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In Reply to: Solicitation Number N69450-11-R-0762 Soliciting Comments on Potential Use of Project Labor Agreements (PLAs) at B603 Saufley Field, Naval air Station (NAS) Pensacola, FL

Dear Mr. McGrattan:

Thank you for soliciting comments from the contracting community on the Department of Navy's potential use of project labor agreements (PLAs) on a renovation at Saufley Field, NAS Pensacola, FL.

I trust this detailed response will answer NAVFAC's questions about PLAs, and help the NAVFAC 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, Associated Builders and Contractors (ABC) is a national construction trade association representing 23,000 individual employers in the commercial and industrial construction industry, including general contractors, subcontractors and material suppliers belonging to 75 local ABC chapters throughout the United States. 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 federal agencies like NAVFAC provide taxpayers with the best possible construction product at the best possible price.

Conservatively, ABC's members employ more than 2 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, known as *merit shop contractors* in the industry, are not signatory to a construction trade union and they have a core workforce of experienced and qualified employees that do not belong to a construction trade union. The Bureau of Labor Statistics' (BLS) most recent report states that nonunion employees in the U.S. construction industry comprises 86.9 percent of the total construction industry workforce.[1]

[1] *See* bls.gov "*Union Members Summary*" (Jan. 2011).

Approximately 97.4 percent of Florida's 2010 private construction workforce does not belong to a union.[2]

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 NAVFAC's decision to build 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 use of anti-competitive and costly government-mandated PLAs and discriminatory PLA preferences on federal construction projects.

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

The following are answers to the questions posed by the Department of Navy in the sources sought notice N69450-11-R-0762.

a). Should PLAs be executed on selected large dollar contracts at Saufley Field, NAS Pensacola? What other factors should the Department of the Navy consider before deciding to include PLA provisions in a Saufley Field ? What type of project should or should not be considered for the utilization of a PLA?

ABC National urges NAVFAC to exercise discretion and refrain from imposing PLA mandates on any of the Saufley Field construction projects.

NAVFAC should allow contractors—the only parties with experience in labor-management relations in the construction industry, and the only ones that would be subject to the terms and conditions of a PLA—to decide whether a PLA is appropriate for a particular project. NAVFAC should expect that contractors will voluntarily execute PLAs if it would lower their costs, make them more competitive, and help them achieve economy and efficiency in federal procurement.

It is difficult to make a convincing case that government-mandated PLAs are needed on any NAVFAC project for a variety of compelling reasons addressed in answers to the questions posed by the NAVFAC.

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[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. This is the most recent data. There is no data on construction union workforce membership at the local, city or county level.

[3] *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, Office of Advocacy (2009), at page 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.

In today's construction marketplace, as has been the case for decades, there is a qualified, thriving and skilled alternative to union labor. There are quality merit shop contractors and skilled employees that will build NAVFAC projects on-time and on-budget and without a PLA. However, if projects are subject to a PLA mandate, NAVFAC can expect less competition, increased costs and potential delays.

In the interest of understanding ABC National's perspective on the controversial PLA issue and putting our comments in the appropriate context, NAVFAC should understand that it is difficult to predict precisely how a PLA will impact contractors, subcontractors, construction tradespeople and the NAVFAC construction projects at Saufley Field without knowing and reviewing the exact content of a PLA and how the PLA will be executed in the procurement process. 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.

Without knowing the exact contents of a PLA, because the agreement has not been finalized, our response assumes the NAVFAC PLA for the Saufley Field project will contain the following mandatory provisions that are particularly objectionable to merit shop companies and their employees:

1. Merit shop companies must obtain most or all of their employees from union hiring halls. This means that if a nonunion contractor is even able to use some of its existing employees, it has to send its workers to the union hiring hall and hope that the union dispatches the same workers back to the PLA jobsite.[5] In addition, this provides unions with the opportunity to dispatch "salts" (paid union organizers) with conflicts of interest in employment to nonunion companies. Unfamiliar union workers may be 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 NAVFAC.

2. Nonunion employees must pay nonrefundable union dues and/or fees and/or join a union to work on a PLA project, even though they have decided to work for a nonunion employer.[6] 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 agree to union representation is made by the employer rather than the employees.[7] Construction union employees often argue that forced unionization and/or representation—even for one project—is an infringement of their workplace rights and runs contrary to their intentional decision not to join a union.

