IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS, Plaintiffs v. WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, OFFICE OF GOVERNMENT-WIDE POLICY, GENERAL SERVICES ADMINISTRATION, *et al.* Defendants.	**Case No. 24-cv-318-WWB-MCR**

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiffs Associated Builders and Contractors Florida First Coast Chapter ("ABCFFC") and Associated Builders and Contractors ("ABC" or "ABC National") (collectively "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 65 and Middle District of Florida Local Rule 6.02,[1] by and through its undersigned attorneys, move for a preliminary injunction against William F. Clark, Christine J. Harada, John M. Tenaglia, Karla S. Jackson, Jeffrey A. Koses, and Shalanda Young (collectively "Defendants").

Specifically, Plaintiffs move to enjoin the implementation and enforcement of Executive Order 14063 (the "EO"), "Use of Project Labor Agreements for Federal Construction Projects," issued by President Joseph Biden on Feb. 4, 2022, 87 Fed.

[1] Plaintiffs do not seek security under Rule 65(c) or Local Rule 6.01(a)(4).

Reg. 7363 (Feb. 9, 2022); as implemented by the Final Rule having the same title, promulgated by the Federal Acquisition Regulatory ("FAR") Council, 88 Fed. Reg. 88708 (Dec. 22, 2023) (the "PLA Rule"), and by the Office of Management and Budget's ("OMB") Guidance Memorandum M-24-06 ("Memo"). The FAR Council issued the PLA Rule expressly to implement the EO. The PLA Rule took effect January 22, 2024.

The EO, PLA Rule, and OMB Memo (collectively the "PLA Mandate") for the first time (ever) compel federal agencies to mandate union-favoring project labor agreements (PLAs) on all federal construction contracts valued at $35 million or more. Imposition of the PLA Mandate is an *ultra vires* action that exceeds the Executive Branch's authority under and/or directly conflicts with the Federal Property and Administrative Services Act ("FPASA" or the "Procurement Act"), 40 U.S.C. § 121, *et seq.*, the Competition in Contracting Act ("CICA"), 41 U.S.C. § 3301, the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), and the First Amendment. The PLA Rule further violates the Office of Federal Procurement Policy ("OFPP") Act, 41 U.S.C § 1301, *et seq*., Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Act ("SBREFA"), 5 U.S.C. § 601, and the Small Business Act ("SBA"), 15 U.S.C. § 644. For these reasons, and as further explained below, Defendants must be preliminarily enjoined from further implementing the PLA Mandate.

MEMORANDUM OF LAW

I. STATEMENT OF FACTS

A. Discriminatory Impact of the Government-Mandated Project Labor Agreements Under the Challenged Rule

As noted above and in Plaintiffs' Complaint (ECF No. 1), the PLA Rule mandates that all federal construction projects valued at more than $35 million must require all contractors and subcontractors bidding for such work to be bound by a PLA as a condition of performing the work. The Rule defines a PLA as "a pre-hire collective bargaining agreement with one or more labor organizations" that outlines specified terms for a construction project. (*See* Ex. 2B, 88 Fed Reg. 88723). Under the guise of increasing "economy and efficiency" and "full and open competition" in federal contracting, as required by the Procurement Act, the CICA, and other federal laws, the PLA Rule plainly has the opposite effect. It stifles competition from the majority of construction contractors (those employing 89% of the industry nationally; 97% of the industry in Florida) whose employees have chosen not to be represented by labor unions, as well as contractors that have signed bargaining agreements with unions disfavored by the PLA Rule, thereby reducing economy and efficiency and irreparably injuring full and open competition. (Ex, 14, Brubeck Aff. ¶ 10; Ex. 1, ABC Comments at 21-24).

Plaintiff ABCFFC is a Florida corporation headquartered in Jacksonville, FL. Its primary mission is to advocate for fair and open competition for construction work, including federal construction projects, on behalf of its 180 member companies. (Ex. 15, Karin Tucker Aff. ¶ 2). ABCFFC shares this mission with ABC National, which

represents more than 23,000 contractors in Florida and nationwide. (Ex. 14, Brubeck Aff. ¶ 1).[2]

The PLA mandate at issue here requires non-union contractors and subcontractors to give up their right not to associate with labor unions who do not represent their employees, as a condition of performing covered contracts. As explained in the numerous attached affidavits submitted by contractors and subcontractors who are members of ABCFFC and/or ABC,[3] the restrictive PLA mandate irreparably harms them in the bidding process by erecting barriers making it more difficult for ABCFFC's and ABC's members to fairly compete for and be awarded government contracts.

As one of many examples, ABCFFC member **Haskell,** which "typically performs work exceeding $50 million in revenue" from federal projects exceeding $35 million, is aware of numerous upcoming federal projects requiring a PLA under the new Rule. (Ex. 4, ¶¶ 1-5). These include the NAVFAC SE MACC program in Jacksonville, the Marine Corp. Support Facility Blount Island Command, FL; and Fort Liberty, NC. Haskell wants to bid on these projects but believes that the PLA Rule has made it irreparably "inefficient and costly" to do so. (*Id.* ¶¶ 6-7). Haskell surveyed its subcontract partners,

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[2] *See also* ABC First Coast > About > The ABC Story (last visited March 26, 2024); *ABC and the Merit Shop Philosophy*, Associated Builders and Contractors, https://www.abc.org/About-ABC/About-ABC/ABC-Philosophy (last visited Mar. 8, 2024).

[3] **The Haskell Company**, member of ABCFFC and ABC ("Haskell") (Ex. 4, Ferguson Aff.); **Brasfield & Gorrie, LLC**, member of ABCFFC and ABC ("B&G") (Ex. 5, Murray Aff.); **Hensel Phelps Construction Co.**, member of ABCFFC and ABC ("Hensel Phelps") (Ex. 6, Starnes Aff.); **The Cianbro Companies**, ABC member ("Cianbro") (Ex. 7, Bennett Aff.); **American-Electrical Contracting, Inc.**, member of ABCFFC and ABC ("American-Electrical") (Ex. 8, Yencarelli Aff.); **MC Dean, Inc.**, member of ABC ("MC Dean") (Ex. 9, Pattee Aff.); **Interstate Sealant & Concrete, Inc.**, member of ABC ("Interstate Sealant") (Ex. 10, Sment Aff.); **JCM Associates, Inc**., ABC member ("JCM") (Ex. 12, McReady Aff.); **Environmental Chemical Corp**., ABC member ("ECC") (Ex. 13, Laurie Aff.).

73% of whom said they would not be interested in bidding on a PLA-covered project. (*Id.* ¶ 7). The "extreme...reduction of subcontractor participation" renders Haskell's "risk of failure...extreme" and would require it to submit bids with increased prices to account for "administrative burdens, lack of subcontractor competition," as federal projects are "firm-fixed price leaving no ability to clarify or revise pricing after award."[4] (*Id.*). Because Haskell's employees have never voted to unionize, forcing Haskell to associate with unions also infringes its constitutional freedom of association.[5] (*Id.* ¶ 8).

B&G, another contractor member of both ABCFFC and ABC, has "secured over $2 billion in federal contract awards" and has recently contracted to complete fifteen federal projects with contracts exceeding $35 million. (Ex. 5 ¶¶ 1-4)[6]. B&G planned to bid for numerous upcoming similar projects; but they now require PLAs, including the Brownsville Texas Land Port of Entry (GSA), the NAVFAC Southeast multiple award project (Navy); the Auburn University USDA ARS Lab, and the Anniston Army Depot. But B&G "will not be able to confidently submit bids/proposals and will be forced to include significant contingency sums to account for uncertainties that union contractors and subcontractors do not face." (Ex. 5 ¶ 10). B&G further observes unions hold significant leverage in PLA negotiations, which further "must be reflected by a contingency in our bid/proposal pricing"; indeed, under the PLA Rule unions need not execute PLAs at all nor "treat all contractors the same." (*Id.*).

