



**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,

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 RFA⁹ or will very likely be unable to perform

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

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.