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 defined in union collective bargaining agreements that increase labor costs. Merit shop contractors achieve significant labor cost savings and deliver quality

[5] See www.TheTruthAboutPLAs.com, *Project Labor Agreement Basics: What is a PLA?* 04/24/09.
[6] See www.TheTruthAboutPLAs.com, *Understanding PLAs in Right to Work States*, 07/20/09.
[7] 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.

projects 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. This practice has tremendous labor productivity advantages for contractors, but it is forbidden by typical union work rules and, by extension, PLAs.[8]

4. PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds, even though these companies have their own benefit plans. Workers cannot access any of their union benefits unless they decide to leave their nonunion employer, join a union and remain with the union until vested.[9] Few nonunion employees will join a union after working on a PLA project, so in order to ensure that nonunion employees have retirement and benefit plans that actually help their employees, companies have to pay benefits twice: Once to the union plans and once to the existing company plans. In addition, paying into underfunded and mismanaged union pension plans may expose merit shop 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 prevent it from qualifying for construction bonds needed to build future projects for the NAVFAC and other customers.[10]

5. PLAs require nonunion companies to obtain apprentices exclusively from union apprenticeship programs. Participants in federal and state-approved nonunion apprenticeship programs and community or employer training programs cannot work on a job covered by a PLA. This means young people enrolled in qualified apprenticeship programs could be excluded from work in their community if these training programs are not run by unions.[11]

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 nonunion 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. Union PLA proponents require these provisions because they are crucial to cutting competition and ensuring union contractors have an unfair advantage over nonunion contractors.

Therefore, no project should be subjected to a government-mandated PLA.

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[8] See www.TheTruthAboutPLAs.com, *Understanding the Merit Shop Contractor Cost Advantage*, 05/17/10.

[9] 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 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

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

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

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 when considering whether to impose a PLA on a federal construction project.

Without conceding that a government-mandated PLA is ever appropriate or lawful on a federal construction project, ABC requests that NAVFAC consider the following steps prior to requiring a PLA in the Pensacola, FL area 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 nonunion 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 nonunion contractors to use their entire existing workforce without having to refer them to union halls, exempts nonunion contractors from following inefficient and archaic union work rules, exempts nonunion workers from paying union dues, fees etc., and allows contractors to employ apprentices enrolled in registered nonunion 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 nonunion 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 does 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 merit shop contractors and their skilled employees, please do not hesitate to contact me.

b.) Is the use of PLAs effective in achieving economy and efficiency in Federal procurement? What is the estimated relative cost impact or any other economies or efficiencies derived by the Federal Government if using PLAs? Will a PLA impact the cost of submitting an offer?

Using PLAs would **NOT** help NAVFAC achieve economy and efficiency on Florida projects and other federal projects in the United States.

First, labor costs will increase under typical PLAs due to inefficient union work rules and requirements of double payment into union and existing nonunion pension and benefit plans.

Second, a PLA mandate makes submitting a bid more expensive, as contractors will be faced with increased legal and administrative costs if they are forced to negotiate a PLA and/or comply with a PLA if they are unfamiliar with operating under these union contracts.

Third, because PLAs discourage competition from qualified general contractors and subcontractors, overall bid prices may increase when there is less competition from qualified competitors. Anecdotal evidence suggests cost increases may be especially high if unionized contractors know there is little to no nonunion competition.

The cost increases are likely to be amplified in the region supplying labor to this project, as more than 97 percent of the construction workforce in Florida does not belong to a union and there are only a few qualified general contractors and subcontractors that are unionized in the region.

If NAVFAC were to mandate a PLA or implement a discriminatory PLA preference, it would reduce competition, increase costs and create inefficiencies for contractors and procurement officials that could jeopardize the NAVFAC construction project for numerous reasons documented below.

1. **The asserted justifications for the final rule and government-mandated PLAs have no basis in fact.**

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:[12]

> 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

[12] 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

prohibiting the use of government-mandated PLAs on federal and federally assisted projects.[13] 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 billion[14]) built between 2001 and Feb. 2009, despite the outright prohibition of any PLAs on any large (projects exceeding $25 million in total cost) or small federal construction projects.

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 failed to identify any federal project that has suffered from a 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. 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.[15]

Thus, the entire factual premise underlying Executive Order 13502, the final rule, and government-mandated PLAs is demonstrably false.[16] There have been no labor problems on recent federal construction projects in the United States or in the Pensacola region that justify imposing PLA restrictions on future federal projects.[17]

2. PLAs will increase costs, not achieve "economy" in federal procurement.

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[13] In 2001, President George W. Bush issued Executive Order No. 13202 and 13208, prohibiting any government mandate of PLAs on federal and federally funded or assisted construction projects. It was repealed by President Obama's Executive Order 13502 on Feb. 6, 2009.

[14] See http://www.census.gov/const/C30/federal.pdf

[15] *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.

[16] 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.

[17] 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.

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.