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[4] (*See also* Ex. 5 ¶ 9); (Ex. 6 ¶ 16.
[5] (*See also* Ex. 6 ¶ 10); (Ex. 8 ¶ 9); (Ex. 9 ¶ 8).
[6] The General Services Administration recently named B&G as its first "biennial Construction Award" winner. *GSA celebrates first biennial Construction Award winner*, https://www.gsa.gov/about-us/newsroom/news-releases/gsa-celebrates-first-biennial-construction-award-w-02282024 (last visited, Mar. 8, 2024).

Similarly, **Hensel Phelps**, which typically performs contracts on four government contracts exceeding $35 million each year in the SE Region, is aware of upcoming projects on which it would bid absent a PLA mandate. (Ex. 6 ¶¶ 1-6). These include the Jacksonville NAVFAC MACC, the USDA Lab Annex at Auburn University, and projects at Patrick Space Force Base. (*Id.* ¶¶ 5-6). But Hensel Phelps believes bidding would be futile because it "would not be able to meaningfully estimate how the PLA would impact our cost calculations." [7] (*Id.* ¶ 8-9). Because Hensel Phelps' Southeast Region typically spends approximately 700 hours on each bid, it "does not have the capacity to submit bids when doing so would be futile."[8] (*Id.* ¶ 7).

Cianbro, an ABC member with a subsidiary, R.C. Stevens, that belongs to ABCFFC, further shares concerns about the PLA Rule. (Ex. 7). Cianbro has bid on and been awarded five federal projects since 2020 that exceeded $35 million but believes a PLA mandate will disqualify it from securing work on future similar projects. (*Id.* ¶¶ 2-5). Another ABC member, **ECC**, attests to similar irreparable harm on upcoming government projects exceeding $35 million, including Fort Liberty, NC, Cherry Point, NC (two projects), Key West, FL, Camp Eisenhower, GA, Eareckson AFB, AK (Ex. 13). ECC has been informed by the agencies that there will be no exemptions on these projects, even though no area unions have offered any PLA terms needed to comply, and the contractor lacks sufficient subcontractors willing to work under a PLA. (*Id.*)

[7] (*See also* American-Electrical Ex. 8 ¶¶ 7-8); (MC Dean Ex. 9 ¶¶ 6-7).
[8] (*See also* B&G Ex. 5 ¶ 8) (B&G "typically spends one to two years planning for specific pursuits and then four to six months and hundreds of man-hours on each bid or proposal we submit.").

Additionally, numerous subcontractors and small business members of both association plaintiffs are being harmed by the PLA Rule. As a non-exclusive example, **American-Electrical**, an ABCFFC and ABC member, has performed electrical work on federal projects exceeding $35 million in value as a subcontractor. (Ex. 8 ¶ 2). American-Electrical attests merit shop contractors would ask it to participate on an upcoming $35 million-plus project in Jacksonville, FL, were it not for the PLA mandate; and further attests that as a subcontractor, it would not have the opportunity to negotiate PLA terms. (*Id.* ¶¶ 4, 6,14). **MC Dean**, a national electrical subcontractor, attests the general contractors with which it normally works will not bid for PLA-covered projects and union contractors will not consider it as a subcontract partner. (Ex. 9 ¶¶ 1-5). **JCM Associates**, an ABC member, has executed a CBA with a union unaffiliated with the North American Building Trades Union ("NABTU") and is concerned it cannot serve as a subcontractor on identified projects requiring PLAs because the general contractors it knows have entered PLAs with NABTU-affiliated unions. (Ex. 12 ¶¶ 2-3). Similarly, **Interstate Sealant**, an ABC member and 2010 Small Business Person of the Year for Wisconsin, attests to the adverse impact of the PLA Rule on her small business, noting harms similar to other ABC and ABCFFC members, exacerbated by the PLA Rule's failure to address small business concerns under the RFA and APA. (Ex. 10 ¶ 10).

Although the PLA Rule purports to recognize limited exemptions from the federal PLA mandate, ABC and ABCFFC members in Jacksonville and around the country have attested that federal agencies are repeatedly imposing the PLA mandate on

solicitations issued since the PLA Rule went into effect, without any exemptions.[9] (*E.g.*, Haskell Ex. 4 ¶ 6; Hensel Phelps Ex. 6 ¶ 5; American-Electrical Ex. 8 ¶ 5; MC Dean Ex. 9 ¶ 3); (*see also* Ex. 14, Brubeck Aff. ¶¶ 7, 12-14).

As Plaintiffs' attached affidavits further attest, PLAs typically require contractors and subcontractors to agree to restrictive union hiring hall requirements, inefficient work rules, and seniority-based wage scales without regard to merit of experience, productivity, or safety performance; and require costly payments into union fringe benefit plans without regard to whether such benefits will vest with non-union workers whose coverage under the PLA is limited to the scope of the project. (Ex. 14, Brubeck Aff. ¶ 3; Ex, 1, ABC Comments at 7-8, 10-11).

ABC conducted a survey of its contractor members about government-mandated PLAs and the proposed version of the PLA Rule: 99% of respondents said they would be less likely to begin or continue bidding on federal contracts if the proposed rule is finalized and 97% said that government-mandated PLAs decrease economy and efficiency in government contracting. (Ex. 14, Brubeck Aff. ¶ 11; Ex. 1, ABC Comments at 15). 97% of respondents "who self-identified as small businesses said they would be less likely to bid on contracts if the rule is finalized" and "73% of small businesses stated PLAs decrease hiring of minority, women, veteran and disadvantaged business enterprises." (Ex. 1, at 37).

[9] Contracting officers have further "refused to either produce, share and/or acknowledge the market research they are supposed to examine." (B&G Ex. 5 ¶ 11). The EO and FAR Rule announced creation of a website where exemptions would be posted. But no exemptions have been posted there as of this filing. *See* Project Labor Agreements (PLA) | Acquisition Gateway (Ex. 14, Brubeck Aff. ¶¶ 12-14).

B. Federal Government PLA Policies Prior to the PLA Rule

Prior to the PLA Rule, no President claimed authority to require federal construction contractors to sign PLAs with unions as a condition of performing work on federal contracts. Rather, Congress enacted laws, beginning with the FPASA, requiring federal agencies to consider competitive proposals from private contractors and to "award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the Federal Government, considering only cost or price and the other factors included in the solicitation." 41 U.S.C. § 3703.[10]

In 1984, Congress passed the CICA, 41 U.S.C. § 3301, requiring all federal agencies awarding contracts for services—including construction contracts—"shall obtain full and open competition through the use of competitive procedures." The law's purpose was and remains to *increase* competitors for government contracts and savings through more competitive pricing.[11] Since enactment of the CICA in 1984, no President has attempted to impose an across-the-board mandate of PLAs on federal contracts, until now. (*See* ABC Comments Ex. 1, at 35).

Under the previous Executive Order 13502 "encouraging" - but not mandating - PLAs on federal projects above $25 million between fiscal years 2009 and 2024, just 12 federal contracts valued at $1.26 billion contained a PLA out of 3,222 contracts of $25 million or more valued at a total of $238 billion. This means federal procurement officials saw no benefit or need to impose PLAs in order to increase economy or efficiency on

[10] The specific rules governing the federal government's acquisition processes are set forth in the Federal Acquisition Regulations System ("FARS"). 48 C.F.R. § 1, *et seq.*

[11] For a full discussion of CICA's requirements, *see* Kate M. Manuel, *Competition in Federal Contracting: An Overview of the Legal Requirements*, CONGRESSIONAL RESEARCH SERVICE (April 2009).

more than 99% of federal construction contracts of $25 million or more. (*See* Ex. 14, Brubeck Aff. ¶ 15; Ex. 1, at 18). During this same period ABC members won and successfully performed 54% of the $205.56 billion in total value of direct prime construction contracts exceeding $35 million awarded by federal agencies during fiscal years 2009-2023. (*Id.* ¶ 15).

