



October 18, 2010

U.S. Army Engineer District, Honolulu
Attn: Kent Tamai, Contracting Division
Honolulu, Building 230
Fort Shafter, HI 96858-5440

In Reply to: Sources Sought Notice W9128A-PLA-INFO on USACE Project Labor Agreements

Dear Mr. Tamai:

Thank you for soliciting comments from the contracting community on the U.S. Army Corps of Engineers (USACE) Honolulu District's potential use of project labor agreements (PLAs) on future construction projects.

I trust this letter and the enclosed materials will answer your questions about PLAs, and help the USACE make an informed decision that will result in on-time and on-budget construction free from anti-competitive and costly government-mandated PLAs.

As you may know, ABC is a national construction trade association representing 25,000 individual employers in the commercial and industrial construction industry, including general contractors, subcontractors and material suppliers throughout the United States and Guam. ABC and its members promote the merit shop construction philosophy, which ensures that public works contracts are procured through fair and open competition that encourages a level playing field for all qualified contractors and their skilled employees, regardless of whether they belong to a union. Experience demonstrates that the merit shop philosophy helps construction customers like the USACE provide taxpayers with the best possible construction product at the best possible price.

Conservatively, ABC's members employ more than 2.5 million skilled construction workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. The majority of ABC member companies do not belong to a construction trade union, and they have a core workforce of employees that is not signatory to a construction trade union. The Bureau of Labor Statistics' (BLS) most recent report states that the non-union private sector workforce in the U.S. construction industry comprises more than 85 percent of the total industry workforce.¹ In Hawaii, 33.5 percent of the construction workforce belongs to a union.²

¹ See bls.gov "Union Members Summary" (Jan. 2010).

² The *Union Membership and Coverage Database*, available at www.unionstats.com, is an online data resource providing private and public sector labor union membership, coverage and density estimates compiled from the Current Population Survey (CPS), a monthly household survey, using BLS methods. The database, constructed by Barry Hirsch (Andrew Young School of Policy Studies, Georgia State University) and David Macpherson (Department of Economics, Trinity University), is updated annually.

The majority of ABC's contractor members are classified as small businesses by the Small Business Administration (SBA). This is consistent with the SBA's findings that the construction industry has one of the highest concentrations of small business participation (more than 86 percent).³ At the same time, many ABC members are large construction companies that have contracted directly with the federal government to successfully build large projects of the type that might be impacted by USACE's decision to build on Hawaii with PLAs.⁴

ABC and its members, large and small, are greatly concerned that the Federal Acquisition Regulatory (FAR) Council's April 13, 2010, final rule [FAR Case 2009-005] implementing President Obama's pro-PLA Executive Order 13502 will lead to increased government-mandated PLAs on federal construction projects.

ABC is opposed to government-mandated PLAs because these agreements typically restrict competition, increase costs, create delays, discriminate against non-union employees and place non-union contractors at a significant competitive disadvantage. Government-mandated PLAs are nothing more than anti-competitive schemes that end open and fair bidding on taxpayer-funded projects.

The FAR final rule and Executive Order 13502 encourage executive agencies to consider using PLAs on federal projects exceeding \$25 million on a project-by-project basis, but do not require agencies to use PLAs. Federal agencies are permitted to require a PLA on a particular large-scale construction project if the agency determines the PLA will achieve the 10 considerations listed in the FAR rule, as well as any additional evaluation factors, such as the seven questions listed on the sources sought notice.

Below are ABC's comments on those factors.

In the interest of understanding ABC's perspective on the controversial PLA issue and putting our comments in the appropriate context, the USACE must be warned that it is difficult to predict precisely how a PLA will impact USACE projects on Hawaii without knowing and reviewing the exact content of a PLA. A PLA is a contract, so the various terms and conditions contained in a PLA will significantly increase or decrease its anti-competitive and discriminatory effect.

Section 4 of Executive Order 13502 specifies the minimum requirements contained in PLAs. Frankly, this section hardly scratches the surface of the complex issues addressed in typical PLAs. The FAR Council's final rule clarified that an agency may "specify the terms and conditions of the project labor agreement, as appropriate to advance economy and efficiency in procurement."⁵ It is difficult for federal agencies to know the effects and unintended consequences of a PLA on a contractor's complicated employer-employee labor relations and successful business model, which is why PLAs should never be forced onto a contractor, but instead voluntarily entered into by a contractor if it feels a PLA will help promote the economy and efficiency in which a construction project is delivered to the federal government.

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 See: Federal Acquisition Regulation; FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects. <http://edocket.access.gpo.gov/2010/2010-8118.htm>

Without knowing the exact contents of a PLA, ABC's analysis and comments assume USACE PLAs will contain the following typical provisions that are particularly objectionable to non-union companies and their employees:

1. Non-union companies must obtain most or all of their employees from union hiring halls. This means that a non-union contractor has to send its workers to the union hiring hall and hope that the union dispatches the same workers back to the PLA jobsite.⁶ In addition, this provides unions with the opportunity to dispatch "salts" (paid union organizers) with conflicts of interest in employment to non-union companies. These union workers are of unknown quality and may delay time and cost-sensitive construction schedules that add uncertainty to the ability of a contractor to deliver a quality, on-time and on-budget construction product to the USACE.
2. Non-union employees must pay nonrefundable union dues and fees and/or join a union to work on a PLA project, even though they have decided to work for a non-union employer.⁷ PLAs require unions to be the exclusive bargaining representative for workers during the life of the project. When agreeing to participate in a PLA project, the decision to elect union representation is made by the employer rather than the employees.⁸ It is one way PLAs take away workers' rights.
3. PLAs require contractors to follow union work rules, which changes the way they otherwise would assign employees to specific job tasks—requiring contractors to abandon an efficient labor utilization practice called "multiskilling" and instead assign work based on inefficient and archaic union jurisdictional boundaries that increase labor costs. Merit shop contractors achieve significant labor cost savings through multiskilling, in which workers possess a range of skills that are appropriate for more than one work process and are used flexibly across multiple trades on a project or within an organization. It has tremendous labor productivity advantages for contractors, but it is forbidden by typical union work rules and, by extension, PLAs.⁹
4. PLAs require non-union companies to pay their workers' health and welfare benefits to union trust funds, even though these companies have their own benefit plans. Thus, companies have to pay benefits twice: once to the union and once to the company plan. Workers cannot access any of their union benefits unless they decide to leave their non-union employer and remain with the union until vested.¹⁰ Paying into underfunded and mismanaged union pension plans can expose merit shop