NAVFAC should 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).[18] BHI has performed a series of cost studies on public construction projects built with 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 nonunion 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.[19] 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 the costs of construction under the PLA were 48 percent higher than without the PLA.[20] 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.[21]

In 2010, the U.S. General Services Administration (GSA) awarded a $52.3 million contract to a general contractor to build a federal building in Washington, D.C. Post award, the GSA forced the contractor to sign a change order to build it with a union-favoring PLA. The change order only addressed the PLA and it cost taxpayers an additional $3.3 million.[22]

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 mandate 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 plants[27] and

[18] *Ibid*.
[19] Worchester Regional Research Bureau, Project Labor Agreements (2001), available at http://abc.org/plastudies.
[20] Baskin, *The Case Against Union-Only Project Labor Agreements*, 19 Construction Lawyer (ABA) 14, 15 (1999).
[21] *Power Plant Costs To Soar*, Pasadena Star News, Mar. 21, 2003.
[22] See www.TheTruthAboutPLAs.com, *Millions of Stimulus Dollars Wasted on Lafayette Building's Project Labor Agreement Gift to Big Labor*, 12/6/10.
[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*

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 largest 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 in defense of PLAs. 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, however, addresses and refutes the PLA apologists' economic analyses. [32] BHI notes therein that the counter-studies produced by PLA proponents 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 required by federal contracting law. The final rule makes no effort to meet this burden, and in reality there is no proof that PLAs reduce costs in a competitive environment, under generally recognized standards of evidence.

It 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*

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.

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 13.1 percent of the U.S. construction workforce is now unionized), that it is now extremely rare for a federal agency such as NAVFAC to undertake a project on which there are no potential qualified nonunion general contractors or subcontractors available to bid and compete for federal construction contracts.[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.

3. PLAs on NAVFAC projects will cause procurement delays, not achieve "efficiency" in federal procurement.

It is unclear how and when NAVFAC will use PLAs in the procurement process so it is important to examine the options and guidance given in the final rule. However, 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 permits federal agencies to select options that build into the procurement process additional and inefficient steps that may decrease competition, increase costs and delay construction projects.

The final rule provides federal agencies with three procurement options. NAVFAC 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.

NAVFAC 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 who have invested time and resources in bidding a project with the expectation that there are no PLA mandates. 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. Nonunion contractors and union-signatory contractors with no familiarity with labor organizations that have jurisdiction over the project location would find it difficult to allocate the time and to marshal resources and expertise needed to negotiate a PLA with multiple unfamiliar unions. 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 that may be submitted.

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

[34] See discussion above at n. 15. S*ee 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.

The second and third procurement options make it difficult for contractors to submit an accurate price proposal to NAVFAC because the final negotiated terms of the PLA impact labor costs and those costs are unknown until a PLA agreement is negotiated and executed.

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 NAVFAC and contractors. Projects could be delayed pending the outcome of the PLA negotiations (as was the case with the GSA Headquarters Building at 1800 F Street in Washington, D.C. project managed by the GSA this year[36]) and projects may have to be re-bid depending on whether agreements can be reached.

All of the PLA procurement options permitted under the final rule create problems that may lead to delays and inefficiencies in the NAVFAC procurement process. This is another reason why PLAs should not be mandated by the NAVFAC.

4. 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 NAVFAC projects completed every year have been built on time and within budget by nonunion contractors, or by a mixture of union and nonunion companies—all without PLAs. Conversely, government-mandated PLAs have resulted in some of the poorest quality public 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.

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[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 testimony from GSA witness Susan Brita at *ABC Members Testify in Support of Legislation Restoring Fairness in Federal Contracting* TheTruthAboutPLAs.com, 6/7/11

[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." Erie 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

5. PLAs will expose NAVFAC to potential legal challenges.

PLA mandates will expose NAVFAC 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 federal 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 regulatory comments from ABC National to the FAR Council[43] remain largely unsettled, and could be addressed via a legal challenge on a NAVFAC project subject to a federal PLA mandate or PLA preference—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.[44]

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).[45] Unless the president has acted in a manner consistent with this statutory authority, neither the final rule nor Executive Order 13502 is valid.[46]

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 previously and in the following comments, 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.[47]

The foundation for the federal government's procurement requirements is the Competition in Contracting Act of 1984 (CICA),[48] which was enacted to ensure 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

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[43] See ABC National's 8/13/09 comments on the FAR Council's proposed rule [FAR Case 2009-005], available at www.abc.org/plastudies

[44] 40 U.S.C. § 101, *et seq*.

[45] 40 U.S.C. §471 *et seq*. and 41 U.S.C. §251 *et seq*.

[46] *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.").

[47] 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.

[48] 40 U.S.C. §471 *et seq*. and 41 U.S.C. §251 *et seq*.

sources are permitted to submit competitive proposals on a procurement action. CICA requires, with certain limited exceptions, that the government promote full and open competition in awarding contracts.[49]

Of particular significance to NAVFAC, 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."[50]

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.[51] Nor has any federal court authorized federal agencies to impose PLAs on federal construction contracts under CICA.[52] 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.[53]

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).[54] By showing favoritism toward a narrow class of unionized

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[49] 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).