C. President Biden's Executive Order 14063

President Biden issued the challenged EO on February 4, 2022, which states federal agencies "shall" require contractors and subcontractors to negotiate or become parties to PLAs for federal construction contracts valued at $35 million or more. (Ex 2A, EO 14063, §§ 2-4). The PLAs must prohibit strikes, lockouts, and other comparable job disruptions; include labor dispute resolution procedures; provide for labor-management cooperation on relevant issues; and otherwise comply with applicable law. (Ex. 2A § 4). Only "senior agency procurement officials" may grant exceptions to the requirement after finding a PLA would not advance the government's interest in economy and efficiency; would "substantially reduce" bidders "as to frustrate full and open competition"; or would otherwise be inconsistent with applicable law. (Ex. 2A § 5).

D. The New PLA Rule

On December 22, 2023, following notice and public comment (including by ABC), the FAR Council published the final PLA Rule. (Ex. 2B, 88 Fed. Reg. 88708). The PLA Rule requires contractors and subcontractors to enter PLAs as a condition of being awarded work on federal construction projects valued at more than $35 million, absent extremely narrow exceptions. (*See id.* at 88709).

E. The OMB Memo

On December 18, 2023, OMB issued - without notice and comment - the OMB Memo, purporting to provide guidance to agencies regarding exceptions to the PLA Rule, with the force and effect of law. (*See* Ex. 3, Memorandum M-24-06). The OMB Memo acknowledges "many PLAs require contractors to use the union's hiring hall for referrals," and appears to acknowledge PLAs could create "unintended barriers to entry." (Ex. 3 at 4-5). The OMB Memo indicates "[a] likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage" and shockingly states: "two or more qualified offers is sufficient to provide adequate price competition for negotiated contracts." (Ex. 3, at 6-7).

II. ARGUMENT

A. Legal Standard

To obtain a preliminary injunction, a movant must demonstrate: (1) substantial likelihood of success on the merits; (2) substantial threat of irreparable injury; (3) the threatened injury outweighs any damage the injunctive order might cause the non-moving party; and (4) the order will not be adverse to the public interest. *Georgia v. Biden*, 46 F.4th 1283, 1291 (11th Cir. 2022); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1317 (S.D. Ala. 2002).

B. Plaintiffs Have Standing, the Case is Ripe, and Venue is Proper

As set forth in attached affidavits, Plaintiffs are a Jacksonville, Florida trade association and a national trade association, both of whose members regularly bid on and are awarded government contracts exceeding the threshold amounts covered by the PLA Mandate. As trade associations representing federal contractors in this District

and nationwide, ABCFFC and ABC National have standing to bring this action on behalf of their members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977),[12] because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to Plaintiffs' organizational purposes; and (3) neither the claims nor relief require the participation of Plaintiffs' individual members.

More specifically, as set forth above, ABCFFC and ABC have identified in their complaint and have attached affidavits to this motion from numerous members who are being irreparably harmed by the PLA Mandate and have standing to sue in their own right. These are by no means the exclusive list of irreparably harmed members but are identified solely in order to establish the standing of the plaintiff associations of which they are members. *See Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

In sum, Plaintiffs' members - contractors and subcontractors - have standing to challenge the PLA Mandate, as the PLA mandate makes it much more difficult for ABC and ABCFFC members to compete on equal footing. *See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (group members have standing to challenge barriers erected by the government making it more difficult for them to compete for government contracts). And although the PLA

[12] *See also America's Health Ins. Plans v. Hudges*, 742 F.3d 1319, 1326 n.5, 1327-28 (11th Cir. 2014) (trade association had standing to challenge law on behalf of its members); *ABC of SE. Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *6 (E.D. Tex. Oct. 24, 2016) (ABC had standing to challenge certain Federal Acquisition Regulations and guidance threatening injury to the association's government contractor members); *see also Am. Sec. Ass'n v. U.S. Dept. of Labor*, 2023 U.S. Dist. LEXIS 24076 (M.D. Fl. Feb. 13, 2023) ("little question" of standing where association members are the "objects of the [challenged] regulation").

Rule purports to recognize certain exemptions, ABC's members attest that federal agencies are so restricted by the text of the EO, the Rule and the OMB Memo, that as a practical matter the exemptions have proved to be a dead letter. On multiple identified projects, PLA mandates have been imposed without any justification based on need or availability of unionized construction. (*E.g.*, Ex. 14, Brubeck Aff. ¶¶ 12-14; Ex. 4 ¶ 6; Ex. 6 ¶ 5; Ex. 8 ¶ 5; Ex. 9 ¶ 3).

Plaintiffs also meet the second and third requirements for associational standing, as the present action is clearly germane to each association's organizational purposes of advocating for fair and open competition for construction work, including federal construction contracts (Ex. 14, Brubeck Aff. ¶ 8; Ex. 15, Tucker Aff. ¶ 3, 6; Ex. 1, at 1-2); and Plaintiffs' individual members need not participate as the Complaint seeks only injunctive relief based on the administrative record.[13]

Plaintiffs further have organizational standing on their own behalf because the PLA Mandate is directly and currently harming their organizational interests by requiring ABC and ABCFFC to divert their attention away from other activities, such as management training, workforce development, and jobsite safety. (Ex. 14, Brubeck Aff. ¶ 5; Ex. 15, Tucker Aff. ¶ 9). *See Plaintiffs v. Kemp,* 2023 U.S. Dist. LEXIS 144918, at *55-56 (N.D. Ga. Aug. 18, 2023) (organization injured by diverting resources).

[13] *Schalamar Creek Mobile Homeowners' Ass'n v. Adler*, 855 Fed. App'x 546, 553 (11th Cir. May 7, 2021) ("[G]ermaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose."); *Fla. Auto. Dealers Ass'n, Inc. v. Ford Motor Co.*, 2024 U.S. Dist. LEXIS 50834, at *8 (N.D. Fla. Jan. 25, 2024) ("[T]he Eleventh Circuit has held that the third prong...was satisfied where an organization's members sought prospective injunctive relief.").

The dispute is ripe for review as it raises pure questions of law and Plaintiffs are suffering hardship that will continue absent judicial relief.[14] *See Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019). Finally, venue is proper under 28 U.S.C. § 1391(e) because Plaintiff ABCFFC maintains its principal place of business in this District and, alternatively, because facts and circumstances relating to the enforcement of the challenged PLA mandate are taking place in this District.[15] Accordingly, Plaintiffs have standing to sue, the case is ripe, and venue is proper.

C. Plaintiffs Meet the Standard for Preliminary Injunction

1. The Likelihood That Plaintiffs Ultimately Will Prevail on the Merits of Their Claims

Considering the likelihood of success on the merits, "the most important preliminary-injunction criterion," "requires the court to consider the merits of plaintiffs' claim under the appropriate legal standard for review of that decision." *See Georgia*, 46 F.4th at 1301; *Sierra Club*, 207 F. Supp. 2d at 1318. As set forth below, it is likely Plaintiffs will succeed on their claims.

a. *The EO, PLA Rule, and OMB Memo Exceed the Authority of the Executive Branch Under the FPASA*

The EO, PLA Rule and OMB Memo are impermissible *ultra vires* actions by the President, that are being carried out by other executive officers, *i.e.*, the FAR Council and OMB. The FPASA is designed "to provide the Federal Government with an

[14] A claim may be ripe even where a future contingent event could cause the plaintiff to suffer no injury. *See Mulhall v. United Here Local 355*, 618 F.3d 1279, 1291 (11th Cir. 2010).

