VENABLE® LLP
575 SEVENTH STREET NW WASHINGTON, DC 20004
T 202.344.4000 F 202.344.8300 www.Venable.com

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Maurice Baskin
T 202-344-4823
F 202.344.8300
mbaskin@venable.com

Via Email

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

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

Dear Sir or Madam:

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

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

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

I. Interested Party Status Of The Protestor.

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

II. Timeliness Of The Protest.

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

III. Required Suspension Of Contract Award.

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

IV. Background

A. The Solicitation.

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

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

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

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

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

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

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

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

Exhibit 1, Amend. 0001 at 2.

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

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

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

B. Adverse Impact of the PLA Requirement On Competition.

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

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

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

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

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

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

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

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

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

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

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

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

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[6] See 40 U.S.C. § 3141, et seq.

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

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

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

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

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

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

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

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

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

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

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

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

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

GROUNDS OF PROTEST

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

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

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

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

1. The PLA Requirement Unduly Restricts Competition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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