute was partially constructed under a union-only PLA. Comparisons of bid packages released under the PLA and bid packages undertaken without any union-only requirement revealed that costs of construction under the union-only PLA were 48% higher than without the PLA.[50] Similarly, the Glenarm Power Plant in Pasadena, CA saw the low bid on its project increase from $14.9 million to $17.1 million expressly due to the imposition of a PLA.[51]

ABC has collected more than a dozen other examples from around the country of projects that were bid both with and without PLAs. In every instance, fewer bids were submitted under the PLA than were submitted without it; or the costs to the public entity went up; **or both**. That study is hereby incorporated by reference and made a part of these comments.[52]

In addition to these direct comparisons in the bidding process, experience with public sector PLAs after contract awards at the state and local level has revealed many instances in which PLAs have failed to achieve promised cost savings, and have instead led to cost overruns, on such diverse public projects as stadiums, [53] convention centers,[54] civic centers,[55] power plants,[56] and airports,[57] in addition to the several school comparisons previously mentioned.[58] The most notorious example of a PLA failing to achieve promised cost savings is the Boston Central Artery Project (the "Big Dig"). Originally projected to cost $2.2 billion dollars, the Big Dig wound up costing more than

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[50] Baskin, *The Case Against Union-Only Project Labor Agreements*, 19 Construction Lawyer (ABA) 14, 15 (1999).

[51] *Power Plant Costs To Soar*, Pasadena Star News, Mar. 21, 2003.

[52] *See Examples of Projects Bid With and Without PLAs*, available at http://abc.org/plastudies.

[53] *Nationals Park Costs Rise, Sports Commission Struggles*, Washington Examiner, Oct. 21, 2008. Similar cost overruns were experienced on PLA-covered stadiums in Cleveland, Detroit, and Seattle. *See Mayor's Final Cost at Stadium 25% Over*, Cleveland Plain Dealer, June 24, 2000; *Field of Woes*, Crain's Detroit Business Magazine, June 18, 2001; *New Seattle Stadium Battles Massive Cost Overruns*, ENR, July 27/Aug. 3, 1998, at 1, 9. By contrast, Baltimore's Camden Yards and Washington's FedEx Field, among many other merit shop stadiums built around the country over the past two decades, were built without any union-only requirements, with no cost overruns.

[54] Washington Business Journal (March 2003).

[55] *Troubled Center Moves Ahead*, Des Moines Register, July 12, 2003; *Say No to Project Labor Agreement*, Des Moines Register, July 23, 2003; *Civic Center Bids Exceed the Budget*, Post-Bulletin, Sept. 28, 1999.

[56] *Power Plant Costs to Soar*, Pasadena Star-News, March 21, 2003.

[57] *SFO Expansion Project Hundreds of Millions Over Budget*, San Francisco Chronicle, Dec. 22, 1999.

[58] Detailed discussion of these cost overruns on PLA projects around the country appears in Baskin, *supra* n. 34, at 5-12, available at abc.org/plastudies.

$14 billion dollars, among the biggest cost overruns in the history of American construction projects.[59]

Faced with this overwhelming evidence of PLA cost increases, the PLA apologists have put forward a series of unconvincing explanations for the mounting adverse data. First, they have attacked the BHI studies for allegedly focusing on bid costs as opposed to actual costs and for failing to segregate labor costs or account for additional factors.[60] BHI's new study, however, incorporated by reference in these comments,[61] addresses and refutes the PLA apologists' economic analyses. BHI notes therein that the counter-studies have failed to acknowledge the numerous variables controlled for by BHI's previous studies, and that the apologists have relied on inappropriate variables that undercut their own premises. As stated in the latest BHI report:

> If PLAs really did increase efficiency, it would be possible to show statistically that they also reduce costs. The very regression provided by [Belman-Bodah-Philips] shows that PLAs do not reduce costs.
>
> * * *
>
> Economic theory suggests that by burdening contractors with union rules and hiring procedures, PLAs reduce the number of bidders and thus increase both winning bids and actual construction costs. We have provided many regressions, with various specifications, ... that confirm this hypothesis.

As BHI has further pointed out, the burden should be on PLA proponents and the Executive Branch to prove that PLAs actually save money. This is particularly so in light of the obvious conflict between union-only PLAs and the principles of open competition discussed above. The Proposed Rule makes no effort to meet this burden, and in reality there is no proof that PLAs reduce costs in a competitive environment, under generally recognized standards of evidence.

It should also be noted that in virtually every instance when PLA apologists have attempted to demonstrate how PLAs can reduce construction costs, they do so by comparing the costs of an *already unionized project workforce* with and without a PLA. [62] Such circumstances were once common in

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[59] http//www.issuesource.org.