⁶ See www.TheTruthAboutPLAs.com, [Project Labor Agreement Basics: What is a PLA?](#) 04/24/09.

⁷ See www.TheTruthAboutPLAs.com, [Understanding PLAs in Right to Work States](#), 07/20/09.

⁸ Workers normally are permitted to choose union representation through a card check process or a federally supervised private ballot election. PLAs are called pre-hire agreements because they can be negotiated before the contractor hires any workers or employees vote on union representation. The [National Labor Relations Act](#) generally prohibits pre-hire agreements, but an exception in the act allows for these agreements only in the construction industry. In short, PLAs strip away the opportunity for construction workers to choose a federally supervised private ballot election or a card check process when deciding whether union representation is right for them.

⁹ See www.TheTruthAboutPLAs.com, [Understanding the Merit Shop Contractor Cost Advantage](#), 05/17/10.

¹⁰ An October 2009 report by Dr. John R. McGowan, "The Discriminatory Impact of Union Fringe Benefit Requirements on Nonunion Workers Under Government-Mandated Project Labor Agreements," finds that employees of nonunion contractors that are forced to perform under government-mandated PLAs suffer a reduction in their take-home pay that is conservatively estimated at 20 percent. PLAs force employers to pay employee benefits into union-managed funds, but employees will never see the benefits of the employer contributions unless they join a union and become vested in these plans. Employers that offer their own benefits, including health and pension plans, often continue to pay for existing programs as well as into union programs under a PLA. The

contractors to massive pension withdrawal liabilities. Depending on the health of a union-managed multi-employer pension plan, signing a PLA could bankrupt a contractor or prohibit contractors from qualifying for construction bonds needed to build future projects.¹¹

5. PLAs require non-union companies to obtain apprentices exclusively from union apprenticeship programs. Participants in federal and state-approved non-union apprenticeship programs, or participants in community or employer training programs, cannot work on a job covered by a PLA. This means young people enrolled in non-union apprenticeship programs could be excluded from work in their hometowns.¹²

This begs the question: Why not eliminate these provisions and therefore eliminate the controversy? The answer: Without these anti-competitive and discriminatory provisions that discourage non-union contractors from competing for public projects, unions rarely agree to concessions regarding labor peace, work schedules and other provisions that are the cornerstones of the alleged benefits of a PLA. The unions require these provisions because they are crucial to cutting competition and ensuring union contractors have an unfair advantage over non-union contractors.

ABC trusts the USACE understands these provisions would be typical in union-approved government-mandated PLAs for USACE projects in Hawaii and in the United States; there may be additional terms and conditions addressed in PLAs that non-union contractors and their employees would find offensive and would ultimately discourage competition from these qualified businesses.

Following are answers to these questions posed by the USACE:

- (1) Should PLAs be executed on selected large dollar contracts in Hawaii?
- (2) Are there concerns by prime contractors on the availability of skilled construction labor?
- (3) Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?
- (4) What type of project should not be considered for PLA clauses?
- (5) What is the time impact to the completion of the contract due to a PLA?
- (6) What is the cost impact to the bid due to a PLA?
- (7) What other factors should the Corps consider before deciding to include PLA provisions in a Honolulu Engineer District contract?

1. PLAs should not be executed on selected large dollar contracts in Hawaii because PLAs will not achieve economy and efficiency in federal procurement

If USACE were to require PLAs on Hawaii projects, it would increase costs and create inefficiencies for contractors and procurement officials that could jeopardize critical USACE construction projects for numerous reasons.

a. The asserted justifications for the final rule have no basis in fact

McGowan report found that nonunion contractors are forced to pay in excess of 25 percent in benefit costs above and beyond existing prevailing wage laws as a result of “double payment” of benefit costs.

See www.TheTruthAboutPLAs.com, [New Report Finds PLA Pension Requirements Steal From Employee Paychecks, Harm Employers and Taxpayers](#), 10/24/09

¹¹See www.TheTruthAboutPLAs.com, [Required Reading on Multi-Employer Pension Plan Crisis](#), 03/13/10.

¹²See www.TheTruthAboutPLAs.com, [Op-Ed: ABC Fights to Preserve Apprenticeship Training Opportunities for Future Construction Work Force](#), 06/01/10

Section 1 of the executive order, mirrored in the final rule, asserts the following justifications—and *only* these justifications—for believing PLAs will achieve greater “economy and efficiency” in federal construction procurement. As stated in the final rule:¹³

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.”

Neither the final rule nor Executive Order 13502 offers any factual basis for the aforementioned assertions in the current federal construction environment. Indeed, the facts refute such claims. Specifically, the investigations of ABC and other groups indicate there have been no significant labor-related problems on any large federal construction projects since President George W. Bush issued a 2001 executive order barring government-mandated PLAs on federal and federally assisted projects.¹⁴ 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 are the sole stated justifications for federal PLAs referenced in the final rule—have arisen on any of the thousands of large federal projects (totaling \$147.1 billion¹⁵) built since 2001, despite the outright prohibition of any PLAs on any large (or small) federal construction.