[15] Plaintiffs have identified numerous ABCFFC members who would have standing to sue in their own right. (*E.g.*, Exs. 4-6, 8). Those members have further identified federal projects in the Jacksonville area where the PLA mandate is being imposed despite reported union market share of less than 6%. *See* www.unionstats.com.

economical and efficient system" for procurement activities. *See* 40 U.S.C. § 101; *Georgia v. Biden*, 46 F.4th 1283, 1298 (11th Cir. 2022). "[T]he President's authority should be based on a 'specific reference' [in] the [FPASA]." *Georgia*, 46 F.4th at 1294, 1297-98, 1301 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 304 n.34 (1979)) (Plaintiffs likely to succeed on the merits of claim President exceeded authority under the FPASA where "no statutory provision" contemplated mandate).[16] Here, like in *Georgia*, Defendants have pointed to no "specific reference" in FPASA allowing Defendants' actions; instead, Defendants cite various general provisions regarding procurement. This Circuit has expressly held "[a]n executive order cannot rest merely on the 'policy objectives of [a statute].'" *Georgia*, 46 F.4th at 1298.

Analysis under the major questions doctrine further reveals the President, FAR Council, and OMB lacked authority to issue the EO, PLA Rule, and OMB Memo, as the PLA Rule and EO assert issues of "economic and political significance," and therefore require "clear congressional authorization." *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).[17] Major questions appear where, as here, government action impacts contracts and solicitations "across broad procurement categories" in an unprecedented way. *See Georgia*, 46 F.4th at 1295-96.

[16] *See also Florida v. Nelson*, 576 F. Supp. 3d 1017, 1038 (M.D. Fla. 2021) (Plaintiff "demonstrate[d] a substantial likelihood that [executive order] exceed[ed] the President's authority under FPASA" because "FPASA confers no 'blank check for the President to fill in at his will' and requires power to 'be exercised consistently with the structure and purposes' of FPASA.").

[17] *See also Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021); *FDA v. Brown & Williamson* (2000); *Georgia*, 46 F.4th at 1295-96 (applying major case doctrine to Presidential actions restricting government contractor rights under the FPASA); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022) (same).

Thus, in issuing the EO, the President has ignored the boundaries of the FPASA and invalidly seeks and exercises authority Congress explicitly refused to grant him. The President's EO has been enforced by his officers: the FAR Council[18] and OMB. *E.g.*, 88 Fed. Reg. 88708; (Ex. 3). Therefore, Plaintiffs may challenge the EO. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (permitting challenge to executive order based on executive agency's implementation of a rule enforcing the executive order); *see also ABC SE Tex.*, 2016 WL 8188655, at *15 (enjoining Executive Order and FAR Council rule unlawfully imposing labor reporting requirements on federal government contractors). Accordingly, Plaintiffs are likely to succeed in showing the PLA Mandate exceeds the Executive Branch's authority under the FPASA.

b. *The EO and PLA Rule Violate the CICA*

Congress passed the CICA, 41 U.S.C. § 3301, to require federal agencies awarding contracts to "obtain full and open competition through ... competitive procedures." CICA bars federal agencies from using restrictive bid specifications to "effectively exclude" potential bidders or offerors.[19] "[I]mposing more criteria than necessary works against the... oft-repeated priority of achieving 'full and open competition' in the procurement process." *Georgia,* 46 F.4th at 1297.

Contrary to a claim by Defendants that non-union contractors "may compete for contracts" under the PLA Rule, (Ex. 2B, 88 Fed. Reg. 88709), non-union contractors

[18] The FAR Council's rulemaking authority is prescribed within the confines of the OFPP Act and the FPASA, which establish the limited rulemaking power within which the FAR Council must operate. No delegation of authority to issue the presently challenged Rule can be presumed by the agency. *Georgia*, 46 F.4th at 1297-1301.

[19] *Competition in Federal Contracting: Legal Overview*, Congressional Research Service, p. 19, Jan 21, 2015.

cannot do so *unless* they give up their non-union status and accept various other costly burdens. (*E.g.*, Exs. 4-10). The Rule's preamble concedes "union contractors...are more likely to work on PLA-covered projects." (Ex. 2B, 88 Fed. Reg. 88713). And the OMB Memo acknowledges "many PLAs require contractors to use the union's hiring hall for referrals" and appears to acknowledge PLAs could create "unintended barriers to entry." (*See* Ex. 3 at 4-5).

The existence of potential exemptions to the PLA Mandate compels no different result. Numerous federal projects are proceeding without any exemption, even in areas (such as Jacksonville) where few (if any) union contractors are available to perform the work. (*E.g.*, Ex. 4 ¶ 6; Ex. 6 ¶ 5; Ex. 8 ¶ 5; Ex. 9 ¶ 3). Further, the OMB Memo undermines the exemption process by stating: "[a] likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage" and "two [or three] qualified offers is sufficient to provide adequate price competition…." (Ex. 3, at 6-7). In other words, exemptions will not apply *even where agencies have not achieved "full and open competition" consistent with the CICA. See* 41 U.S.C. § 3301. This case is very much like *Georgia*, where the Eleventh Circuit found the President exceeded his authority after his executive order "impos[ed] more criteria than necessary" on contractors, contrary to the CICA. *See Georgia*, 46 F.4th at 1294.

c. *The PLA Rule and OMB Memo Violate the APA and OFPP*

The APA, 5 U.S.C. § 706(2)(A), (D) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found. . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," and "found to

be...without observance of procedure required by law."[20] An agency "must...provide good reasons" for changing positions. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto*. *Ins. Co*., 463 U.S. 29, 41–43 (1983); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). An agency's action is arbitrary and capricious where it fails to consider important aspects of the problem, offers explanations counter to evidence, and relies on factors it should not have considered. *State Farm*, 463 U.S. at 41-43; *Regents of the Univ. of Cal.*, 140 S. Ct. at 1913; *see also FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009). The agency must also consider costs and reliance interests for regulated parties *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (*en banc*).

Defendants have failed to give an adequate explanation (other than political favoritism) for imposing a PLA mandate. Defendants have offered explanations for the PLA mandate that run counter to the evidence, claiming without support that a PLA mandate will "promote economy and efficiency in federal procurement." (Ex. 2B, 88 Fed. Reg. 88711). To the contrary, PLAs discourage bidding from the employers of 89% of the construction industry, and thereby *reduce* economy and efficiency, facts which the PLA Rule ignored. (Ex. 1, at 21-24). In response to Comments that Defendants did not provide data on costs and benefits of the PLA rule, Defendants conceded that they relied on the President's "judgment." (Ex. 2B, 88 Fed. Reg. 88711).

[20] The APA's substantive requirements, including its directive courts must set aside arbitrary and capricious agency actions, apply to FAR Council actions. *See Texas v. Biden*, 328 F. Supp. 3d 662 712-13 (S.D. Tex. 2018); *ABC SE Tex.*, 2016 WL 8188655, *12 (examining whether FAR Council action was arbitrary and capricious under the APA). The PLA Rule and OMB Memo are not exempt from the APA's procedural requirements. *See Louisiana v. Becerra*, 577 F. Supp. 3d 483, 499 (W.D. La. 2022).

The results of the federal government's pro-PLA policy from fiscal year 2009 to fiscal year 2023, encouraging—but not requiring—federal agencies to mandate PLAs, conclusively shows no factual basis for the PLA Rule. Between fiscal years 2009 and 2024, just 12 federal contracts valued at $1.26 billion contained a PLA mandated by a federal agency out of 3,222 contracts of $25 million or more valued at a total of $238 billion. This means procurement officials saw no need to impose PLAs to increase economy or efficiency on more than 99% of federal construction contracts of $25 million or more. (*See* Ex. 14, Brubeck Aff. ¶ 15; Ex. 1, at 18). During this same period ABC members won and successfully performed 54% of the $205.56 billion in total value of direct prime construction contracts exceeding $35 million awarded by federal agencies during fiscal years 2009-2023. (Ex. 14 ¶ 15).