[60] Kotler, *supra* n. 20; Belman, Bodah and Philips, *supra* n. 20.

[61] Tuerck, Bachmann, and Glassman, *Union-Only Project Labor Agreements On Federal Construction Projects: A Costly Solution In Search Of A Problem*, (Beacon Hill Institute at Suffolk University) August, 2009, at 36, available at http://abc.org/plastudies.

[62] *See* Kotler *supra* n. 20; Belman, Bodah and Philips, *supra* n. 20.

the construction industry, which was 87% unionized as recently as 1947. However, the demographics of the industry have so dramatically changed (only 15% unionized), that it is now extremely rare for a federal agency to undertake a project on which there are no potential non-union bidders or subcontractors.[63]

In the absence of such proof, and in light of the testimony in this proceeding demonstrating how and why PLAs increase costs to taxpayers, there can be no rational claim that government-mandated PLAs will achieve greater "economy" in the federal procurement process. For this reason as well, the Proposed Rule should be rescinded.

c. PLAs Will Not Achieve "Efficiency" But Will Instead Cause Procurement Delays

In addition to failing to serve the interests of greater "economy" in federal procurement in accordance with FAPA's requirements, the Proposed Rule cannot be said to make the procurement process more efficient. In fact, the Proposed Rule would build into the procurement process additional steps that will inherently delay construction projects.

According to the Proposed Rule, agencies are encouraged to decide whether to use a PLA *before* the agency knows the terms of the PLA or the alternatives. Specifically, the Rule requires that an agency decide whether to include a PLA in a bid solicitation which naturally occurs before bids are submitted by contractors. But at the pre-bid stage, the agency will not generally know the terms of the prospective PLA it is imposing, since the Proposed Rule contemplates that the PLA will be negotiated *after bidding is completed.*[64] In addition, an agency will not know the alternatives to using a PLA prior to receiving bids for the project that do not include a PLA.

Moreover, the Proposed Rule leaves to the successful offeror the task of negotiating a PLA with all applicable unions, provided that specific terms of the PLA must be included. This means that, at the time the agency makes the decision whether to impose a PLA, the agency will likely not know whether such negotiations have been successful. Projects will therefore be delayed pending the outcome of the negotiations and projects may have to be rebid depending on the terms that are actually negotiated.

An agency cannot make an informed decision about whether a PLA is in the government's procurement interests: (1) before it knows the terms of the PLA; (2) before the PLA is actually negotiated; and (3) before the alternatives to a PLA are known. On

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[63] See discussion above at n. 15. *See also* Northrup, *Government-Mandated Project Labor Agreements In Construction: A Force To Obtain Union Monopoly On Government-Funded Projects*, (2000), available at http://abc.org/plastudies.

[64] 74 Fed. Reg. 33955.

the other hand, waiting until after the successful offeror is selected and then imposing a PLA is inefficient as well as misleading to bidders. Either way, requiring a PLA under the Proposed Rule would be arbitrary and capricious and would clearly not bring greater "efficiency" to the federal procurement process.

d: PLAs Will Not Achieve Greater Efficiency In Terms Of Productivity, Quality, or Safety

Union-only PLAs do nothing to guarantee better quality, skills, or productivity on construction projects. There is certainly no evidence that union-only labor in the 21st century is more skilled than merit shop workers.[65] Some of the largest and most successful federal projects completed every year have been built on time and within budget by non-union contractors, or by a mixture of union and non-union companies, all without PLAs. Conversely, government-mandated PLAs have resulted in some of the poorest quality construction projects featuring extremely defective workmanship and lengthy delays in construction. Prominent examples of such inefficient and defective PLA projects include the Big Dig in Boston,[66] the Washington, D.C. Convention Center,[67] the Iowa Events Center,[68] Milwaukee's Miller Park,[69] and many others.[70] There is thus no "efficiency"-based justification for mandating a PLA on federal construction projects.

4. The Proposed Rule Discourages Bidding For Federal Construction Projects By Small And Disadvantaged Businesses, Thereby Violating the Small Business Act.

As noted above, a great many of ABC's small business members, along with many other small non-union contractors who are not ABC members, perform work on

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[65] After performing a thorough study of PLAs in the New York area, Ernst & Young concluded that "[t]here is no quantitative evidence that suggests a difference in the quality of work performed by union or open shop contractors." Erice County (NY) Courthouse Construction Projects: Project Labor Agreement Study (September 2001), available at http://opencontracting.com/studies. *See also* Northrup, *Government-Mandated Project Labor Agreements In Construction: A Force To Obtain Union Monopoly On Government-Funded Projects*, J. Lab. Res. (1998).