The Office of Management and Budget (OMB) essentially admitted the complete absence of any factual support for Executive Order 13502 and the FAR Council final rule in response to a Freedom of Information Act (FOIA) 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 Executive Order 13502. OMB produced no such documents, citing only a handful of unrelated documents 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 any large federal construction project suffering significant cost overruns or delays as a result of any of the labor-related issues cited in Executive Order 13502 or the final rule.

ABC also surveyed its own members, receiving responses from contractors that have performed billions of dollars worth of large federal construction projects during the past decade. These contractors uniformly confirmed the absence of any of the labor “challenges” identified in President Obama’s Executive Order 13502 as the sole justification for encouraging federal agencies to impose PLAs on future federal construction projects.

¹³ See: Federal Acquisition Regulation; FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects. <http://edocket.access.gpo.gov/2010/2010-8118.htm>

¹⁴ In 2001, President George W. Bush issued Executive Order No. 13202, prohibiting any government mandate of PLAs on federal or federally funded construction projects. It was repealed by President Obama’s Executive Order 13502.

¹⁵ See <http://www.census.gov/const/C30/federal.pdf>

Finally, a study of this issue conducted by the Beacon Hill Institute revealed no evidence of any significant labor problems on federal construction projects in the absence of PLAs.¹⁶

Thus, the entire factual premise underlying Executive Order 13502 and the final rule is demonstrably false.¹⁷ There have been no labor problems on recent federal construction projects in Hawaii or the mainland United States that justify imposing PLA restrictions on future federal projects.¹⁸

b. PLAs will increase costs, not achieve “economy” in federal procurement

Neither the executive order nor the final rule identifies any factual basis to support the claim that government-mandated PLAs will reduce the costs of construction on large federal projects. Therefore, the FAR Council is not entitled to rely on such a claim in support of the final rule. There is no factual basis for claiming PLAs will reduce costs on federal construction projects, and the overwhelming weight of the evidence establishes PLAs will cause increased costs to taxpayers.

USACE must review the aforementioned study issued by the Beacon Hill Institute (BHI), which estimates that PLAs on federal construction projects will increase the costs to taxpayers by millions of dollars (i.e., between 12 percent and 18 percent of the total cost of construction).¹⁹ BHI has performed a series of cost studies on public construction projects under PLAs based on rigorous comparisons of similar projects built in various jurisdictions with and without PLAs. The studies have adjusted the data for inflation and accounted for factors such as the size and type of the project, and whether new construction was involved. Each of these studies demonstrated that government-mandated PLAs increase the costs of public construction projects between 12 percent and 18 percent. According to BHI, such increased costs result from the decreased competition for PLA-covered work, and from the increased costs to non-union bidders for being subjected to union hiring, work rules and double fringe benefit payments.

BHI’s findings have been corroborated by both empirical and anecdotal evidence. A 2001 study published by the nonpartisan Worcester Regional Research Bureau estimated that PLAs increase project costs by approximately 15 percent.²⁰ In addition, in New York, the Roswell Park Cancer Institute was partially constructed under a union-favoring government-mandated PLA. Comparisons of bid packages released under the PLA and bid packages undertaken without a PLA requirement revealed that costs of construction under the PLA were 48 percent higher than without the PLA.²¹ Similarly, the Glenarm Power Plant in Pasadena, Calif., saw the low bid on its project increase from \$14.9 million to \$17.1 million expressly due to the imposition of a PLA.²²

¹⁶ 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>.

¹⁷ In 2009, ABC National, ABC members and construction industry stakeholders sent hundreds of regulatory comments in opposition to the FAR Council’s proposed rule implementing Executive Order 13502. Enclosed are comments from ABC National that illustrate the anti-competitive and discriminatory effect of government-mandated PLAs on merit shop businesses and their employees that will lead to waste and inefficiency in federal procurement.

¹⁸ For the same reasons, the discriminatory impact of the Executive Order and final 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.

¹⁹ *Ibid.*

²⁰ Worcester Regional Research Bureau, *Project Labor Agreements* (2001), available at <http://abc.org/plastudies>.

²¹ Baskin, *The Case Against Union-Only Project Labor Agreements*, 19 *Construction Lawyer* (ABA) 14, 15 (1999).

²² *Power Plant Costs To Soar*, Pasadena Star News, Mar. 21, 2003.

ABC has collected more than a dozen other examples 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.²³

In addition to these direct comparisons in the bidding process, experience at the state and local level has revealed many instances in which PLAs failed to achieve promised cost savings, and instead led to cost overruns, on public projects such as stadiums,²⁴ convention centers,²⁵ civic centers,²⁶ power plants²⁷ and airports,²⁸ in addition to the school comparisons previously mentioned.²⁹ 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, the Big Dig wound up costing more than \$14.6 billion, among the biggest cost overruns in the history of American construction projects.³⁰

Faced with this overwhelming evidence of cost increases, PLA proponents have put forward a series of unconvincing explanations. 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.³¹ BHI's most recent study,³² however, 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 PLA 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 pointed out, the burden should be on PLA proponents and the Executive Branch to prove that PLAs actually save money. This is particularly true in light of the obvious conflict between government-mandated PLAs and the principles of open competition discussed above. The final rule makes no effort to meet this

²³ See *Examples of Projects Bid With and Without PLAs*, available at <http://abc.org/plastudies>.

²⁴ *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 during the past two decades, were built without any PLA requirements, with no cost overruns.

²⁵ Washington Business Journal (March 2003).

²⁶ *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.