[50] *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).

[51] 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.

[52] 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).

[53] 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.

[54] As noted above, 86.9 percent of the construction industry does not belong to a union 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* Northrup, OPEN SHOP CONSTRUCTION REVISITED (Wharton School

contractors, government-mandated PLAs clearly do not "obtain full and open competition" and therefore are unlawful under CICA.

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.[55]

Previous surveys of nonunion 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.[56] Across the country in the state of Washington, another survey of contractors revealed that 86 percent of open shop contractors would decline to bid on a project under a government-mandated PLA.[57] Government-mandated PLAs clearly have an adverse impact on competition by discouraging contractors from bidding for government construction work.[58]

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."[59] 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.[60]

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 nonunion contractors and may result in those projects having artificially

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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.

[55] *Newsline* (July 22, 2009 and January 19, 2011), available at http://abc.org.

[56] *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.

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

[58] 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.

[59] 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.

[60] 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.

inflated costs."[61] Similar conclusions were reached by the Clark County, Nev., School District, which recommended against adoption of any union-only requirements on county schools.[62]

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.;[63] the Central Artery/Tunnel project in Boston;[64] school projects in Fall River, Mass.,[65] Middletown, Conn.,[66] Hartford, Conn.,[67] and Wyoming County, W.Va.; [68] the Wilson Bridge project near Washington, D.C., [69] and the San Francisco International Airport project.[70] 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 NAVFAC is encouraged to review.[71]

Proponents of PLAs have attempted to rebut the overwhelming proof of reduced bidding on public PLA projects by claiming that a significant number of nonunion 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.[72] In each case, however, the claims of significant nonunion participation on these PLA projects turned out to be grossly exaggerated.[73] Moreover, the fact that a small minority of nonunion 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.

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[61] Ernst & Young, Erie County Courthouse Construction Projects: Project Labor Agreements Study (2001), available at: http://abc.org/plastudiess/Erie.pdf.

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

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

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

[65] 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.

[66] *State's Dubious Labor Policy*, Hartford Courant, Aug. 20, 1998, 3.

[67] *School Project Back in Limbo*, Hartford Courant, April 7, 2004.

[68] *New Wyoming County School to be Rebid*, Associated Press, Dec. 20, 2000.

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

[70] *Labor Protests Fly, Bids Are High*, ENR, July 22, 1996, at 16.

[71] *See* Baskin, *Government-Mandated Union-Only PLAs: The Public Record Of Poor Performance* (2009), available at www.abc.org/plastudies.

[72] *See, e.g.*, Kotler, *supra* n. 20.

[73] 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."[74]

Finally, the construction community has already shown its willingness to challenge federal agency PLA mandates through legal actions. In August, the USACE Louisville District removed a PLA mandate on an Armed Forces Reserve Center in Camden, N.J. after a contractor filed a bid protest with the Government Accountability Office (GAO) against the PLA mandate.[75] PLA mandates were also removed from solicitations on a Research Office Building in Pittsburgh, PA procured by the U.S. Department of Veterans Affairs,[76] a Job Corps Center in Manchester, N.H. procured by the U.S. Department of Labor[77] and the Lafayette Building in Washington, D.C. procured by the U.S. General Services Administration[78] after contractors filed similar bid protests with the GAO against each federal agency's respective PLA mandate.

Government-mandated PLAs are inconsistent with existing law, and it would be unwise for NAVFAC to mandate a PLA and expose Saufley Field and other NAVFAC projects to a significant legal challenge. Further, it is legal and permissible under the FAR Council's final rule for NAVFAC to decline to mandate a PLA.

To avoid the costs and delays associated with a legal challenge, ABC recommends that NAVFAC refrain from mandating the use of a PLA on all projects and instead allow contractors to voluntarily decide whether a PLA is appropriate.

c.) Is the use of PLAs effective in producing labor-management stability? Have labor disputes or other labor issues contributed to project delays in the local area?

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" in exchange 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:

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

[75] See www.TheTruthAboutPLAs.com, *ABC Wins Challenge Against Mandatory Federal PLA in New Jersey*, 8/26/10.

[76] See www.TheTruthAboutPLAs.com, *ABC Wins Another Challenge Against Government-Mandated Project Labor Agreements on Federal Construction Projects*, 1/6/1.1

[77] See www.TheTruthAboutPLAs.com, *Labor Department Admits Project Labor Agreement Policy Responsible for Construction Delay* 11/11/09.

[78] See www.TheTruthAboutPLAs.com, *Washington Times: Obama Union Push Stymies Contractors*, 12/27/09.