[66] *See* WBZTV: *$21 Million Settlement In Big Dig Tunnel Collapse*, available at http://wbztv.com/bigdig. *See also* Powell, *Boston's Big Dig Awash in Troubles: Leaks, Cost Overruns Plague Project*, Washington Post, Nov. 19, 2004, available at http://washingtonpost.com.

[67] *Roof Section Collapses at D.C. Convention Center Site*, Washington Construction News (May 2001).

[68] Frantz, et al, *The PLA for the Iowa Events Center: An Unnecessary Burden On The Workers, Businesses and Taxpayers of Iowa*, Policy Study 06-3 (Public Interest Institute at Iowa Wesleyan College, April 2006), available at http://limitedgovernment.org/publications/pubs/studies.

[69] *Crane Accident Kills Three At Unfinished Miller Park*, Washington Times, July 15, 1999.

[70] A more comprehensive list can be found in Baskin, *Government-Mandated Union-Only PLAs: The Poor Record of Public Performance*, available at http://opencontracting.com/studies

federal construction projects, including projects whose total cost exceeds $25 million. In a recent ABC membership survey, more than 35% of the respondents stated that they perform work on such projects. As has also been noted, 98% of these survey respondents further indicated that they would be less likely to bid on such work if a project labor agreement were imposed as a condition of performing the work.[71]

The previously referenced discriminatory impact of PLAs falls particularly hard on small business subcontractors, many of whom are minority, women-owned and disadvantaged businesses. Several hundred individual contractor statements submitted in this proceeding testify to the negative impact of PLAs on small business procurements. *See also* the McGowan study of the discriminatory impact of PLAs on federal construction, cited above.

The adverse economic impact of PLAs on small businesses in the construction industry directly contravenes Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses. Since 1978, when Congress amended the Small Business Act to require all federal agencies to set percentage goals for the awarding of procurement contracts to MBEs,[72] the amount of federal procurement dollars directed towards small businesses has increased dramatically. The Small Business Administration reports that more than 38% of federal subcontracts, including construction contracts, are awarded to small businesses.[73]

Further evidence of the impact of PLAs on small businesses is contained in comments being submitted in this proceeding by prime contractors who have themselves performed contracts in the $25 million-plus range. These comments uniformly confirm that they have subcontracted much of the work on such projects to small business subcontractors. *See*, for example, the comments of Jeff Wenaas, President of Hensel Phelps Construction, a prime contractor who has performed more than $6 billion in construction contracts on federal projects with costs exceeding $25 million. Hensel Phelps has subcontracted more than $3.5 billion of that amount to small businesses, the majority of whom are non-union. These percentages are typical of the experience of many other ABC members. As the comments repeatedly show, such small business subcontractors are very unlikely to continue to perform work on federal construction contracts under the Proposed Rule because they know that they will be discriminated against by PLAs.

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[71] *Newsline* (July 22, 2009), available at abc.org.

[72] P.L. 95-507 (1978), 15 U.S.C. 644 (g).

[73] *See* Clark, Moutray and Saade, *The Government's Role in Aiding Small Business Federal Subcontracting Programs in the United States,* Office of Advocacy, Small Business Administration (2006), available at sba.gov/advo/research.

The conflict between the Proposed Rule and the Small Business Act is exacerbated by the Councils' failure to comply with the Regulatory Flexibility Act.[74] The RFA requires all agencies conducting rulemakings to "prepare and make available for public comment an initial regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities."[75] As part of its analysis, the agency is required to consider other significant alternatives to the rule which could affect the impact on small entities, and explain any rejection of such alternatives in its final regulatory flexibility analysis.[76] The sole relevant exception to this requirement arises if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[77] The agency must provide a factual basis for its certification.[78] Such a determination is subject to judicial review for its correctness under a non-deferential standard.[79]

In particular, the Councils' failure to address the economic impact of the Proposed Rule on subcontractors plainly violates the RFA, as the U.S. Court of Appeals for the D.C. Circuit recently held in the closely analogous case of *Aeronautical Station Assn, Inc. v. FAA.*[80] There the Court held that the FAA was required to consider the economic impact of a proposed drug testing rule on subcontractors who performed safety-related functions for air carriers. The D.C. Circuit found that both contractors and subcontractors (at whatever tier) "are entities subject to the proposed regulation – that is, those small entities to which the proposed rule will apply."