Defendants also failed to meaningfully consider important aspects of the problems with a PLA mandate, ignoring overwhelming academic and real-world evidence provided by ABC and others that a government-mandated PLA inherently discourages non-union contractors from bidding on covered projects, reducing competition and increasing costs. (Ex. 1 at 7, 12, 15-16 25). Indeed, Defendants cite only one (refuted) study to support an assertion that PLAs do not reduce competition. (Ex. 2B, 88 Fed. Reg. 88709). Defendants further failed to meaningfully engage with concerns about delays and costs from PLAs (*see* Ex. 1, at 21-22), noting only "there is no conclusive evidence to support that specifically requiring a PLA will be the *sole* reason for additional delays or litigation." (Ex. 2B, 88 Fed. Reg. 88172) (emphasis added).

Defendants also did not meaningfully consider the impact of the PLA Rule on non-union contractors. In response to numerous concerns expressed in the administrative record, Defendants stated parties can simply negotiate for less objectionable provisions. (*E.g.*, Ex. 2B, 88 Fed. Reg. 88710, 88713-88716; Ex. 3, at 4-5). Defendants further contended "there is no data to suggest...bad-faith bargaining by unions." (Ex. 2B, 88 Fed. Reg. 88712). But Defendants miss the point. The PLA mandate grants unwarranted leverage to unions: bidding contractors must reach agreement in short periods to bid or receive awards; while the unions, even if acting in good faith, have no corresponding incentive to reach agreement on any but their own terms.

Defendants rely heavily on their supposed exemptions to the PLA Mandate, but the exemptions do not salvage the Rule because they are improperly narrow on their face, posing numerous arbitrary obstructions, and the PLA Mandate does not present any meaningful criteria for agencies to use in determining whether an exemption is appropriate. (Ex. 2A and B, 88 Fed. Reg. 88712); *see also East Bay Sanctuary Covenant v. Biden*, 2023 U.S. Dist. LEXIS 128360, at *38, 42-43 (N.D. Cal. July 25, 2023) (rule arbitrary and capricious where plaintiffs argued government was relying on rule's exceptions to justify it). Further, since the PLA Rule went into effect, the exemptions have proved to be a dead letter, as agencies have declined to conduct meaningful market research, or have ignored contractor information demonstrating that PLAs impose needless and unlawful injuries to competition, and/or relied on the unlawful OMB Memo to reject all exemption requests to date. (*E.g.*, Ex. 4 ¶ 6; Ex. 6 ¶ 5; Ex. 8 ¶ 5; Ex. 9 ¶ 3); *see also East Bay, 2023 U.S. Dist. LEXIS 128360*, at *55-56 (rule

arbitrary and capricious where "record suggests [the] exceptions will not be meaningfully available to many [parties'] subject to the Rule").

Finally, OMB promulgated the OMB Memo without providing notice and opportunity for public comment, in violation of the plain language of the OFPP Act. *See Louisiana v. Biden*, 575 F. Supp. 3d 680, 694 (W.D. La. 2021) (OMB violated the APA when it issued binding guidance without following OFPP notice and comment requirements). Accordingly, Plaintiffs will likely succeed in showing the EO, PLA Rule, and OMB Memo – separately and together - violate the APA and OFPP.

d. *The PLA Rule, EO, and OMB Memo Violate Plaintiffs' First Amendment Free Association Rights*

First Amendment protections apply to government contractors. The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests" such as "his constitutionally protected ... associations," and the government may not restrict First Amendment rights as "the price of maintaining eligibility to perform government contracts." *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *ABC*, 2016 WL 8188655, at *8; *White v. Sch. Bd. of Hillsborough County*, 2009 U.S. App. LEXIS 1532, at *7 (11th Cir. Jan. 27, 2009); *Martin v. Wrigley*, 540 F. Supp. 3d 1220, 1229 (N.D. Ga. 2021).

Union association is a type of protected expressive association under the First Amendment. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463-66 (2018). "Just as '[t]he First Amendment clearly guarantees the right to join a union...it presupposes a freedom not to associate' with a union." *See Mulhall*, 618 F.3d at 1287. "[M]andatory associations are permissible only when they serve a 'compelling state interes[t]...that

cannot be achieved through means significantly less restrictive of associational freedoms.'" *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012).

Here, the challenged PLA mandate infringes on Plaintiffs' freedom of association by requiring Plaintiffs' members to associate with unions in order to bid on and/or perform contracts that the PLA Rule covers. (*See also* Ex. 4 ¶ 8, Ex. 6 ¶ 10, Ex. 7 ¶¶ 6-7, Ex. 8 ¶ 9, Ex. 9 ¶ 8). [21] But the PLA Rule does not serve the government's claimed interest in increased efficiency. Further, the government has previously encouraged (not required) PLAs, and Defendants have not shown the previous approach was insufficient to meet any compelling government interest "that cannot be achieved through means significantly less restrictive of associational freedoms.'" *See Knox*, 567 U.S. at 310.

e. *The PLA Rule, EO, and OMB Memo Violate Section 8(d) of the NLRA.*

Consistent with CICA, Congress has long prohibited the federal government from requiring employers to enter into any labor agreement or specific term thereof in Section 8(d) of the NLRA. *See H.K. Porter v. NLRB*, 397 U.S. 99, 102-109 (1970) (holding that the federal government's National Labor Relations Board ("NLRB") does not have the power to compel employers to agree to any substantive contractual provision of a collective bargaining agreement). That is exactly what the PLA Rule unlawfully does as a condition of awarding federal contracts, thereby violating the NLRA.[22]

[21] In addition, the PLA Rule requires Plaintiffs' members to compel their employees to associate with unions as a condition of award of construction work, forcing them to aid and abet the infringement of employee rights under the Constitution.

[22] The Supreme Court expressly excluded Section 8(d) from its ruling in the *"Boston Harbor*" case that the NLRA does not preempt state PLA requirements. *Bldg. & Const. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./RI* 507

f. The PLA Rule, EO, and the OMB Memo Fail to Comply with the RFA and SBA, in Violation of the APA

Under the SBA, "[i]t is the policy of the United States" that small businesses "have the maximum practicable opportunity to participate" in federal contracts and federal agencies must set percentage goals for awarding contracts to small businesses. 15 U.S.C. § 637(d), 644(g). Here, most ABC members are small businesses (Ex. 1, at 36), and a PLA mandate will drastically reduce the participation of small businesses, most of which are not unionized (Ex. 11, SBA Comments, at 2-3).

Relatedly, the RFA, as amended by SBREFA, 5 U.S.C. §§ 601-611, requires agencies issuing rules under the APA publish a final regulatory flexibility analysis ("FRFA") assessing the negative impact of a rule on small businesses, considering less burdensome alternatives, and responding to "any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule." 5 U.S.C. § 604(a). *See Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436-37 (M.D. Fla. 1998), and 55 F. Supp. 2d 1336 (M.D. Fla. 1999) (enjoining portion of regulations that did not comply with RFA).

The SBA Office of Advocacy noted multiple concerns with the PLA Rule, which the PLA Rule failed to address. (Ex. 11, at 3). Defendants also improperly dismissed numerous alternatives to the PLA Rule advanced in comments, including ABC's comments, with minimal analysis. 88 Fed. Reg. 88716-88717; *see also Southern Offshore*, 55 F. Supp. 2d at 1340 (RFA analysis of a few pages inadequate).

2. **The Irreparable Nature of the Threatened Injury**

U.S. 218, n.2 (1993). That case has no application to the present challenge to the federal PLA Rule, which is independently barred by Section 8(d).