1. Adopting a PLA creates a virtual monopoly for union contractors and rewards the extortionary tactics of union bosses and union members.

2. Nonunion employees don't strike, and they compose 86.9 percent of the U.S. construction workforce and more than 97 percent of the Florida 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 the Pensacola area, ABC is not aware of any examples of labor unrest, strikes or work stoppages in the construction industry or specifically on federal projects. This may be attributed to the fact that the region's construction workforce is largely nonunion and cooperative and merit shop contractors have mutually beneficial relationships with their employees. Nonunion employees just 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.

However, 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.[79] The strike cost $1 million. The project, which was already a month behind schedule, lost even more time.[80] Similar strikes on PLA projects have occurred on public projects in the Chicago area in 2010 and on a private project in 2006.[81]

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 NAVFAC work, it is important for NAVFAC officials to become familiar with the collective bargaining agreements of trade unions that may work on projects in the Pensacola area.

d.) Is the use of PLAs conducive to ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards and other relevant matters? Are there instances where these standards have not been met on Federal contracts in the local area? Were PLA's used for those specific contracts?

It is unclear how a PLA would advance compliance with safety, health, EEOC, labor and employment standards and regulations on this project, as federal contractors already are subject to these rules, regulations and penalties whether or not a federal agency mandates a PLA. Numerous federal agencies are charged with enforcing and monitoring contractor compliance with labor and employment laws. If

[79] *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.
[80] *Carpenters at Airport Protest Against Union Leadership*, San Francisco Chronicle, May 21, 1999.
[81] See www.TheTruthAboutPLAs.com, *PLA Projects Delayed By Chicago Construction Union Strike: Another PLA Myth Busted*, 07/17/10

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.

Unfortunately, both union and nonunion contractors on various projects with and without PLAs have violated these important rules and standards governing federal contracting. The government has been there to hold them accountable. But the public record demonstrates that just having a PLA is not enough to ensure compliance with laws and regulations. There have been a number of instances of contractors and their employees violating laws on PLA projects. However, because the Pensacola area rarely imposes government-mandated PLAs, examples of violations on PLA projects must be taken from outside the area.

The public record does not support claims of increased safety on construction sites as a result of government-mandated PLAs. To the contrary, over the last several years PLA construction projects have been cited numerous times for serious safety violations. Many of these safety violations caused fatalities and serious injuries to workers and bystanders, including the following:

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) fined three construction companies and 14 site contractors a total of $16.6 million – the second largest OSHA fine ever – following a gas explosion during the construction of the Kleen Energy Plant in Middletown, Conn., that killed 6 workers and injured 30 people Feb. 7, 2010.[82] The accident occurred while the project was built under a PLA[83] and used union labor from as far away as Kentucky and California.[84]

On the Boston Harbor PLA clean-up project, OSHA proposed fines totaling $410,900 against four contractors in connection with the fatalities of two workers overcome by insufficient oxygen.[85] OSHA had already proposed penalties against subcontractors on the project in amounts exceeding $100,000 for violations of "safety standards relative to tunneling, cranes, suspended work platforms, electrical grounding and guarding of an open shaft pit."[86] Harbor tunnel work ceased because of an electrical fire; workers were evacuated because of fumes; and an engineer was crushed to death in an accident. There were two other fatalities on the project.

In July 1995, 200 Boston Harbor tunnel workers were sickened from a stench in the wastewater tunnel to Deer Island; and other incidents indicated a lack of sufficiently diligent management safety practices.[87] In September of 1998, the Occupational and Safety and Health Administration fined a unionized contractor $158,500 for safety violations on Boston's Deer Island Wastewater Treatment Plant.[88] The violations were

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[82] *Kleen Energy's fatal deal.* CNN Money. 09/10/10
http://money.cnn.com/2010/09/09/news/companies/kleen_energy_explosion_full.fortune/index.htm
[83] *As Day Went On, It Got Worse: Kleen Plant Director Shaken By Lost Lives*. Hartford Courant. 02/14/10.
http://articles.courant.com/2010-02-14/news/hc-commentarycorvo0214.artfeb14_1_kleen-energy-power-plant-project-labor-agreement
[84] *Workers pushed hard to get Kleen Energy job done.* Middletown Press. 02/02/10.
http://www.middletownpress.com/articles/2010/02/10/news/doc4b721b2e0801f508365733.txt
[85] *OSHA Cites Boston Harbor Contractors*, 13 Daily Labor Report (BNA) A-2 (Jan. 20, 2000).
[86] "*Boston Harbor"-Type Project Labor Agreements in Construction: Nature, Rationales, and Legal Challenges*, 19 J. Lab. Res., Winter 1998, at 1, 14.
[87] *Id.*
[88] *Modern Hit With Heavy Fine*, ENR, Sept. 21, 1998, at 9.