It should also be noted that minority and disadvantaged businesses have voiced their opposition to government-mandated PLA requirements and are expected to do so again in this proceeding. The American Asian Contractors Association, The National Association of Women Business Owners, the National Black Chamber of Commerce, and the Latin Builders Association are among the groups that have gone on record as opposed to PLAs. The National Black Chamber of Commerce described PLAs as "anti-free-market, non-competitive and, most of all, discriminatory."

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[74] 5 U.S.C. § 601. ABC's separate comments on the Councils' noncompliance with the RFA are hereby incorporated by reference.

[75] 5 U.S.C. § 603(a).

[76] *Id.* at § 604. A "significant regulatory alternative" is defined as one that: 1) reduces the burden on small entities; 2) is feasible; and 3) meets the agency's underlying objectives. See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, May 2003, p. 73-75 (available at http://www.sba.gov/advo/laws/rfaguide.pdf).

[77] *Id.* at § 605(b).

[78] See *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1988).

[79] *See Aeronautical Repair Station Assn, Inc. v. FAA*, 449 F. 3d 161, 175-177 (D.C. Cir. 2007), reversing agency certification of lack of impact on small entities.

[80] 494 F. 3d 161 (D.C. Cir. 2007).

For similar reasons, the Proposed Rule violates Executive Order 11246 and related longstanding affirmative action requirements. Far from encouraging contractors to employ minority employees or minority subcontractors, the Proposed Rule encourages federal agencies to impose PLAs which discourage non-union minorities from bidding on or performing the work. A significant number of PLAs have resulted in charges of minority discrimination and/or sexual harassment by union members.[81]

5. The Proposed Rule Constitutes Regulatory Interference With Private Employment Rights Under the National Labor Relations Act, ERISA, and the National Apprenticeship Act.

Although the Proposed Rule purports to serve the federal government's proprietary interests, its establishment of a new government-wide policy in favor of PLAs constitutes unlawful regulation which interferes with private sector labor relations and fringe benefit programs in violation of the National Labor Relations Act and ERISA. The Proposed Rule is not protected from challenge by the Supreme Court's limited holding in *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("Boston Harbor")*,[82] because it is not limited in its scope to a single project.[83]

In addition, the Proposed Rule violates Section 8(d) of the NLRA, which was not addressed in *Boston Harbor*, because it imposes labor agreements on construction contractors over their objection.[84] The Proposed Rule is also inconsistent with Sections 8(e) and 8(f) of the NLRA, which the Supreme Court referred to as exempting public entities from NLRA preemption, solely to the extent that such entities acted in a manner that was authorized for private construction users under the NLRA. Sections 8(e) and 8(f), however, only authorize PLAs to be entered into by "employers in the construction industry" and even then only in the "context of collective bargaining" on a voluntary basis, un-coerced by either unions or governments.[85]

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[81] See Baskin, Government-Mandated Union-Only Project Labor Agreements: The Public Record of Poor Performance, at 27-29 (2009), available at http://abc.org/plastudies.

[82] 507 U.S. 218 (1993).

[83] *See Chamber of Commerce v. Brown*, 522 U.S ___ , 128 S. Ct. 2408 (2008) ("In finding that the state agency had acted as a market participant, we stressed [in *Boston Harbor*] that the challenged action "was specifically tailored to one particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost."

[84] *See* 29 U.S.C. § 158(d), which expressly states that neither party to collective bargaining can be compelled by the government to agree to a proposal. *See also H.K. Porter v. NLRB*, 397 U.S. 99, 103 (1970).

[85] *See Glen Falls Building and Construction Trades Council*, 350 NLRB 417 (2007) (Invalidating a PLA imposed by an owner on construction contractors outside the context of the owner's collective bargaining).

The Proposed Rule likewise violates ERISA[86] by encouraging federal agencies to mandate employer participation in union benefit programs covered by that Act, which ERISA has long declared to be voluntary, not mandatory. In addition, the Proposed Rule discriminates against non-union benefit programs that are supposed to be protected by ERISA, including non-union apprenticeship training programs. As noted above, employees of non-union contractors who are forced by federal agencies to sign PLAs will no longer receive credit towards their existing apprenticeship programs, and such employees will be forced to enroll in union apprenticeship programs (or alternatively, the non-union contractors will be forced to hire existing union apprentices instead of their own). Such government-mandated discrimination violates the National Apprenticeship Act, which has been previously found to prohibit union vs. non-union discrimination.[87]

6. The Proposed Rule Violates The Congressional Review Act.

The Proposed Rule incorrectly states that "This rule is not a major rule under 5 U.S.C. 804."[88] ABC disagrees. The Congressional Review Act (as codified at 5 U.S.C. §804(2)) defines a major rule as including any rule likely to result in:

> (A) an annual effect on the economy of $100,000,000 or more;
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
> (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

As discussed above, the imposition of PLAs on federal agency construction projects, even at the 10% level anticipated by the Councils will have significant adverse effects on competition, will also cause major increases in construction costs for federal agencies, and may have an annual effect on the economy of $100,000,000 or more. If any one of these effects is likely to occur then, at minimum the Councils are required to conduct a proper cost benefit analysis of PLAs, and otherwise comply with the "major rule" requirements of the CRA.

