



DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
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IN REPLY REFER TO

8 February 2011

From: Assistant Commander for Acquisition, NAVFACENGCOM
To: NAVFAC Commanders, Commanding Officers, BLL's, SLL's and Acquisition Directors

Subj: Naval Facilities Engineering Command (NAVFAC) Use of Project Labor Agreements In Construction Contracts

Encl. (1) PLA Determination Decision Model
 (2) Q&As

1. **Background.** Executive Order No. 13502, issued February 6, 2009, directs federal contracting agencies to consider requiring the use of Project Labor Agreement (PLAs), on construction projects, or task orders, exceeding \$25M. PLAs are permissible pre-hire agreements under sections 8(e) and (f) of the National Labor Relations Act. In an effort to assist the Naval Facilities Engineering Command (NAVFAC) in seeking efficiencies and economies in construction contracting, it has been determined that the consideration of PLAs will be pursued for all future construction contracts exceeding \$25M. The Federal Acquisition Regulation (FAR) was revised to implement Executive Order 13502, at FAR Subpart 7.1 Acquisition Plans, subparagraph 7.103(v) Agency Head Responsibilities. The subparagraph adds a requirement encouraging agency planners to consider PLAs for large scale construction projects, as defined at FAR 22.5.
2. **Project Labor Agreement Evaluation Criteria/Factors.**
 - a. FAR 22.503(b) provides the federal agency authority to require that every contractor and subcontractor engaged in construction on a project agree, for that project, to negotiate or become a party to a PLA with one or more labor organizations, if it decides that the use of project labor agreements 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.
 - b. FAR 22.503(c) also sets forth an additional six factors that may be considered when determining if a PLA is appropriate:

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- i. The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades,
 - ii. There is a shortage of skilled labor in the region in which the construction project will be sited,
 - iii. Completion of the project will require an extended period of time,
 - iv. Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project,
 - v. A project labor agreement will promote the agency's long term program interests, facilitating the training of a skilled workforce to meet the agency's future construction needs,
 - vi. Any other factors that the agency decides are appropriate, see below for examples:
 1. The unique and compelling schedule requirements of a particular project. In this regard, projects that are tied to court-imposed deadlines or mission-critical schedules may also provide a basis for a PLA requirement.
 2. The availability of skilled labor for projects located in a remote location where use of a PLA may assist a contractor who may otherwise encounter difficulties in recruiting and retaining a skilled workforce for an extended period.
 3. Skilled labor shortages may also result where there may be competition within the contractor community for skilled labor arising from concurrent large-scale construction contracts in the project vicinity.
 4. Expected costs, if any, to implement a PLA should be measured against expected benefits. Industry and other construction stakeholder comments may be helpful in determining expected costs, benefits, and/or savings of implementing a PLA as a percentage of overall labor costs.
3. Required PLA Contents. PLAs entered into under the Executive Order authority must contain terms and conditions necessary to advance economy and efficiency. These terms are specifically identified at FAR 22.504(b) and are listed below.
- (a) Requirements. The project labor agreement shall—
- (1) Bind all contractors and subcontractors engaged in construction on the construction project to comply with the project labor agreement;
 - (2) Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
 - (3) Contain guarantees against strikes, lockouts, and similar job disruptions;
 - (4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

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- (5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
- (6) Include any additional requirements as the agency deems necessary to satisfy its needs.