²⁷ *Power Plant Costs to Soar*, Pasadena Star-News, March 21, 2003.

²⁸ *SFO Expansion Project Hundreds of Millions Over Budget*, San Francisco Chronicle, Dec. 22, 1999.

²⁹ 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.

³⁰ See www.TheTruthAboutPLAs.com, *The Most Infamous PLA Job: Lessons from Boston's Big Dig*, 06/29/10

³¹ Kotler, *supra* n. 20; Belman, Bodah and Philips, *supra* n. 20.

³² 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>.

burden, and in reality there is no proof that PLAs reduce costs in a competitive environment, under generally recognized standards of evidence.

It also should 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.³³ Such circumstances were once common in the construction industry, which was 87 percent unionized as recently as 1947. However, the demographics of the industry have changed so dramatically (only 14.5 percent of the U.S. workforce is now unionized), that it is now extremely rare for a federal agency such as the USACE to undertake a project on which there are no potential non-union bidders or subcontractors.³⁴

In the absence of such proof, and in light of the robust public record 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.

The cost increases resulting from a lack of competition, inefficient union work rules, and requirements of double payment into union and existing non-union pension and benefit plans are likely to be amplified in Hawaii.

c. PLAs on Hawaii USACE projects will cause procurement delays, not achieve “efficiency” in federal procurement

In addition to failing to serve the interests of greater “economy” in federal procurement, the final rule does not make the procurement process more efficient. In fact, the final rule builds into the procurement process additional and inefficient steps that may decrease competition, increase costs and delay construction projects.

The final rule provides agencies with three procurement options. The agency may require submission of an executed PLA: (1) when offers are due, by all offerors; (2) prior to award, by only the successful offeror; or (3) post award, by only the successful offeror. None of these procurement strategies make sense, and each could cause procurement delays.

An agency cannot make an informed decision about whether a PLA is in the government’s 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 the other hand, waiting until after the successful offeror is selected and then imposing a PLA is inefficient, as well as unfair and misleading to bidders. Either way, requiring a PLA under the options permitted by the final rule would be arbitrary and capricious, and clearly would not bring greater efficiency to the federal procurement process.

The first option requires all offerors on a project to negotiate a PLA with up to as many as 20 unspecified labor organizations and submit a signed PLA with their bids. This practice is complicated, costly and wastes both the labor organizations’ and contractors’ time and resources. It also forces agencies to develop a new area of expertise to review all of the various PLAs. Non-union contractors and union-signatory contractors with no familiarity with labor organizations that have jurisdiction over the project location would find it difficult to

³³ See Kotler *supra* n. 20; Belman, Bodah and Philips, *supra* n. 20.

³⁴ 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>.

allocate the time and to marshal resources and expertise needed to negotiate a PLA with multiple unfamiliar unions.

For all three procurement options, contractors cannot force a labor organization to negotiate with them, so if a labor organization fails to respond or refuses to negotiate a PLA, or gives competitors more favorable terms and conditions, the contractor has no recourse.³⁵ Labor organizations hold all of the power and may not act in the best interests of the federal agency.

For all of the options, projects could be delayed pending the outcome of the PLA negotiations, and projects may have to be re-bid depending on whether agreements can be reached.

Finally, in the event there is a shortage of labor during peak USACE construction, procurement officials would need to devise strategies that ensure the hiring of Hawaii's non-union workforce ahead of mainland union members dispatched through union hiring halls because PLAs defer to union hiring hall and dispatch procedures. Typical union hiring hall rules give preference to union "travelers" or "boomers" seeking work from the mainland and union members of that local hiring hall that have been on the out-of-work list the longest, regardless of whether they are a local resident.³⁶

d. PLAs will not achieve greater efficiency in terms of productivity, quality or safety

Union-favoring government-mandated PLAs do nothing to guarantee better quality, skills or productivity on construction projects. There is certainly no evidence that union labor in the 21st century is more skilled than merit shop workers.³⁷ Some of the largest and most successful federal and USACE 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. Prominent examples include the Big Dig in Boston,³⁸ the Convention Center in Washington, D.C.,³⁹ the Iowa Events Center,⁴⁰ Milwaukee's Miller Park,⁴¹ and many others.⁴² There is no efficiency-based justification for mandating a PLA on federal construction projects.

³⁵ Absent an established collective bargaining relationship with the contractor under Section 9(a) of the NLRA, unions have no legal obligation to negotiate with any contractor and have no legal obligation to negotiate in a good-faith, nondiscriminatory and timely manner.

³⁶ See www.TheTruthAboutPLAs.com [Project Labor Agreements and Big Labor Fail at Local Job Creation](http://www.TheTruthAboutPLAs.com/Project-Labor-Agreements-and-Big-Labor-Fail-at-Local-Job-Creation), 08/05/10

³⁷ 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).

³⁸ 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>.

³⁹ *Roof Section Collapses at D.C. Convention Center Site*, Washington Construction News (May 2001).

⁴⁰ 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>.

⁴¹ *Crane Accident Kills Three At Unfinished Miller Park*, Washington Times, July 15, 1999.

⁴² 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>

2. PLAs will not produce labor-management stability

Government officials often argue that the increased costs and discriminatory and anti-competitive nature of union-favoring government-mandated PLAs are “bitter pills worth swallowing” for the union sector of the construction industry’s promise not to strike, picket and engage in other forms of labor unrest on jobsites.

That flawed logic makes little sense for three key reasons:

1. Adopting a PLA creates a virtual monopoly for union contractors and rewards the extortionary tactics of union bosses and union members.
2. Non-union employees don’t strike, and they compose more than 85 percent of the U.S. construction workforce and almost 70 percent of Hawaii’s construction workforce. There would not be a labor shortage if union members strike. Why capitulate to the demands of union organizations if there is a reliable and quality alternative?
3. It’s a myth that PLAs prevent strikes, as there are numerous examples of strikes on public and private projects subject to a PLA.