For each of these reasons, ABC believes that the Councils must reclassify the Proposed Rule as a major rule and comply with all of the requirements of the Congressional Review Act.[89]

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[86] 29 U.S.C. § 1001, *et seq.*

[87] *Associated Builders and Contractors, Inc. v. Reich*, 963 F. Supp. 35, 38 (D.D.C. 1997).

[88] 74 Fed. Reg. at 33954.

[89] ABC also objects to each of the findings contained in the Proposed Rule under the **Data Quality Act**, section 515 of P.L. 106-554 (2001). In particular, the findings in support of the new policy on PLAs and the impact of this new policy on small businesses lack sufficient thoroughness and/or accuracy to meet the level of quality that would permit their dissemination and use as the basis of the policy that the Councils'

7. The Proposed Rule Fails To Establish Any Meaningful Criteria For Federal Agencies To Apply In Considering Whether To Impose PLAs.

The Proposed Rule invites comments on the "factors for the contracting officer to consider in determining whether use of a PLA will be in the best interest of the government." Without conceding that a government-mandated PLA is ever appropriate or lawful on a federal construction project, ABC responds to the Councils' invitation as follows:

Before any agency decides to implement a PLA on a project, the agency should at a minimum take the following actions:

1) The agency should first determine that the project cost will exceed $25 million. If not, then no PLA should be considered or required.

2) The agency should then determine whether the PLA is consistent with applicable law. In particular, if the procurement is covered by the Competition in Contracting Act, 41 U.S.C. § 253, then no PLA should be required that would be inconsistent with CICA's mandate to "obtain full and open competition."

3) To determine whether the PLA will result in less than full and open competition, the agency should issue at least 30 days' notice to interested parties (potential bidders, construction trade associations, and other stakeholders) that the agency is considering whether to require a PLA on the project and obtain comments or hold a hearing on the issue. Without obtaining comments from affected stakeholders, the agency is unlikely to obtain information necessary to determine the impact of the PLA on full and open competition as required by CICA.

4) In the course of such hearing/notice and comment process, the agency should determine whether a PLA would discourage interested parties, including potential subcontractors, from bidding to perform work on the project. If there is evidence that a PLA would discourage interested parties from bidding, indicating an adverse impact on full and open competition then no PLA should be further considered or required.

5) The agency should also determine whether a PLA would achieve procurement cost savings for the agency, thereby increasing economy and efficiency in procurement. Unless it can be proven that a PLA would generate such increased costs, no PLA should be considered or required.

6) The agency should also determine whether there is evidence that a PLA would result in increased costs of construction. Unless it can be proven that a PLA

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are proposing to set through this rulemaking, as required by the DQA and the Office of Management and Budget guidance issued thereunder.

would not generate such increased costs, no PLA should be considered or required.

7) The agency should also determine whether there have been any labor-related disruptions causing delays or cost overruns, of the type identified in Section 1 of the Executive Order, on similar federal projects undertaken by the agency in the geographic area of the project. Such labor-related challenges include "lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, causing friction and disputes." *Id.* If no such labor-related issues have arisen on similar federal projects undertaken by the agency in the geographic area of the project, then there is no justification for considering or requiring a PLA.

8) The agency should determine whether substantially all of the potential bidders for the project are already union signatory contractors who have agreed to union-only subcontracting clauses in their bargaining agreements. If not, then a PLA should not be considered or required.

9) The agency should determine whether the process of negotiating the PLA between the successful contractor and any applicable unions might delay the award of the project. If so, then a PLA should not be considered or required.

10) The agency should determine whether imposition of a PLA will have an adverse impact on small or disadvantaged businesses, including subcontractors. If so, then a PLA should not be considered or required.

11) In the event that the agency does exercise its discretion to require a PLA, the agency should take steps to minimize the discriminatory impact of the PLA on previously non-signatory contractors, subcontractors and non-union workers. Such steps should include but not be limited to prohibiting imposition of PLAs which require previously non-signatory contractors to participate in or contribute to union fringe benefit trust funds from which their employees cannot receive benefits during the life of the project. PLAs should also not be allowed to restrict contractors or subcontractors in their hiring practices, nor should they be allowed to force employees to join labor unions who such employees have not selected as their bargaining representatives.

