



**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.

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

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

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

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

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

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

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/plastudies/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

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

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

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 Worcester 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

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

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

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

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.

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."

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

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 ERISA⁸⁶ 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

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

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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