"This Circuit has recognized that unrecoverable monetary loss," including costs associated with complying with a government requirement, "is an irreparable harm." *See Georgia*, 46 F.4th at 1301-02. Further, this Court has acknowledged lost contract opportunities as an irreparable harm. *See Florida*, 576 F. Supp. 3d at 1039. Here, Plaintiffs have explained the PLA mandate will expose its members to various costs. For example, if Plaintiffs' members bid for PLA-covered projects, they will suffer costs from complying with the PLA mandate. (*E.g.*, Ex. 5 ¶ 16, Ex. 9 ¶¶ 11-13, Ex. 10 ¶ 10); *see also Georgia*, 46 F.4th at 1302 (irreparable harm present where employers would lose employees and would need to devote "time and effort" to comply with mandate). Similarly, Plaintiffs' members will lose contract opportunities because the PLA mandate will either deter them from bidding and/or prevent them from equally competing with other bidders. (*E.g.*, Exs. 4-10); *see also Florida*, 576 F. Supp. 3d at 1039. Accordingly, Plaintiffs will suffer irreparable harm absent injunctive relief.

3. The Harm that Will Result Absent Injunction

When a plaintiff shows a likelihood of success on the merits and irreparable harm absent injunctive relief, the balancing of potential harms favors the plaintiff when "[a]n injunction poses little injury" to a defendant. *See Florida*, 576 F. Supp. 3d at 1040. Here, as discussed above, Plaintiffs have shown a likelihood of success on the merits and that they will suffer irreparable harm absent injunctive relief. Any injury Defendants suffer does not tip the balance to them. Even the government's interest in combating COVID-19 (a much greater harm than a non-union workforce) did not justify unlawful agency action. *See Georgia*, 46 F.4th at 1303. And if the Court grants injunctive relief, Defendants "retain the right to recommend [PLAs] among contractors and to seek

contractual remedy for delay or failure to perform a contract." *See Florida*, 576 F. Supp. 3d at 1040. Accordingly, the balance of potential harms weighs toward injunctive relief.

4. The Nature and Extent of Any Public Interest Affected

The public interest favors "maintaining the integrity of the procurement process and ensuring fair and open competition," *see Mark Dunning Indus. v. Perry*, 890 F. Supp. 1504, 1518 (S.D. Ala. 1995), and supports protecting parties from "likely-unlawful government action." *See Florida*, 576 F. Supp. 3d at 1040; *see also Georgia*, 46 F.4th at 1303. As discussed above, Defendants' actions here are unlawful and inconsistent with open competition; accordingly, an injunction serves the public's interest.

D. Nationwide Injunctive Relief is Appropriate

Plaintiffs pray the Defendants be preliminary enjoined from implementing and enforcing the PLA Mandate in all jurisdictions where Plaintiffs' members and the U.S. government do business, *i.e*., nationwide. *See Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015); (authorizing nationwide injunctions against unlawful federal regulations and/or executive orders). Nevertheless, even if the Court concludes nationwide injunctive relief is not appropriate, Defendants should still be enjoined "from enforcing the mandate against...members of [ABC]." *See Georgia*, 46 F.4th at 1308.

III. CONCLUSION

Plaintiffs request the Court grant this Motion. A proposed Order is submitted herewith pursuant to M.D. Fla. L. R. 6.02(a)(1) incorporating Rule 6.01(a)(6).

Dated this 26th day of April, 2024.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April, 2024, I electronically filed the foregoing with the Clerk of the Courts by using the ECF system, which will send a notice electronically to the following: None. I further certify that a true and correct copy of the foregoing was Delivered by certified mail to all Defendants, the Attorney General, and the U.S. Attorney for the Middle District of Florida, as follows:

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/s/Kimberly J. Doud
Kimberly J. Doud

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,

Plaintiffs

v.

WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, OFFICE OF GOVERNMENT-WIDE POLICY, GENERAL SERVICES ADMINISTRATION, *et al.*

Defendants.

Case No. 24-cv-318-WWB-MCR

[PROPOSED] ORDER
GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Upon consideration of the Motion for Preliminary Injunction ("Motion") filed by Plaintiffs Associated Builders and Contractors Florida First Coast Chapter ("ABCFFC") and Associated Builders and Contractors ("ABC") (collectively "Plaintiffs"), the Court, pursuant to Federal Rule of Civil Procedure 65 and Local Rules 6.01 and 6.02 for the U.S. District Court, Middle District of Florida, hereby **GRANTS** Plaintiffs' Motion, as described more fully below:

1. On February 9, 2022, President Joseph R. Biden issued Executive Order 14063 (the "EO"), "Use of Project Labor Agreements for Federal Construction Projects." The EO requires contractors and subcontractors to negotiate or become parties to project labor agreements ("PLA") for federal construction contracts valued at $35 million or more.

The PLAs must prohibit strikes, lockouts, and other comparable job disruptions; include labor dispute resolution procedures; provide for labor-management cooperation on relevant issues; and otherwise comply with applicable law. Only senior agency procurement officials may grant exceptions to the requirement after finding a PLA would not advance the government's interest in economy and efficiency; would "substantially reduce" bidders "as to frustrate full and open competition"; or would otherwise be inconsistent with applicable law. (*See* EO 14063).

2. On December 18, 2023, the Office of Management and Budget issued Guidance Memorandum M-24-06 ("OMB Memo"), which implemented the EO, purporting to provide guidance to agencies regarding exceptions to the PLA Rule and reporting, with the force and effect of law.

3. On December 22, 2023, the Federal Acquisition Regulatory ("FAR") Council issued the Final Rule titled "Use of Project Labor Agreements for Federal Construction Projects" (PLA Rule), which implemented the EO. The PLA Rule took effect January 22, 2024. The PLA Rule requires federal contractors and subcontractors to enter PLAs as a condition of being awarded work on federal construction projects valued at more than $35 million, absent exception.

4. Plaintiffs seek to enjoin William F. Clark, Christine J. Harada, John M. Tenaglia, Karla S. Jackson, Jeffrey A. Koses, and Shalanda Young (collectively "Defendants") from enforcing the EO, PLA Rule, and OMB Memo (collectively the "PLA Mandates") on the grounds they violate and/or conflict with the Federal Property and Administrative Services Act ("FPASA" or the "Procurement Act"), 40 U.S.C. § 121, *et seq.*; the Competition in Contracting Act ("CICA"), 41 U.S.C. § 3301; the National Labor

Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq*.; the First Amendment to the U.S. Constitution; the Office of Federal Procurement Policy ("OFPP") Act, 41 U.S.C § 1301, *et seq*.; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; the Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Act ("SBREFA"), 5 U.S.C. § 601; and the Small Business Act ("SBA"), 15 U.S.C. § 644.

5. Plaintiffs have standing to sue under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977) because (1) Plaintiffs' members, as identified through various affidavits presented to the Court, would otherwise have standing to sue in their own right; (2) the interests at stake are germane to Plaintiffs' organizational purposes of advocating for fair and open competition for construction work; and (3) neither the claims nor relief require the participation of Plaintiffs' individual members as Plaintiffs seek injunctive relief. *See also Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (finding standing of group members to challenge barriers erected by the government making it more difficult for the group's members to compete in the process of bidding for government contracts). In addition, Plaintiffs have shown harm to their own organizational interests resulting from the PLA Rule. *See Plaintiffs v. Kemp,* 2023 U.S. Dist. LEXIS 144918, at *55-56 (N.D. Ga. Aug. 18, 2023) (organization injured by diverting resources).

6. The dispute is ripe for review as it raises pure questions of law and Plaintiffs are suffering hardship that will continue absent judicial relief. *See Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019).

7. Venue is proper in this District under 28 U.S.C. § 1391(e) because ABCFFC maintains its principal place of business in this District and Plaintiffs identified numerous

ABCFFC members harmed by the PLA Rule. Alternatively, venue is established because facts and circumstances relating to the enforcement of the challenged PLA mandate are taking place on bid solicitations regarding Jacksonville federal projects.