12) At all steps in the process outlined above, the burden should always be on those who are considering or advocating a PLA to prove by clear and convincing evidence that the PLA will not injure competition, is justified by the needs of economy and efficiency, and will not adversely impact small and disadvantaged businesses, including subcontractors.

CONCLUSION

For each of the reasons set forth above and in ABC's separate comments on the Councils' apparent violation of the Regulatory Flexibility Act, the Proposed Rule should be rescinded or severely modified to avoid or mitigate the discriminatory and anti-competitive impact of PLAs on 84% of the construction industry, including many small and disadvantaged businesses and their employees, and to comply with applicable law.

Respectfully submitted,

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BEFORE THE CIVILIAN AGENCY ACQUISITION COUNCIL AND THE DEFENSE ACQUISITION REGULATIONS COUNCIL

Notice of Proposed Rule: Federal Acquisition Regulation
FAR Case 2009-005
Use of Project Labor Agreements For Federal Construction Projects

RIN 9000-AL31

Comments of Associated Builders and Contractors, Inc. Concerning The Economic Impact Of The Proposed Rule And The Councils' Failure to Comply With The Regulatory Flexibility Act, 5 U.S.C. § 601

Associated Builders and Contractors, Inc. (ABC), hereby expresses its strong opposition to the FAR Councils' failure to perform a Regulatory Flexibility Analysis in connection with its Notice of Proposed Rulemaking implementing Executive Order No. 13502.[1] As is more fully set forth in ABC's separate comments on the substance of the Proposed Rule, the Executive Order violates federal law and discriminates against non-union workers and contractors, without achieving any increased economy or efficiency in federal procurement, and indeed with the opposite effects of increasing costs and delays. However, the Councils' failure to perform a Regulatory Flexibility Analysis, and its finding that the proposed rule does not have a significant economic impact on a substantial number of small entities, constitutes an independent violation of law, *i.e.*, 5 U.S.C. § 601, and must be redressed.

[1] 74 Fed. Reg. 33953, 33954. ABC is filing these separate comments on Councils' failure to comply with the Regulatory Flexibility Act in accordance with the Councils' request in the NPRM that such comments should be filed separately. However, we note that no such requirement appears in the RFA itself, and ABC objects to this procedure to the extent that the Councils intend to ignore comments filed in the substantive docket of the Rulemaking proceeding. ABC hereby incorporates its separately filed comments by reference. ABC further objects to the Councils' statement that it will consider only comments from "small entities" concerning the RFA compliance issue. 74 Fed. Reg. at 33954. The Councils are required by law to consider all comments filed by members of the public, regardless of their size.

1. ABC's Interest In Compliance With The RFA

ABC is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are small business "merit shop" companies, who support and practice full and open competition, without regard to labor affiliation. The merit-shop philosophy helps ensure that taxpayers and consumers alike receive the most for their tax and construction dollars.

Conservatively, ABC's members employ more than 2.5 million skilled construction workers whose training, skills, and experience span all of the twenty-plus skilled trades that comprise the construction industry. The Bureau of Labor Statistics (BLS) most recent report states that the non-union private sector workforce in the construction industry comprises more than eighty four (84) percent of the total industry workforce.[2]

The great majority of ABC's contractor members are classified as small businesses by the Small Business Administration. This is consistent with the findings of the Small Business Administration that the construction industry has one of the highest concentrations of small business participation (more than 86 percent).[3]

A great many of ABC's small business members, along with many other small non-union contractors who are not ABC members, perform work on federal construction projects, including projects whose total cost exceeds $25 million. In a recent ABC membership survey, more than 35% of the respondents stated that they perform work on such projects. Significantly, 98% of these survey respondents further indicated that they would be less likely to bid on such work if a project labor agreement were imposed as a condition of performing the work.[4]

2. Economic Impact Of The Proposed Rule On Small Businesses

The reason why so many small businesses refuse to bid on PLA-mandated projects, as explained in greater detail in ABC's separate substantive comments, is that PLAs have a discriminatory impact on the costs and business methods of non-union contractors and their workers, increasing the contractors' costs while reducing their workers' take home pay on public projects covered by prevailing wage laws. Individual statements to this effect are being filed by many small contractors and subcontractors in this proceeding,

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[2] *See* bls.gov "*Union Members Summary*" (Jan. 2009).

[3] *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, Office of Advocacy (2009), at 8.