Instability between labor and management can lead to strikes and labor unrest. In Hawaii, ABC is not aware of any examples of labor unrest, strikes or work stoppages in the construction industry. This may be attributed to the fact that Hawaii’s construction workforce is largely non-union and cooperative. Non-union employees don’t strike. Work disruptions occasionally occur in construction markets where unions have a large construction market share. Such environments give unions strong bargaining leverage during contract negotiations that often precede strikes.

A PLA offers no guarantee against strikes. In 1999, union carpenters working on the union-only San Francisco Airport expansion struck over wages even though their union had signed a PLA. The union electricians, plumbers and painters also went on strike in support of the union carpenters.⁴³ The strike cost \$1 million. The project, which was already a month behind schedule, lost even more time.⁴⁴ Similar strikes on PLA projects have occurred on public projects in the Chicago area in 2010 and on a private project in 2006.⁴⁵

Finally, in today’s construction marketplace, many union collective bargaining agreements already contain a promise against strikes, so the alleged need to enter into a PLA to prevent labor unrest may be a moot point. Before deciding whether a PLA is appropriate for USACE work, it is important for USACE officials to get familiar with the collective bargaining agreements of trade unions that may work on USACE projects.

3. PLAs do not ensure compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters

It is unclear how a PLA would advance compliance with safety, health, EEOC, labor and employment standards and regulations in Hawaii and in the mainland United States, as federal contractors already are subject to these

⁴³ *Carpenters at Airport Protest Against Union Leadership*, San Francisco Chronicle, May 21, 1999; see also *Arbitrator Orders California Carpenters To End Wildcat Strike, Return to Work*, Daily Labor Report, June 23, 1999.

⁴⁴ *Carpenters at Airport Protest Against Union Leadership*, San Francisco Chronicle, May 21, 1999.

⁴⁵ See www.TheTruthAboutPLAs.com, [PLA Projects Delayed By Chicago Construction Union Strike: Another PLA Myth Busted](http://www.TheTruthAboutPLAs.com), 07/17/10

rules, regulations and penalties. Numerous federal agencies are charged with enforcing and monitoring contractor compliance with labor and employment laws. If contractors are not complying with any of the laws, it is the responsibility of the appropriate government enforcement agency to find, correct and punish violators.

4. PLAs will expose the USACE to potential legal challenges

PLA mandates will expose USACE to legal challenges that will harm the economy and efficiency in contracting, because Executive Order 13502, the FAR Council's final rule and the act of a federal agency requiring a PLA run afoul of numerous laws.

Released April 13, 2010, the FAR Council's final rule has raised questions about the legality of Executive Order 13502 and whether mandating a PLA on a federal construction project per the FAR Council's final rule is a violation of federal procurement laws. The legal concerns raised in the attached comments from ABC National remain largely unsettled, and could be addressed via a legal challenge on a USACE project subject to a federal PLA—resulting in increased costs and project delays.

The heart of said legal challenges are strong arguments that Executive Order 13502 and the FAR Council's final rule exceed the president's authority under the Federal Property and Administrative Services Act (FPASA) of 1949.⁴⁶

The sole statutory authority for the final rule, and for the president's executive order, is the FPASA, which is intended to "provide the Federal Government with an economical and efficient system" of government procurement. FPASA gives the president the authority to "prescribe policies and directives that [he] considers necessary to carry out," only so long as such policies are "consistent with" the act and with other laws (such as the Competition in Contracting Act of 1984).⁴⁷ Unless the president has acted in a manner consistent with this statutory authority, neither the final rule nor Executive Order 13502 is valid.⁴⁸

Executive Order 13502 and the final rule have offered no fact-based justification for the claim that PLAs are necessary to allow federal agencies to achieve "economy or efficiency" in the federal procurement of construction services. Rather, as discussed below, the known facts regarding the federal government's prohibition of PLAs on federal and federally assisted projects from 2001 to 2009 show that none of the asserted justifications for federal PLAs have any basis in actual experience on federal construction projects during that time period or in recent decades. As a result, Executive Order 13502 and the final rule cannot be found to be authorized by the FPASA.⁴⁹

The foundation for the federal government's procurement requirements is the Competition in Contracting Act of 1984 (CICA),⁵⁰ which was enacted to assure 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 also required "full and open" competition. Full and open competition means all responsible sources are permitted to

⁴⁶ 40 U.S.C. § 101, *et seq.*

⁴⁷ 40 U.S.C. §471 *et seq.* and 41 U.S.C. §251 *et seq.*

⁴⁸ *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.").

⁴⁹ Because of the president's failure to justify Executive Order 13502 with facts demonstrating a close nexus between government-mandated PLAs and increase economy and efficiency of federal procurement, cases such as *AFL-CIO v. Kahn*, 618 F. 2d 784 (D.C. Cir. 1979) are distinguishable.

⁵⁰ 40 U.S.C. §471 *et seq.* and 41 U.S.C. §251 *et seq.*

submit competitive proposals on a procurement action. CICA requires, with certain limited exceptions, that the government promote full and open competition in awarding contracts.⁵¹

Of particular significance to the USACE, 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.”⁵²

Since the enactment of CICA, no president has 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.⁵³ Nor has any federal court authorized federal agencies to impose PLAs on federal construction contracts under CICA.⁵⁴ Indeed, to ABC’s knowledge, no federal agency has imposed a PLA over the objection of construction contractor offerors since CICA’s enactment in 1984.⁵⁵

The final rule conflicts directly with CICA by encouraging federal agencies to impose PLAs that discriminate against and discourage competition from potential bidders (i.e., contractors that are not signatory to any union agreements).⁵⁶ By showing favoritism toward a narrow class of unionized contractors, government-mandated PLAs clearly do not “obtain full and open competition” and therefore are unlawful under CICA.