8. To obtain a preliminary injunction, a movant must demonstrate: (1) substantial likelihood of success on the merits; (2) substantial threat of irreparable injury; (3) the threatened injury outweighs any damage the injunctive order might cause the non-moving party; and (4) the order will not be adverse to public interest. *Georgia v. Biden*, 46 F.4th 1283, 1291 (11th Cir. 2022); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1317 (S.D. Ala. 2002).

9. Considering the likelihood of success on the merits, "the most important preliminary-injunction criterion," "requires the court to consider the merits of plaintiffs' claim under the appropriate legal standard for review of that decision." *See Georgia*, 46 F.4th at 1301; *Sierra Club*, 207 F. Supp. 2d at 1318. Based on the administrative record and the proofs of irreparable harm presented by Plaintiffs, it is likely Plaintiffs will succeed on each of their claims.

10. First, Plaintiffs have shown they are likely to succeed on the merits of their claim that the PLA Mandate exceeds the Executive Branch's authority under the FPASA. The FPASA is designed "to provide the Federal Government with an economical and efficient system" for procurement activities. *See* 40 U.S.C. § 101; *Georgia*, 46 F.4th at 1298 (issuing an injunction against the President's imposition of a mandate on federal contractors not authorized by any specific reference in the FPASA.) Further, analysis under the major questions doctrine establishes that this case presents issues of "economic and political significance," and therefore the PLA mandate required "clear

congressional authorization." *See West Virginia v. EPA*, 142 S. Ct. 2587, 2595 (2022).

11. Plaintiffs have also shown they are likely to succeed on the merits of their claim that the PLA Mandate violates the CICA, 41 U.S.C. § 3301, which requires federal agencies awarding contracts to "obtain full and open competition through ... competitive procedures." "[I]mposing more criteria than necessary works against the... oft-repeated priority of achieving 'full and open competition' in the procurement process." *Georgia,* 46 F.4th at 1297. The existence of potential exemptions to the PLA mandate compels no different result. Plaintiffs have shown that the exemption process is not functioning in a rational manner but instead is arbitrarily resulting in universal PLA mandates on covered projects, regardless of market research and proofs of improper injury to competition.

12. Plaintiffs also have shown they are likely to succeed on the merits of their claim that the PLA Mandate violates the APA and OFPP. The APA, 5 U.S.C. § 706(2)(A), (D) directs reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found. . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," and "found to be...without observance of procedure required by law." Here, Defendants did not adequately explain why they imposed a nationwide PLA mandate; they offered explanations running counter to evidence, failed to consider important aspects of the problem, relied on factors Congress prohibited Defendants from considering, improperly relied on overly narrow exemptions to the PLA Mandate to justify it, and issued the OMB Memo without notice and comment in violation of the OFPP Act.

13. Plaintiffs have also shown they are likely to succeed on the merits of their claim the PLA Mandate violates Plaintiffs' First Amendment Free Association rights. The government may not restrict First Amendment rights as "the price of maintaining eligibility

to perform government contracts." *See ABC of SE. Texas v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *8 (E.D. Tex. Oct. 24, 2016); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *White v. Sch. Bd. of Hillsborough County*, 2009 U.S. App. LEXIS 1532, at *7 (11th Cir. Jan. 27, 2009). Union association is a type of protected expressive association under the First Amendment. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463-66 (2018). The PLA Mandate here requires Plaintiffs' members to associate with unions—a type of expressive association—without any corresponding compelling state interest that cannot be achieved through means less restrictive of associational freedoms.

14. Plaintiffs have shown they are likely to succeed on the merits of their claim the PLA Mandate conflicts with Section 8(d) of the NLRA. Under that provision, the government may not compel an employer or a union to execute a CBA or agree to any specific contract provision. *See H.K. Porter v. NLRB*, 397 U.S. 99, 102-109 (1970). That is exactly what the PLA Mandate does, in violation of the NLRA.

15. Plaintiffs have further shown they are likely to succeed on the merits of their claim the PLA Mandate fails to comply with the RFA and SBA, in violation of the APA. The PLA Mandate, contrary to the SBA, reduces small business participation on federal contracts for or exceeding $35 million. Further, Defendants did not conduct a suitable final regulatory flexibility analysis under the RFA.

16. In sum, based upon the Pleadings, Motions, Memoranda, Affidavits, and portions of the Administrative Record submitted to this Court, Plaintiffs have demonstrated a substantial likelihood of success on the merits of their claims against Defendants**.**

17. Plaintiffs provided notice of their Motion to Defendants and therefore need

not demonstrate notice is impractical.

18. Plaintiffs have further shown they will suffer irreparable injury absent injunctive relief through costs associated with complying with the PLA mandate and through lost contract opportunities in the billions of dollars.

19. In contrast, Defendants have not shown an injunction will harm them as they can still *encourage* PLAs and can seek contractual remedies against contractors for any delays or failures to perform awarded contracts if an injunction is in place.

20. The public interest favors injunctive relief, as the public interest favors a competitive procurement process and protection against unlawful government actions.

21. Nationwide injunctive relief is appropriate as to Plaintiffs' members on any federal construction project of more than $35 million, as to which Plaintiffs' members are eligible and qualified to perform such projects nationwide.

22. Plaintiffs do not seek security under Federal Rule of Civil Procedure 65(c) and therefore the Court will not order security.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that the **DEFENDANTS** are hereby immediately enjoined and restrained from mandating PLAs on federal contracts valued at $35 million or more as follows:

1. Defendants Clark, Koses, Tenaglia, Jackson, Harada, and Young are enjoined from implementing the EO anywhere in the United States against any potential offerors on federal contracts for or exceeding $35 million;

2. Defendants Clark, Koses, Tenaglia, Jackson, and Harada are enjoined from implementing the PLA Rule anywhere in the United States against any potential offerors on federal contracts for or exceeding $35 million;

3. Defendant Young is enjoined from implementing the OMB Memo anywhere in the United States against any potential offerors on federal contracts for or exceeding $35 million.

SO ORDERED this _____ day of _____ 2024.

_____
Wendy Berger, U.S. District Judge

EXHIBIT “1”

VIA ELECTRONIC SUBMISSION

October 18, 2022

William F. Clark
Director
Office of Government-wide Acquisition Policy
General Services Administration
1800 F Street NW
Washington, DC 20405

RE: Docket No. FAR-2022-0003, Notice of Proposed Rulemaking on Federal Acquisition Regulation (FAR); FAR Case 2022-003, Use of Project Labor Agreements for Federal Construction Projects [RIN: 9000-AO40]

Dear Mr. Clark:

Associated Builders and Contractors hereby submits the following comments in response to the above-referenced proposed rule published in the Federal Register on Aug. 19, 2022, at 87 Federal Register 51044.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private customers.[1]

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)[2] and industry workforce employment (more than 82% of the construction industry is employed by small businesses).[3] In fact, construction companies that employ less than 100 construction

[1] For example, see ABC's 32nd Excellence in Construction Awards program from 2022: https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167.
[2] U.S. Census Bureau 2019 County Business Patterns: https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true and https://www.census.gov/programs-surveys/cbp/data/tables.2019.html.
[3] 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf.

professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.[4] The vast majority of small businesses in the construction industry are not unionized.

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private-sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

Specific to this rulemaking, ABC members won 57% of the $128.73 billion in direct prime construction contracts exceeding $25 million awarded by federal agencies during fiscal years 2009-2021. Winning ABC member federal contractors provided subcontracting opportunities to large and small contractors in the specialty trades and delivered taxpayer-funded construction projects safely, on time and on budget for their federal government customers.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

For these reasons, ABC's membership is heavily invested in the FAR Council's proposed rule impacting federal contracting opportunities for taxpayer-funded construction contracts and is vigorously opposed to government-mandated PLAs and PLA preferences on federal government and federally assisted construction projects, as well as state and local government infrastructure projects.