[4] *Newsline* (July 22, 2009), available at abc.org.

which are hereby incorporated by reference. Representative samples of such statements by small subcontractors are attached to these comments for ease of reference.[5]

A recent study of the discriminatory impact of PLAs on federal construction, performed by Professor John McGowan of St. Louis University demonstrates conclusively that PLAs have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 601.[6] As calculated therein, if only 10% of non-union contractors are forced to enter into PLAs as a condition of performing work on federal projects, the costs to such contractors will exceed $360 million. The increased costs to small businesses could exceed $1 billion if more contracts are affected than the Councils are currently estimating.

The adverse economic impact of PLAs on small businesses in the construction industry is directly contrary to Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses. Since 1978, when Congress amended the Small Business Act to require all federal agencies to set percentage goals for the awarding of procurement contracts to MBEs,[7] the amount of federal procurement dollars directed towards small businesses has increased dramatically. The Small Business Administration reports that more than 38% of federal subcontracts, including construction contracts, are awarded to small businesses.[8]

Further evidence of the impact of PLAs on small businesses is contained in comments being submitted in this proceeding by prime contractors who have themselves performed contracts in the $25 million-plus range. These comments uniformly confirm that they have subcontracted much of the work on such projects to small business subcontractors. *See*, for example, the comments of Jeff Wenaas, President of Hensel Phelps Construction, a prime contractor who has performed more than $6 billion in construction contracts on federal projects with costs exceeding $25 million. Hensel Phelps has subcontracted more than $3.5 billion of that amount to small businesses, the majority of whom are non-union. These percentages are typical of the experience of many other ABC members. As the comments repeatedly show, such small business subcontractors will either incur substantial costs which the Councils have altogether failed to consider in their initial RFA[9] or will very likely be unable to continue to perform

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[5] See Attachment..

[6] McGowan, *The Discriminatory Impact of Executive Order 13502 On Non-Union Workers and Contractors, available at* http://abc.org/plastudies .

[7] P.L. 95-507 (1978), 15 U.S.C. 644 (g).

[8] *See* Clark, Moutray and Saade, *The Government's Role in Aiding Small Business Federal Subcontracting Programs in the United States,* Office of Advocacy, Small Business Administration (2006), available at sba.gov/advo/research.

[9] *See,* ABC's separately filed comments to this docket which discuss ABC's substantive concerns with the Proposed Rule in addition to the Councils' RFA analysis. Pages 5-7 of those comments in particular provide a number of examples of the significant costs which contractors and subcontractors would have to bear as a result of the Proposed Rule which the Councils have failed to consider.

work on federal construction contracts under the Proposed Rule because they know that they will be discriminated against by PLAs.

3. Requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601.

The RFA requires all agencies conducting rulemakings to "prepare and make available for public comment an initial regulatory flexibility analysis," which "shall describe the impact of the proposed rule on small entities."[10] As part of its analysis, the agency is required to consider other significant alternatives to the rule which could affect the impact on small entities, and explain any rejection of such alternatives in its final regulatory flexibility analysis.[11] The sole relevant exception to this requirement arises if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[12] The agency must provide a factual basis for its certification.[13] Such a determination is subject to judicial review for its correctness under a non-deferential standard.[14]

4. Comments On The Councils' Specific Grounds For Non-Compliance With The Regulatory Flexibility Act.

The Councils' entire justification for failing to conduct an Initial Regulatory Flexibility Analysis is contained in one sentence: "[B]ecause the rationale for this determination is based on the discretionary nature of the regulation being promulgated and the fact that the application of the rule is only in connection with large scale construction projects over $25 million (those that would likely impact large businesses)."[15] This finding is legally insufficient and, to the extent that it states a factual basis at all, the facts are wrong.

First, the discretionary aspect of the policy is an insufficient ground to determine that the policy will not have a substantial impact, and in fact the impact of the Proposed Rule will be very significant. As specifically stated in the Proposed Rule, the Rule's

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[10] 5 U.S.C. § 603(a).

[11] *Id.* at § 604. A "significant regulatory alternative" is defined as one that: 1) reduces the burden on small entities; 2) is feasible; and 3) meets the agency's underlying objectives. See, *A Guide to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, May 2003, p. 73-75 (available at http://www.sba.gov/advo/laws/rfaguide.pdf).

[12] *Id.* at § 605(b).

[13] See *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1988).

[14] *See Aeronautical Repair Station Assn, Inc. v. FAA*, 449 F. 3d 161, 175-177 (D.C. Cir. 2007), reversing agency certification of lack of impact on small entities.