⁵¹ 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).

⁵² *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).

⁵³ President H.W. 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. Bush issued Executive Order No. 13202, prohibiting any government mandate of PLAs on federal or federally funded construction projects.

⁵⁴ In the only case involving a PLA on a federal project where the CICA issue was previously raised, the Court of Appeals for the 6th Circuit found that 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).

⁵⁵ The often cited 1998 study by the agency then called the Government Accounting Office (GAO), (U.S. Government Accounting Office, *Project labor Agreements The Extent of Their Use and Related Information*, GAO/GGD-98-82) erroneously conflated both government-mandated and purely voluntary PLAs in concluding that 26 PLAs were performed on federal construction work in the 1990s. *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 final 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.

⁵⁶ As noted above, more than 85.5 percent of the construction industry now consists of contractors that 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 percent 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

ABC conducted a survey asking its members whether they would be discouraged from bidding on federal construction projects due to a PLA requirement. In an overwhelming response from hundreds of members, 98 percent of contractors indicated they would be less likely to bid on a job if a project labor agreement were imposed as a condition of performing the work.⁵⁷

Previous surveys of non-union contractors have illustrated similar results. In a study of infrastructure contractors in the Washington, D.C., area conducted by the Weber-Merritt Research Firm, more than 70 percent of the surveyed contractors stated they would be “less likely” to bid on a public construction project containing a PLA.⁵⁸ Across the country in Washington state, another survey of contractors revealed that 86 percent of open shop contractors would decline to bid on a project under a government-mandated PLA.⁵⁹ Government-mandated PLAs clearly have an adverse impact on competition by discouraging contractors from bidding for government construction work.⁶⁰

These survey findings have been repeatedly supported by evidence gathered on actual government construction projects with PLA mandates. In March 1995, a study analyzed the effects of PLAs on bids for construction 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.”⁶¹ 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.⁶²

Ernst & Young agreed with these findings in connection with a study of PLAs in Erie County, Pa., 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.”⁶³ Similar

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 more efficient and minority participation is at its highest level.

⁵⁷ *Newsline* (July 22, 2009), available at <http://abc.org>.

⁵⁸ *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>.

⁵⁹ Lange, *Perceptions and Influence of Project Labor Agreements on Merit Shop Contractors, Independent Research Report* (Winter 1997), available at <http://abc.org/plastudies>.

⁶⁰ 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.

⁶¹ 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.

⁶² 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>.

⁶³ Ernst & Young, *Erie County Courthouse Construction Projects: Project Labor Agreements Study* (2001), available at: <http://abc.org/plastudiess/Erie.pdf>.

conclusions were reached by the Clark County, Nev., School District, which recommended against adoption of any union-only requirements on county schools.⁶⁴

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, N.Y.;⁶⁵ the Central Artery/Tunnel project in Boston;⁶⁶ school projects in Fall River, Mass.,⁶⁷ Middletown, Conn.,⁶⁸ Hartford, Conn.,⁶⁹ and Wyoming County, W.Va.;⁷⁰ the Wilson Bridge project near Washington, D.C.;⁷¹ and the San Francisco International Airport project.⁷² These and other incidents of government-mandated PLAs depressing the number of bidders dramatically below project managers' expectations are too widespread to be ignored. They have been compiled and described in detail in a comprehensive study the USACE is encouraged to review.⁷³

Proponents of 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 Boston Harbor project and on the Southern Nevada Water District project, two large state PLA projects built in the 1990s.⁷⁴ In each case, however, the claims of significant non-union participation on these PLA projects turned out to be grossly exaggerated.⁷⁵ 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.

⁶⁴ *School District Should Heed Conclusions of Report*, Las Vegas Journal, Sept. 11, 2000.

⁶⁵ *Sewer Project Phase Attracts No Bids*, Syracuse Post-Standard, Aug. 20, 1997, E-1.

⁶⁶ *Big Boston bids in 1996*, ENR Nov. 20, 1995, at 26; *Low Bid \$22 Million Over Estimate*, ENR Jan. 13, 1997, at 1, 5.

⁶⁷ 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.

⁶⁸ *State's Dubious Labor Policy*, Hartford Courant, Aug. 20, 1998, 3.

⁶⁹ *School Project Back in Limbo*, Hartford Courant, April 7, 2004.

⁷⁰ *New Wyoming County School to be Rebid*, Associated Press, Dec. 20, 2000.

⁷¹ *Lone Wilson Bridge Bid Comes in 70% Above Estimate*, Engineering News-Record, Dec. 24, 2001; see also Baltimore Sun, March 2, 2002.

⁷² *Labor Protests Fly, Bids Are High*, ENR, July 22, 1996, at 16.

⁷³ See Baskin, *Government-Mandated Union-Only PLAs: The Public Record Of Poor Performance* (2009), available at <http://abc.org/plastudies>.

⁷⁴ See, e.g., Kotler, *supra* n. 20.

⁷⁵ The Boston Harbor claim was based on 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 that 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 that 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>.

It remains clear that government-mandated PLAs damage competition and certainly do not “obtain full and open competition” as required by CICA. As the Supreme Court of Rhode Island held upon consideration of a PLA in the 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 competently complete the substantive work of the project.”⁷⁶ For this reason alone, government-mandated PLAs are inconsistent with existing law, and it would be unwise for the USACE to mandate a PLA and expose Hawaii projects to a significant legal challenge. Further, it is legal and permissible under the FAR Council’s final rule for USACE to decline to mandate a PLA.