4. Responsibilities Relative to the PLA Determination.

- a. For each appropriate construction project, during the acquisition planning stages individuals are encouraged to solicit the perspectives of COMNAVFAC offices with particular expertise in affected program areas (Capitol Improvements, OPS, etc.). As an essential component of their market research, individuals should also solicit the views of various construction community stakeholders as they specifically address the factors set forth at FAR 22.503(b) and (c), as well as the additional factors noted above. The FAR states that an agency may seek the views of, confer with, and exchange information with prospective bidders and union representatives as part of the agency's effort to identify appropriate terms and conditions of a PLA for a particular construction project and facilitate agreement on those terms.
- b. Pursuant to the reporting requirement prescribed by OMB Memo M-09-22, July 10, 2009, the Contracting Officer (CO) shall prepare a decision memorandum for all construction projects \$25M and above. All these decision documents should then be forwarded to NAVFACHQ ACQ, Command Labor Advisor, for a consolidated report to OMB. The CO's memorandum will address whether or not the particular project satisfies the criteria set forth in the Executive Order. This memo shall be completed and approved prior to the issuance of the solicitation. The approval authority for contracts requiring PLA consideration of \$100M or more shall be the HCA for NAVFAC and those less than \$100M shall be the responsibility the appropriately delegated CCO. In preparing this memo the CO should consult with counsel, particularly regarding the compliance with law criterion. The decision memorandum shall become an attachment to the Acquisition Plan.

(A sample memorandum is provided as Attachment 1.)

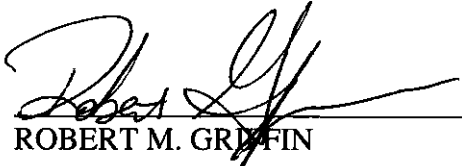
5. Determining Which PLA Submission Option to Employ In NAVFAC Solicitations. If the Contracting Officer approves a determination that a PLA is suitable for a particular construction project, it must then be determined which submission timeline is most appropriate. As set forth at 22.505 (a) and (b) there are three options for submission timelines that can be considered:

- a. Require PLA submission with offer. Implementing at this stage would require all responsive offerors to prepare a PLA and include it with their proposals. To ensure the optimum potential benefit on the final contract price, all offerors would send in their proposals only after the PLA was signed and include the signed PLA with the proposal. This would involve work by all the offerors, some of whom would likely ask for guidance from the Contracting Officer and possibly lead to requests for extensions in the proposal due date from those offerors unfamiliar with PLAs. It is

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here assumed that there would be a single PLA rather than multiple PLAs for a particular project.

- b. Alternative I, Require PLA Submission From Apparent Awardee. Under this alternative, the solicitation would notify all offerors that, if selected, they would be required to provide a signed PLA prior to award. Only the selected offeror would be required to deliver the signed PLA, and the contents would not be overtly involved in selection, except in regard to the possible impact on proposed price. However, the effort to negotiate and sign the PLA could delay contract award, since some offerors would likely wait until after selection before working on the PLA, and this in turn could reduce the potential impact of the PLA.
 - c. Alternative II, Require PLA Submission Before Construction Begins. Designating the PLA as a contract deliverable, subject to NAVFAC approval, could still produce the potential benefits of smoother labor relations. To ensure the PLA is developed sufficiently early in the process, NAVFAC personnel may wish to consider requiring approval of the PLA before issuing a Notice to Proceed with the construction project.
6. Use of a "pre-negotiated" PLA per FAR 22.504 (c) Terms and Conditions. As appropriate to advance economy and efficiency in the procurement, an agency may generally identify the terms and conditions of the project labor agreement in the solicitation and require the successful offeror to become a party to a project labor agreement containing these terms and conditions as a condition of receiving a contract award. Until such time as NAVFAC can develop a wider expertise with PLAs, it is recommended that a pre-negotiated agreement with submission option c., above, be adopted in the initial PLA applications. Requiring the use of the predetermined PLA should enhance economy by encouraging additional offerors to compete. Having labor costs clearly set forth in the solicitation is analogous to one of the principal purposes of the Davis-Bacon Act which provides all parties to the contract with some reasonable expectation of labor costs for the project. As awards must consider price (or are based in part on best value including price), the PLA's negotiated terms enable an offeror to provide pricing for the agency to make an award.
 7. HQ NAVFAC will monitor the PLA experience of other Federal agencies as they develop their specific implementation guidance, and adjust this guidance as experience directs. Questions regarding implementation of this memo may be addressed to Kimberly Hussey, NAVFAC Command Labor Advisor, kimberly.hussey@navy.mil, (202)685-9138.