[15] 74 Fed. Reg. at 33954.

purpose is to impose a new policy on *all* procurement agencies of the federal government, *i.e.*, to encourage all executive agencies to consider requiring the use of project labor agreements on all construction projects whose costs exceed $25 million.[16] By the Councils' own (unsupported) estimate, 10% of all federal construction contracts with costs exceeding $25 million will become subject to PLAs as a result of the Proposed Rule. Based upon the value of such contracts in 2008, which according to usaspending.gov exceeded $28 billion for facilities construction alone, even 10% of that figure will exceed a value of $2.8 billion per year. The actual figure is likely to be higher based upon reports already being received of political pressure for PLAs being brought to bear on agencies across the government.

The only justification cited by the Councils for ignoring this substantial amount of federal construction that will be impacted by the Proposed Rule is the claim referenced above, that large scale construction projects would likely impact only large businesses. The Councils could only have reached this conclusion by impermissibly excluding from consideration the economic impact on subcontractors, most of whom are small businesses.

As described *infra* at p. 2-3 and in numerous small business comments which are being filed in this proceeding, many small construction subcontractors regularly perform work on large scale federal construction projects. Indeed, the small business preferences established by Congress and by each federal agency mandate such subcontracting to small and disadvantaged businesses. As is further set forth in the Proposed Rule, all PLAs imposed by such federal agencies will require both contractors *and subcontractors* to enter into union agreements.[17] Therefore, it is simply false for the Councils to claim that only large contractors will be impacted by the Proposed Rule.

The Councils' failure to address the economic impact of the Proposed Rule on subcontractors plainly violates the Regulatory Flexibility Act, 5 U.S.C. § 601. The U.S. Court of Appeals for the D.C. Circuit recently addressed this issue in the closely analogous case of *Aeronautical Station Assn, Inc. v. FAA*, 494 F. 3d 161 (D.C. Cir. 2007). There the Court held that the FAA was required to consider the economic impact of a proposed drug testing rule on subcontractors who performed safety-related functions for air carriers. The FAA asserted that subcontractors were not "directly regulated" employers for purposes of the proposed rule. Rejecting that claim, the D.C. Circuit found that both contractors and subcontractors (at whatever tier) "are entities subject to the proposed regulation – that is, those small entities to which the proposed rule will apply." The court distinguished *Cement Kiln Recycling Coalition v. EPA*, 255 F. 3d 855, 868-9 (D.C. Cir. 2001) and similar cases relied on by the FAA.

For the same reason, the Councils are required to analyze the impact of the Proposed Rule on subcontractors, because they are plainly subject to the proposed regulation, *according to its express language*. Certainly, whenever a federal agency

[16] 74 Fed. Reg. at 33955, proposed amendment to 48 C.F.R. 22.503 "Policy."

[17] 74 Fed. Reg. at 33956, proposed amendment to 48 C.F.R. 22.504(b)(1).

implements a union-only PLA on future federal construction work, such a PLA will directly regulate subcontractors by requiring them to enter into a labor agreement. Such a requirement will increase such subcontractors' costs by at least 25% and possibly more. See discussion above at p. 2-3. As numerous contractors have commented in this proceeding, either they will be unable to comply with the union-only requirement (thereby losing the chance to perform the work); or if they do sign the PLA, they will be confronted with increased administrative costs of compliance and subjected to unwanted liability to union pension funds, among other costs. The number of small businesses affected will be "substantial," as that term has been defined by legislative history and SBA guidance.[18]

Lastly, ABC objects to the Councils' findings in support of their failure to conduct an Initial Regulatory Flexibility Analysis because they lack the level of quality that would permit their dissemination and use as the basis of the policy that the Councils' are proposing to set through this rulemaking, as required by the **Data Quality Act**, section 515 of Public Law 106-554 (2001) and the regulations and Office of Management and Budget guidance issued thereunder. For this reason as well, no final rule should issue until after new findings are issued by the Councils with opportunity for comment by interested parties.

CONCLUSION

For each of these reasons, the Councils are required to perform an economic impact study under the Regulatory Flexibility Act. As part of that study, the Councils are required to consider alternatives to the Proposed Rule that will reduce the economic impact on small businesses. Absent such an analysis it will be unlawful for the Councils to issue a final rule implementing Executive Order 13502.

Respectfully submitted,

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[18] As noted in the SBA Guide to the RFA: "The intent of the RFA, ... was not to require that agencies find that a large number of the entire universe of small entities would be affected by a rule. Quantification of "substantial" may be industry- or rule-specific. However, it is very important that agencies use the broadest category, "more than just a few." *See "A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act,"* at 19, SBA Office of Advocacy (May 2003), available at sba.gov/advo/laws/rfaguide.pdf. Clearly, this threshold test is met by the substantial number of small subcontractors in the construction industry who perform work on large federal contracts.