for exposing employees to various hazards. The fine also includes $12,500 for this being a second violation.[89]

Safety problems plagued the Central Artery Project discussed above. The State Auditor charged "that faulty design work on the cross-harbor portion…jeopardizes workers and increased costs by more than $1 million…Inadequate controls resulted in a serious leak in the sunken tube tunnel, threatening worker safety."[90] In April, 2001, OSHA proposed $69,000 in fines against a Big Dig contractor for alleged serious health and safety violations.[91]

On New York State's PLA-governed Tappan Zee Bridge project in 1998, there were 32 safety violations.[92] Citations were issued for such violations as failing to comply with fall protection standards, safety training programs and exposure to lead. These safety violations led to $22,530 in penalties.

In August 1999, the PLA-mandated construction of the new Miller Park baseball stadium for the Milwaukee Brewers came to a halt when a crane collapsed onto the stadium killing three workers and injuring three others.[93]

The Hanford nuclear site in Washington State, covered by a government-mandated PLA, was fined a record $330,000 by DOE for nuclear safety violations under the Price-Anderson Act.[94] This was the largest penalty issued in the history of the Price-Anderson Enforcement Program. The construction managers failed to see to it that contractors building the site followed their own safety procedures. They allegedly failed to meet quality assurance requirements in areas such as work process controls, subcontractor qualifications, subcontractor oversight and project design.[95]

The PLA-constructed Iowa Events Center, infamous for its cost overruns and construction defects, also suffered nearly 50 construction accidents in its first six months of construction, including four linked directly to substance abuse by unionized construction workers. One construction worker was killed when he was struck by a steel beam. Ironworkers had been working late shifts to catch up due to previous delays on the project.[96] In another incident, a large crane nearly fell several stories after being compromised by a heavy load. The crane operator was fired for refusing to take a drug test.[97]

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[89] *Id.*
[90] *"Boston Harbor"-Type Project Labor Agreements in Construction: Nature, Rationales, and Legal Challenges*, 19 J. Lab. Res., Winter 1998, at 1, 14.
[91] *OSHA Proposed $69,000 in Fines Against Big Dig Contractor*, OSHA Regional News Release (April 2, 2001).
[92] Cover Story: *Safety*, ENR, June 21, 1999, at 30-31.
[93] *Crane Accident Kills Three at Unfinished Miller Park*, Washington Times, July 15, 1999.
[94] *Fluor Unit Gets Record Fine Over Nuclear Waste Safety*, ENR, June 7, 1999, at 9.
[95] *DOE Fines Hanford Contractor $330,000; Secretary Issues First Compliance Order*, CLR Vol. 45, No. 2231, June 2, 1999, at 370.
[96] Des Moines Register, Sept. 21, 2004.
[97] *County Grapples With Substance Abuse On Self-Insured Construction Project*, Workplace Substance Abuse Advisor, Nov. 26, 2003.

In 2010, a private audit found violations by 55 contractors working on a $150 million high school under a PLA mandated by the Los Angeles Unified School District. The violations included inadequate supervision of workers and performing work under expired or suspended licenses.[98]

In short, construction is a dangerous industry regardless of whether a worker belongs to a union or if a PLA is on a project. There is no compelling or conclusive private or government evidence to support the myth that an all-union workforce, and/or a workforce operating under a PLA, will have a higher rate of compliance with federal safety and health laws and regulations than jobsites not subject to a PLA.

Other laws have been violated on PLA projects too.

For example, in November 2010, the U.S. Department of Justice announced a New Jersey contractor would pay the United States $20 million to resolve a multi-agency joint criminal investigation into fraud the company committed in carrying out various public works contracts. As part of the resolution, the contractor admitted that between 2002 and 2007, employees falsely and fraudulently reported that disadvantaged business enterprises (DBE) and minority and women-owned business enterprises (MWBE) performed subcontracted work on federally funded public works contracts, including the rehabilitation of New York City subway stations and the construction of the Croton Water Filtration Plant in the Bronx (which was constructed under a PLA),[99] when, in fact, non-DBE and non-MWBE subcontractors performed the work.[100]

In May 2008, the U.S. Department of Justice announced it had convicted owners of an asbestos abatement and demolition subcontracting company for prevailing wage violations and one count of conspiracy to embezzle for laws broken while performing work under a PLA at the Fair Haven Middle School in New Haven, CT.[101]

These are just a few examples of PLA projects experiencing violations of federal laws, proving that a PLA does not guarantee compliance with important laws and regulations, despite promises by PLA proponents.

e.) Projects will require multiple construction contractors and/or subcontractors employing working in multiple crafts or trades. Do you foresee any work on projects that may result in both prime contractor and at least one subcontractor or two or more subcontractors employing the same trade?