ROBERT M. GRIFFIN

**Attachment 1 to
Memo _____ on Using Project Labor Agreements in Federal Construction Contracts:**

XX-XX

(Date)

MEMORANDUM FOR RECORD

SUBJECT: Determination on the Use of a Project Labor Agreement for (Solicitation Number, Project Name and Location)

1. References:

- a. Executive Order 13502, Use of Project labor Agreements for Federal Construction Projects
- b. Final FAR Rule, FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects (75 FR 19168)
- c. Office of Management and Budget Memorandum M-09-22, Implementing the President's Executive Order on Project Labor Agreements
- d. Memo, NAVFAC Policy Relating to the Use of Project Labor Agreements (PLAs) for Federal Construction Projects

2. Project Description:

3. The following factors have been considered in order to determine whether the use of a project labor agreement for this project will achieve economy and efficiency in the completion of the subject project. Provided detailed, specific supporting the analysis, conclusions and determinations for each that applies:

Use of a PLA 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 government safety and health, equal employment opportunity, labor and employment standards, and other matters

Use of a PLA is consistent with law.

The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades

There is a shortage of skilled labor in the region in which the construction project

Completion of the project will require an extended period of time

- PLAs have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project
- A PLA will promote the agency's long term program interests, facilitating the training of a skilled workforce to meet the agency's future construction needs
- The unique and compelling schedule requirements of a particular project (e.g. the project is tied to court-imposed deadlines or has a mission-critical schedule)

4. Additional Factors. (Provide any additional project or situation specific details, information or factors (e.g. the local labor market, other projects in the vicinity where PLAs may have been used, etc.) that apply to the instant determination).

5. Background and Discussion. "Any other issues and facts that support the decision"

6. Based on consideration of the above factors, I hereby determine that use of a PLA **is/is not** suitable for the subject project.

XXX
Contracting Officer
(Date)

**Attachment 2 to
Memo _____ on Using Project Labor Agreements in Federal Construction Contracts:**

Frequently Asked Questions:

1. Are there particular types of contracts, e.g., fixed price, cost reimbursement, incentive fee, etc., for which PLAs should never be used?

No. PLAs have been successfully used on all types of contracts in the public and private sector.

2. Should field operating activity personnel be discussing this with potential offerors?

Yes, FAR 22.504(c) encourages seeking the views of both prospective bidders and union representatives in an effort to identify and facilitate agreement on appropriate terms and conditions for a particular PLA. NAVFAC FEC Labor Advisors are generally in the best position to do identify the appropriate points of contact among the respective labor organizations in the initial considerations regarding the use of a PLA.

3. What about Using a Master PLA, as part of the solicitation?

We understand that other Federal agencies routinely use master PLAs and have found them very helpful in achieving economy and efficiency. NAVFAC will develop a template for use as guidance in establishing the appropriate terms and conditions for use by Contracting Officers to their solicitations as a requirement for all offerors.

4. Are PLAs legal?

Federal Acquisition Circular 2005-14 specifically authorizes using PLAs on Federal construction contracts. In addition, PLAs may lawfully be used on construction projects consistent with Sections 8(e) and (f) of the National Labor Relations Act. Agencies should ensure that their actions are tailored to reflect their proprietary interests and do not prescribe how government contractors and subcontractors handle their labor relations beyond performance of the specific government construction project involved. See Building and Trades Council v. Associated Builders, 113 S.Ct. 1190 (1993) (“Boston Harbor”); Chamber of Commerce of U.S. v. Reich, 74 F.3d 1322 (D.C. Cir. 1996), *rehearing denied*, 83 F.3d 439 (1996); *rehearing en banc denied*, 83 F.3d 442 (1996) (“Reich”); Building and Construction Trades Dept., AFL-CIO, et al. v. Allbaugh, et al., 295 F.3d 28, 30 (D.C. Cir. 2002).

5. Should NAVFAC be signing the PLA or participate in part of the negotiations?

No. Federal agencies may be the owner of the facilities, but (with the possible exception of federal corporations such as the Tennessee Valley Authority) they are not the employer of the contractor work forces employed to construct the facilities. As owners and proprietors, federal agencies may be party to bid specifications or solicitations that anticipate or require use of PLAs.

However, because a federal agency is not generally the employer of the workers involved, it does not become party to labor agreements such as PLAs.