5. A PLA will create inefficiencies employing workers in multiple crafts or trades

It is common for prime contractors to staff projects exceeding \$25 million with multiple subcontractors that will employ labor in multiple trades. A PLA fails to offer any specific advantages that a prime contractor already achieves with good management practices and strong contracting language.

Many of Hawaii’s existing non-union construction employees are competent in more than one trade, which produces efficiencies unique to merit shop contractors. A typical PLA would shackle non-union contractors with archaic and costly union work rules that would restrict the ability of their employees to engage in cost-efficient multitasking, in which employees perform tasks across multiple trades.

6. A PLA will exacerbate existing shortages of skilled labor by discouraging Hawaii’s existing non-union workforce from building PLA projects

Hawaii contractors report there could be a shortage of union and non-union skilled tradesmen for future USACE projects depending on the economy and local, state and private construction markets. A lack of a PLA does not restrict union members from working on these projects. However, a PLA may exacerbate shortages of skilled labor by discouraging and discriminating against Hawaii’s existing non-union workforce and its experienced employers.

7. PLAs have been known to delay construction projects

Implementing PLAs could lead to considerable delays stemming from legal challenges and complications in the PLA negotiations and contract procurement process.

In Hawaii, numerous projects have been built during an extended period of time without PLAs. There is no precedent for delayed projects, strikes or work stoppages by construction workers on Hawaii’s federal projects, so a PLA offers little value in terms of enhancing the likelihood of meeting deadlines and preventing work stoppages. Because Hawaii has little experience with PLAs, it is important to review the public record of performance of PLAs in the mainland United States to see if they are effective tools for managing projects that last an extended period of time.

An argument often made in support of PLAs is that PLAs guarantee timely completion of construction projects by guaranteeing labor peace. Once again, proponents’ claims are belied by the published reports of the completion dates of PLA projects and their significant labor disruptions.

⁷⁶ *Associated Builders & Contractors of Rhode Island, Inc. v. Department of Admin.*, 787 A.2d 1179, 1188-89 (R.I. 2002).

In addition to sustaining huge cost overruns under its PLA, the Big Dig in Boston was more than five years delayed in its completion. The project was supposed to be finished in 2002, but finally concluded in December 2007 (although it has experienced a number of construction defects requiring constant repairs).⁷⁷

In Cleveland, the Parma Justice Center was completed behind schedule under a PLA: It was scheduled to open in the spring of 1999, but completion was pushed back to autumn.⁷⁸

A PLA baseball stadium, Miller Park in Milwaukee, missed its scheduled opening season entirely due to construction delays. As a result of a fatal accident involving union workers, the stadium could not be opened as expected during the 2000 season and instead did not open until 2001. The PLA on Safeco Field in Seattle, noted as the most expensive baseball stadium ever built, also was completed months later than scheduled. The stadium could not be opened in time for the beginning of the 1999 season, as had been promised, and the Seattle Mariners could not begin play there until July 1999.

In 1999, the General Services Administration was forced to terminate for default the unionized builder of the St. Louis federal courthouse. A principal cause of the termination, according to published reports, was the severe delays in construction. The government claimed damages of nearly \$5,000 a day because construction fell behind schedule by 361 days.⁷⁹

Published reports also laid part of the blame for the California energy crisis on the inordinate delays in construction of needed power plants resulting from union demands for PLAs. According to *The Wall Street Journal*: “For years, unions have intimidated and badgered power plant builders to employ only the 25 percent of California’s construction workers who hold union cards. These demands by construction unions for bans on non-union labor have both delayed and driven up the cost of, you guessed it, power plants in the state.”⁸⁰

8. PLAs rarely have been used in Hawaii and on federal construction projects during the last decade

Between 2001 and 2008, Executive Order 13202 ensured that at least \$147.1 billion worth of federal construction projects were bid without discriminatory and wasteful government-mandated PLAs. The actual value of construction projects protected by Executive Order 13202 is exponentially larger, as the above figure does not include local construction spending that received federal funding or assistance protected by the executive order. The FAR Council does not dispute the fact that, during the previous decade in which PLAs were essentially banned on federal and federally assisted construction projects under Executive Order 13202, none of the labor issues identified as potential problems in the final rule and/or Executive Order 13502 occurred on any federal projects.

Fair and open competition free from PLAs saved American taxpayers an estimated 10 percent to 20 percent on federal construction spending, and has a proven track record of delivering positive results for federal agencies in Hawaii.

9. Factors the USACE should consider before deciding to include PLA provisions in a Honolulu Engineer District contract

⁷⁷ <http://www.issuesource.org>.

⁷⁸ *Parma Justice Center building behind schedule, over budget*, Cleveland Plain Dealer, Mar. 2, 1999.

⁷⁹ *GSA Terminates Morse Diesel*, ENR, June 28, 1999 at 15.

⁸⁰ *Power Grab*, Wall Street Journal., Feb. 15, 2001.

The FAR Council's final rule implementing President Obama's pro-PLA Executive Order 13502 fails to establish additional meaningful criteria for federal agencies to apply in considering whether to impose a PLA on a federal construction project.

The FAR Council's proposed rule for Executive Order 13502 invited 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." The final rule failed to adopt most suggestions provided by construction industry stakeholders. However, subpart 22.503(c)(6) permits agencies to develop and consider "any other factors that the agency decides are appropriate" when evaluating whether to require a PLA.