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 the existing merit shop construction employees performing work in the Pensacola area are competent in more than one trade, which produces efficiencies unique to merit shop contractors. A typical

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[98] Failing Grade for PLA School Job?, Los Angeles Business Journal, Nov. 1, 2010, available at www.labusinessjournal.com.

[99] *Pressure Increases for More Bronx Filter Plant Jobs*, Norwood News, 10/5/06.

[100] Schiavone Admits Fraudulently Reporting That Minority and Disadvantaged Business Enterprises Performed Subcontracted Work on Contracts with New York City and New York State, U.S. Department of Justice Press Release, 11/29/10.

[101] *New Haven Contractor Sentenced to Federal Prison for Stealing Employee* Benefits, U.S. Department of Justice Press Release, 05/28/08.

PLA would shackle merit shop contractors with archaic and costly union work rules that would restrict the ability of their employees to engage in cost-efficient multiskilling, in which employees perform tasks across multiple trades.

f.) Are there concerns by prime contractors on the availability of skilled construction labor? Information may reference current apprenticeship statistics and workforce age demographics.

A shortage of union and nonunion skilled tradespeople in the Pensacola area in the next 12 to 24 months is very unlikely.

The recession's weak economy resulted in a decreased demand for construction services and pushed the U.S. construction unemployment rate to a high of 27.2 percent in February of 2010–the highest level recorded since the federal government began making the data available in 1976.[102]

Construction industry economists predict the U.S. construction unemployment rate, which currently stands at 16.3 percent—nearly twice the overall national unemployment rate —to remain the same or increase in the long term as a variety of economic factors will reduce construction demand.

The construction industry in Florida has not been spared from the national trends of high construction industry job losses.

The pool of available skilled labor for NAVFAC projects breaking ground in 2014 and beyond will depend on the economy and the current volume of local, state and private construction projects. However, a PLA may exacerbate shortages of skilled labor by discouraging and discriminating against the area's existing nonunion construction workforce.

In contrast, a lack of a PLA does not discourage or restrict union members from working on these projects; furthermore, the Davis-Bacon Act requires federal prevailing wage and benefit rates, which are closely linked to union rates, to be paid to all construction workers on federal projects. Both union and nonunion construction employees are attracted to projects subject to federal prevailing wage laws.

Finally, a number of ABC chapters in Florida and their member contractors have expressed concern that a PLA would exclude participants in local apprenticeship programs registered with the U.S. Department of Labor, accredited employer and association craft training programs, and/or other local/community college and vocational training programs that are not affiliated with union apprenticeship programs because PLAs typically only permit apprentices from union apprenticeship programs to be used on PLA projects.

A failure to create opportunities for tomorrow's construction workforce enrolled in quality training programs alternative to union apprenticeship programs will exacerbate anticipated shortages in skilled construction labor in the short and long term.

g.) Completion of anticipated projects will require an extensive performance period. Will a PLA impact completion time? What is the anticipated volatility in the labor market for the trades required for the execution of the project? Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?

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[102] U.S. Bureau of Labor Statistics, *Industries at a Glance: Construction: NAICS 23* http://www.bls.gov/iag/tgs/iag23.htm, accessed 6/3/11

Industry experts remain unaware of any reliable evidence that government mandates for PLAs help projects stay on schedule or are necessary for projects with an extensive performance period. If a PLA would be likely to have that effect, then, once again, interested contractors would be the first ones to recognize that fact, and to investigate the pros and cons of negotiating such an agreement.

However, implementing PLAs could lead to considerable delays stemming from legal challenges and complications in the PLA negotiations and contract procurement process and PLAs have a record of failing to deliver on-time and on-budget construction projects.

In the Pensacola area, numerous federal, state and local projects have been built during an extended period of time without PLA mandates. There is no precedent for delayed projects, strikes or work stoppages by construction workers on federal projects within the region, so a PLA offers little value in terms of enhancing the likelihood of meeting deadlines and preventing work stoppages. Because there is no record of a PLA on a comparable local, state or federal construction projects within the Pensacola area, it is important to review the public record of performance of PLAs in the rest of the United States to see if PLAs 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.

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).[103]

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.[104]

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 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.[105]

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[103] http//www.issuesource.org.
[104] *Parma Justice Center building behind schedule, over budget*, Cleveland Plain Dealer, Mar. 2, 1999.
[105] *GSA Terminates Morse Diesel*, ENR, June 28, 1999 at 15.

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 nonunion labor have both delayed and driven up the cost of, you guessed it, power plants in the state."[106]

While there is no compelling evidence that a PLA will help deliver a project on-time, there is evidence of PLA projects missing critical deadlines and there is evidence that a PLA may delay the procurement process and expose NAVFAC to costly delays due to bid protests and legal challenges.

h.) Where have PLAs been used on comparable projects undertaken by Federal, State, Municipal or private entities in the geographic area of this District?