6. What projects are included in this change?

The President's Executive Order provides that it shall be the policy of the Federal Government to encourage the use of PLAs in connection with large-scale construction projects (defined as projects where the total cost to the Federal Government of the project is at least \$25 million) as appropriate to promote economy and efficiency in Federal procurement.

7. Are contracts for construction projects that involve less than \$25 million also covered?

Executive Order 13502 encourages agencies to use PLAs on projects below \$25M in value. Thus, DON has the discretion to require use of PLAs on projects where the total costs are expected to be less than \$25 million, if use of a PLA will promote efficiency and economy, but there isn't a requirement that DON consider or use PLAs below this threshold.

8. Does NAVFAC have to make separate determinations for each of a series of similar or related projects?

Yes. The FAR directs agencies to determine whether use of a PLA will contribute to efficiency and economy in Federal procurement on a project-by-project basis.

9. Do PLAs discriminate against non-union contractors or employees who are not members of one of the unions?

No. PLAs in connection with public-sector construction contracts are structured to allow all contractors – union and non-union – to participate. Union hiring halls through which applicants must ordinarily pass to obtain work on a particular project must be operated in a manner that does not discriminate on the basis of union membership.

10. Will a contractor be able to use its existing work force on the project?

Yes, NAVFAC PLAs will contain provisions permitting contractors to bring their existing workers to a particular construction project with them.

11. Won't requiring use of a PLA reduce the number of bids or competition for a project?

No, requiring use of a PLA does not necessarily reduce the number of bids or competition for a contract. See Associated Builders and Contractors, Inc. v. Southern Nevada Water Authority, 159 Nev. 151, 159 n. 1, 979 P.2d 224 (S.Ct. Nev. 1999). In addition, in some instances, using PLAs could increase the pool of potential bidders by encouraging offerors who might otherwise believe their bid or proposal would not be competitive in terms of price (e.g. union shop contractors might be encouraged to bid).

12. Are PLAs legal in Right-to-Work states?

Yes. PLAs are legal in states with Right-to-Work laws prohibiting agreements requiring employees to become full union members so long as the union security provisions are written to be consistent with the particular requirements imposed by the statutes in question. Certain Federal construction projects, however, will take place on property where DON or another agency has exclusive federal jurisdiction and State Right-to-Work legislation would not be applicable in those circumstances anyway. Lord v. Local Union No. 2088, International Brotherhood of Electrical Workers, 646 F.2d 1057 (5th Cir. 1981), rehearing denied 654 F.2d 723 (1981), cert. denied 458 U.S. 1106 (1982).

13. How would NAVFAC evaluate whether an offeror has met the requirement to be party to a PLA? Is it possible for an offeror to gain a competitive advantage by proposing a “better” PLA than another offeror, or are all offered PLAs treated the same during source selection?

The Contractor Officer, in consultation with Office of Counsel, should determine that the offeror has provided evidence that it has agreed to be bound by a PLA. When a solicitation provides that preference will be given in selecting the successful offeror to bidders that propose expanded apprenticeship programs encouraging training and employment of minority or disadvantaged populations, or other lawful socio-economic objectives, proposal of a PLA with such provisions may indeed give an offeror a legitimate competitive advantage. .

14. What role should NAVFAC play in managing a PLA during contract performance? What additional actions will need to be taken as part of administration of a contract involving a PLA that would not otherwise be taken?

Careful contract administration is very important to be sure that the PLA is properly and lawfully implemented and to be sure that the PLA succeeds in providing the economies and efficiencies in procurement anticipated when the determination to require use of a PLA was made. For cost-reimbursement contracts, Contracting Officers should approve the terms of the PLA for purposes of establishing that costs included under the PLA will be allowable under the NAVFAC contract. NAVFAC typically acts as the Navy’s construction manager, so it will also be involved in ensuring compliance with the PLA.

15. What basic steps should be taken to ensure use of a PLA will advance DON’s interest in achieving economy and efficiency?