Without conceding that a government-mandated PLA is ever appropriate or lawful on a federal construction project, ABC requests that the USACE consider the following steps prior to requiring a PLA in Hawaii or on other projects in the United States:

- 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 determine whether the PLA is consistent with applicable law. In particular, if the procurement is covered by the Competition in Contracting Act (CICA), 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) During the course of the hearing/notice and comment process, the agency should determine whether a PLA would discourage interested parties, including potential subcontractors, from bidding 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 considered or required.
- 5) The agency should determine whether a PLA would achieve procurement cost savings for the agency, thereby increasing economy and efficiency in procurement. Unless an agency can produce definitive proof that a PLA would generate such decreased costs, no PLA should be considered or required.
- 6) The agency should determine whether there is evidence that a PLA would result in increased costs of construction. Unless it can be proven that a PLA would not generate such increased costs, no PLA should be considered or required.
- 7) The agency should 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, 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 that have agreed to union 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 it would, then a PLA should not be considered or required.
- 10) The agency should determine whether imposition of a PLA would adversely impact small or disadvantaged businesses, including subcontractors. If it would, then a PLA should not be considered or required.
- 11) In the event the agency exercises 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: (1) prohibiting imposition of PLAs that 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; and (2) inserting language into a PLA that allows non-union contractors to use their entire existing workforce without having to refer them to union halls, exempts non-union contractors from following inefficient and archaic union work rules, exempts non-union workers from paying union dues, fees etc., and allows contractors to employ apprentices enrolled in registered non-union apprenticeship programs. The mandatory terms and conditions of the PLA should be disclosed to potential offerors in a reasonable amount of time before offers are due.
- 12) In the event the agency exercises its discretion to require a PLA, it should take steps, in advance, to evaluate and require each construction trade union party to the PLA to disclose to contractors and agency officials actuarial statements and rules from pension, health and other benefit programs that would apply to plan beneficiaries and contractors contributing fringe benefits to such union programs.
- 13) In the event the agency exercises its discretion to require a PLA, it should take steps, in advance, to evaluate and require each construction trade union party to the PLA to disclose each union hiring hall’s dispatch and hiring rules and procedures in order to minimize the discriminatory impact of the PLA on previously non-signatory contractors, subcontractors and non-union workers.
- 14) At all steps in the process outlined above, the burden should always be on those who are considering or advocating a PLA to prove the PLA is justified by the needs of economy and efficiency, and will not injure competition or adversely impact small and disadvantaged businesses, including subcontractors.

If you have questions or would like to request sample language to insert in PLAs that would encourage fair and open competition from qualified non-union contractors and their skilled employees, please do not hesitate to contact ABC.

Conclusion

ABC appreciates the opportunity to share our perspective and extensive research on government-mandated PLAs. We believe these anti-competitive and costly agreements have no place on federal construction projects in Hawaii or in the mainland United States. We encourage USACE to proceed with construction projects free from PLA mandates and in the spirit of fair and open competition. Doing so will help USACE provide taxpayers with the best possible construction product at the best possible price.

Sincerely,



Ben Brubeck
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Enclosure:

ABC National Comments to FAR Council on FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects

cc: Lieutenant General Robert L. Van Antwerp, USACE Commanding General
Gregory Noonan, USACE Labor Counsel
Robert Slockbower, USACE Military Programs Director
Kim Denver, National Contracting Organization Director, USACE
Jonathan Young, ABC Hawaii President
James Martinez, Guam Contractors Association President
Steve Sandherr, Associated General Contractors (AGC) President



Y--Corps of Engineer Honolulu District Soliciting Comments on the Potential Use of Project Labor Agreements (PLA) on Large Scale Construction Projects in the State of Hawaii

Solicitation Number: W9128A-PLA-INFO

Agency: Department of the Army

Office: U.S. Army Corps of Engineers

Location: USACE District, Honolulu

Notice Type:
Sources Sought

Posted Date:
September 24, 2010

Response Date:
October 18, 2010

Archiving Policy:
Automatic, on specified date

Archive Date:
December 17, 2010

Original Set Aside:
N/A

Set Aside:
N/A

Classification Code:
Y -- Construction of structures and facilities

NAICS Code:
236 -- Construction of Buildings/236220 -- Commercial and Institutional Building Construction

Synopsis:

Added: Sep 24, 2010 1:22 am

The Corps of Engineers Honolulu District is soliciting comments from the construction community addressing the potential use of Project Labor Agreements (PLA) from large scale construction projects (exceeding \$25 million) within the State of Hawaii.

PLA is defined as a pre-hire collective bargaining agreement with one or more labor organizations tghat establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

Federal Acquisition Regulation (FAR) Policy: (a) Project Labor Agreement (PLA) is a tool that agencies may use to promote economy and efficiency in Federal procurement. Pursuant to Executive Order 13502, agencies are encouraged to consider requiring the use of project labor agreements in connection with large-scale construction projects. , (b) An agency may, if appropriate, require that every contractor and subcontractor engaged in construction on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations if the agency decides that the use of project labor agreements will (1) Advance the Federal Governments 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 (2) Be consistent with law.

Reference:

Provision: 52.222-33 Notice of Requirement for Project Labor Agreement Clause 52.222-34 Project Labor Agreement

Request responses to the following questions:

- (1) Should PLAs be executed on selected large dollar contracts in Hawaii?
- (2) Are there concerns by prime contractors on the availability of skilled construction labor?
- (3) Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?
- (4) What type of project should not be considered for PLA clauses?
- (5) What is the time impact to the completion of the contract due to a PLA?
- (6) What is the cost impact to the bid due to a PLA?
- (7) What other factors should the Corps consider before deciding to include PLA provisions in a Honolulu Engineer District contract?

Please provide your comments via e-mail to POH-CECT@usace.army.mil no later than October 18, 2010.

Contracting Office Address:

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Opportunity History

- **Original Synopsis**

Sep 24, 2010

1:22 am