We are not aware of any federal, state or local government-mandated PLAs on projects in Pensacola comparable to the NAVFAC project at Saufley Field.

If PLA proponents are able to produce a list of PLA projects in the region, it is critical for NAVFAC to confirm whether these projects were subject to government-mandated PLAs, or if they were projects where contractors voluntarily entered into PLAs after they won a federal, state, municipal or private project contract once the competitive bidding process ran its course. As discussed above, there is an important distinction between government-mandated PLAs and voluntary PLAs, which is why PLAs should not be mandated by NAVFAC, but instead left up to the interested competitors to utilize if it will help them deliver a quality final product.

In addition, from 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 billions of dollars on federal construction spending and has a proven track record of delivering positive results for federal agencies and local, state and private projects in the Pensacola area.

In contrast, a number of federal, state, local and private PLA projects have experienced cost overruns, delays, safety defects and other problems. Please refer to a white paper produced by ABC General Counsel Maury Baskin: *Union-Only Project Labor Agreements: The Public Record of Poor Performance (2011 Edition).*[107]

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[106] *Power Grab*, Wall Street Journal., Feb. 15, 2001.
[107] Available at www.abc.org/plastudies

i.) Will the use of PLAs impact the ability of potential offerors and/or subcontractors to meet the Small Business utilization goals?

The use of PLAs actually may impede the ability of potential offerors and subcontractors to meet federal small, minority and disadvantaged business utilization goals and mandates. Comments submitted to the FAR Council rulemaking on FAR Case 2009-005 by federal contractors building projects above the $25 million threshold indicate that most small-business contractors are not signatory to a union and would be discouraged from participating on Department of Navy projects subject to PLAs.[108]

The National Black Chamber of Commerce wrote this policy statement[109] in opposition to government-mandated PLAs because PLAs harm minority-owned businesses and serve as a barrier to job creation for minority populations: [110]

> "It is the policy of the National Black Chamber of Commerce, Inc. to oppose Project Labor Agreements. This opposition is based on the fact that African American workers are significantly underrepresented in all crafts of construction union shops. This problem has been persistent during the past decades and there appears to be no type of improvement coming within the next ten years.
>
> There have been rouses of diversity pre-apprenticeship training programs during the past twenty years but no increase in diversity at the apprenticeship to journeymen levels. The higher incidence of union labor in the construction industry, the lower African American employment will be realized. This is constant throughout the nation.
>
> Also, and equally important, the higher use of union shops brings a correlated decrease in the amount of Black owned businesses being involved on a worksite."

The fact that PLAs harm small businesses and weaken the contracting community's ability to meet federal small and disadvantaged business utilization laws and regulations is one of many reasons why the Small Business & Entrepreneurship Council and the following groups are opposed to government-mandated PLAs: Associated General Contractors, Construction Industry Round Table, Independent Electrical Contractors, National Association of Government Contractors, National Association of Minority Contractors - Philadelphia Chapter, National Association of Women in Construction, National Black Chamber of Commerce, National Federation of Independent Business, National Ready-Mixed Concrete Association, National Utility Contractors Association, U.S. Chamber of Commerce and Women Construction Owners and Executives, USA.

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[108] These comments uniformly confirm that federal general contractors have subcontracted much of the work on such projects to small business subcontractors. See, for example, the comments of Jeff Wenaas, President of Hensel Phelps Construction, a prime contractor who has performed more than $6 billion in construction contracts on federal projects with costs exceeding $25 million. Hensel Phelps has subcontracted more than $3.5 billion of that amount to small businesses, the majority of whom are non-union. Wenaas' comments can be viewed at http://www.regulations.gov/search/Regs/home.html#docketDetail?R=FAR-2009-0024. These percentages are typical of the testimony of many other ABC members, which can be reviewed at regulations.gov (Docket ID: FAR-2009-0024) and at ABC Member Survey Supplement to Main Comments at www.abc.org/plastudies.

[109] NBCC Policy Statement on Project Labor Agreements. 01/26/01

[110] For more comments from the National Black Chamber of Commerce on PLAs see http://www.thetruthaboutplas.com/2009/07/23/thetruthaboutplascom-to-speak-at-nbcc-legislative-conference/

Conclusion

ABC National appreciates the opportunity to share our perspective on government-mandated PLAs. We believe these anti-competitive and costly agreements have no place on projects in Pensacola and any local, state or federal construction projects in the United States. We encourage Department of Navy to proceed with construction projects free from PLA mandates and in the spirit of fair and open competition. Doing so will help NAVFAC provide taxpayers with the best possible construction product at the best possible price.

Sincerely,

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