Acquisition Planners should review the project at issue and particularly the schedule and anticipated need for the end product of the construction in order to determine the sensitivity of the project to any delays in project completion and the value in preventing disruptions of work and resolving disputes that may arise on site. For example, retrofitting of occupied structures or construction of new buildings or replacement structures may be very time sensitive, especially if weather in the area could further restrict construction.

To determine the efficiencies and economies that a PLA might bring to a particular project, the planners should assess the complexity of the project involved, and particularly the number of workers, labor organizations, and employers expected to participate and the value in those

circumstances of coordinating wages, hours, work rules, position classifications, dispute resolution, and other terms of employment at the project. If the budget is very tight, the certainty of labor costs provided by a PLA may be particularly important. Similarly, if studies indicate there may be a concern about possible shortage of labor with the needed skills and capabilities in the area where the project is being conducted, there could be a significant advantage to obtaining access to union hiring halls. Acquisition Planners may also take into consideration that apprenticeship programs available under a PLA may contribute to economy and efficiency of the project in a manner that assures the largest pool of labor involved and is cost-effective in the long run, as well as the impact of such programs on immediate project costs. In particular, apprenticeship and hiring hall programs may make an expanded pool of qualified workers available more expeditiously and allow the project to get under way faster. Projects at sites involving remediation of significant environmental hazards or involving particularly dangerous work give rise to particularly acute safety and health concerns and the advantage of PLAs in facilitating coordination of work on site may be important in those circumstances. Such considerations may also constitute socio-economic factors appropriate for consideration by DON. It may also be helpful to issue a Sources Sought Synopsis in order to better determine the likely impact of use of a PLA on a particular project.

16. FAR 22.503(c)(6) talks about other factors. What types of other factors should be considered during acquisition planning to determine whether or not to use a PLA? Why would DON want to promote PLAs?

There are several factors that Navy should consider during acquisition planning in order to determine whether use of a PLA will advance Navy's interest in achieving economy and efficiency. The Department of Energy and the Tennessee Valley Authority have found that projects covered by PLAs tend to come in on time or early, and on budget or under budget, and that any delays in completion of such projects or any increases in costs that do arise are not be due to labor issues.

PLAs may significantly contribute to the economy and efficiency of a project by providing a mechanism for coordinating wages, hours, work rules, and other terms of employment across a project. Agencies should consider the complexity of the particular projects involved, particularly with respect to the number of workers and labor organizations and contractors expected to participate, and the value in those circumstances of coordinating wages, hours, work rules, and other terms of employment at the project in contributing to efficiency and economy. Improving coordination of work may also be especially important in projects involving particularly acute safety and health concerns.

Further, lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, may create friction and labor disputes. On larger, more complex projects that will be of longer duration, such problems tend to be more pronounced. The use of PLAs may prevent such problems from developing by providing structure and stability to large-scale construction projects, thereby promoting the efficient and expeditious completion of Federal construction contracts. PLAs also generally include broad provisions for grievance and arbitration of any disputes that may arise on site so as to promote the efficient and expeditious completion of Federal construction projects.

Moreover, PLAs commonly provide strong prohibitions of work stoppages, slowdowns, or strikes for the duration of a project and may specifically obligate senior union management to use their best efforts to prevent any threats of disruptions of work that might possibly arise. Agencies should therefore consider the sensitivity of the particular projects to delays and the value in the circumstances of preventing disruptions of work and of providing processes for resolving any disputes that do arise on site.

PLAs also commonly include provisions giving employers access to hiring halls maintained by the participating unions. DOE experience has been that projects covered by PLAs have access to a well trained supply of labor available expeditiously, even in remote areas where skilled labor would have otherwise been extremely difficult to find in a timely fashion. Thus, if there is concern about possible shortage of labor with the needed skills and capabilities in the area where the project is being conducted, access to union hiring halls could be important means of obtaining the necessary work force in the most efficient, expeditious, and economical fashion. Apprenticeship and training programs available through a PLA also help meet labor requirements – and do so in a manner that is cost-effective for the duration of the immediate project, that also assures the largest pool of labor involved, and that is cost-effective in the long run. These factors may also constitute socio-economic factors appropriate for consideration by an agency.