Background

On Feb. 4, President Joe Biden signed Executive Order 14063, "Use of Project Labor Agreements for Federal Construction Projects."[5] It requires federal agencies to mandate controversial PLAs on federal construction projects that are $35 million or more in total value.

In addition, independent of EO 14063 and the FAR Council's proposed rule, ABC identified more than $95 billion[6] worth of federal agency grants for infrastructure projects procured by state and local governments subject to language and policies promoting PLA mandates and preferences that will increase costs and reduce competition on federally assisted construction projects. Together, the Biden administration's pro-PLA policies will needlessly increase costs, chill competition and steer hundreds of billions of dollars worth of federal and federally assisted construction projects funded by taxpayers to well-connected special interests, i.e., construction unions and contractors signatory to specific construction unions party to a PLA.

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[4] U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx.

[5] https://www.federalregister.gov/documents/2022/02/09/2022-02869/use-of-project-labor-agreements-for-federal-construction-projects.

[6] A list of federal agency infrastructure competitive grant programs for state and local governments seeking federal dollars to build key construction projects containing pro-PLA language can be found at www.abc.org/PLAgrants.

In response, ABC issued a press release,[7] authored an op-ed in *The Wall Street Journal*[8] and signed coalition letters to the White House opposing EO 14063 and other Biden administration pro-PLA policies.[9] On April 6, more than 1,200 ABC member contractors signed a letter to the White House opposing the Biden administration's anti-competitive and costly pro-PLA policies.[10] ABC members sent more than 14,400 letters to their representatives in Congress urging them to pass legislation protecting fair and open competition on federal and federally assisted construction projects by restricting government-mandated PLAs.[11] In addition, ABC applauded letters of opposition to the White House's pro-PLA policies from governors[12] and members of the U.S. House[13] and Senate.[14]

Furthermore, Congress recently passed the Infrastructure Investment and Jobs Act, a bipartisan law authorizing nearly $550 billion in additional spending for federal and federally assisted infrastructure projects.[15] By choosing not to include language conditioning this funding on government mandated PLAs, Congress has clearly indicated it did not intend to require controversial PLAs on these construction contracts. President Biden's Executive Order 14063 therefore directly contradicts congressional intent when it passed the IIJA and other laws funding infrastructure without pro-PLA language.

Nevertheless, on Aug. 19, 2022, the FAR Council issued a proposed rule that requires PLAs on all federal construction contracts valued at $35 million or more, which affects ABC members and other industry stakeholders performing work on taxpayer-funded federal contracts. ABC immediately issued a press release in opposition to the proposed rule[16] and has been actively educating lawmakers, the public and industry stakeholders about the illegal and inflationary aspects of the Biden administration's pro-PLA policies on both federal and federally assisted infrastructure projects. On Oct. 13, ABC joined 21 other organizations representing thousands of companies employing millions of professionals in the construction industry in a coalition

[7] ABC press release, President Biden's Pro-PLA Executive Order Will Increase Costs to Taxpayers and Exacerbate Skilled Labor Shortage, Says ABC, Feb. 3, 2022.
[8] Ben Brubeck, Infrastructure Law Becomes a Biden Union Giveaway, *The Wall Street Journal*, Feb. 9, 2022.
[9] Feb. 15, 2022, coalition letter to the White House opposing EO 14063 available at: https://buildamericalocal.com/wp-content/uploads/sites/18/2022/02/Coalition-Letter-to-President-Biden-Opposing-Government-Mandated-Project-Labor-Agreement-EO-14063-021522.pdf.
[10] ABC press release, ABC Sends Letter to White House with 1,200 Signatures Opposing Biden's PLA Mandate, April 6, 2022, available at: https://www.abc.org/News-Media/News-Releases/entryid/19354/abc-sends-letter-to-white-house-with-1-200-signatures-opposing-biden-s-pla-mandate.
[11] ABC supports the Fair and Open Competition Act (S. 403/H.R. 1284), sponsored by Sen. Todd Young, R-Ind., and Rep. Ted Budd, R-N.C., which would prevent federal agencies and recipients of federal assistance from requiring or encouraging contractors to sign a controversial PLA as a condition of winning a federal or federally assisted, taxpayer-funded construction contract.
[12] RGA, 18 GOP Governors Oppose Joe Biden's Attempts to Interfere with America's Construction Industry, April 26, 2022.
[13] March 8, 2022, letter signed by 59 U.S. House members available at: https://buildamericalocal.com/wp-content/uploads/sites/18/2022/03/59-Members-of-Congress-Sign-Letter-Opposing-White-House-PLA-Policy-3822.pdf.
[14] March 7, 2022, letter signed by 43 U.S. senators available at: https://buildamericalocal.com/wp-content/uploads/sites/18/2022/03/43-U.S.-Senators-Sign-Letter-Opposing-White-House-PLA-Policy-3722.pdf.
[15] https://www.congress.gov/bill/117th-congress/house-bill/3684.
[16] ABC press release, President Biden's Inflationary PLA schemes Hurt Taxpayers and Construction Job Creators, Aug. 18, 2022, available at: https://www.abc.org/News-Media/News-Releases/entryid/19556/president-bidens-inflationary-pla-schemes-hurt-taxpayers-and-construction-job-creators.

comment letter opposing the FAR Council's proposal.[17] ABC members submitted more than 2,400 individual comments to the FAR Council opposing the proposed rule's harmful impact on their businesses.

The FAR Council estimates that the proposed rule could affect up to 119 direct federal contracts on an annual basis, valued at an average of $114 million each.[18] In total, the FAR Council estimates this rule covers $13.56 billion worth of federal construction projects per year, which is a significant portion of all federal construction contracts. For example, the annual value of federal construction put in place in 2021 was $24.837 billion, so the rule could affect more than 54% of all federal construction put in place by annual value.[19]

Once final, the proposed rule will rescind and replace President Barack Obama's Executive Order 13502, signed Feb. 6, 2009, which encourages—but does not require—federal agencies to mandate PLAs on large-scale federal construction projects exceeding $25 million in total cost on a case-by-case basis and permits recipients of federal assistance to mandate PLAs on state and local public works projects.[20] The Biden proposed rule also establishes circumstances where federal agencies can require PLAs on federal construction projects below the proposed $35 million threshold. The FAR Council proposal does not prohibit a federal agency from requiring PLAs on projects receiving any form of federal financial assistance.

Due to the significant harm the proposed rule will have on federal government procurement officials, federal contractor stakeholders, taxpayers, ABC members and other construction businesses pursuing contracts and building federal construction projects, on Aug. 23, ABC asked the FAR Council to extend the 60-day comment period deadline of Oct. 18 to provide adequate time to analyze the proposal, solicit member feedback and provide meaningful input on the proposal.[21] The extension request was arbitrarily and capriciously denied by the FAR Council, [22] in violation of the Administrative Procedure Act.

Summary of ABC's Response to the Proposed Rule

ABC strongly opposes the proposed rule and its imposition of anti-competitive and inflationary government-mandated PLAs on federal contracts.

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[17] Construction Coalition Opposes Biden's Pro-PLA Proposal, ABC Newsline, Oct. 12, 2022. Of note, the coalition's website, BuildAmericaLocal.com, features a number of educational resources such as studies, op-eds, letters, talking points and a social media kit exposing problems with government-mandated PLAs and the Biden administration's policies promoting anti-competitive and inflationary PLA schemes.

[18] "Based on Federal Procurement Data System (FPDS) data from fiscal year (FY) data from 2019 through FY 2021, the average number of construction awards, including orders against indefinite-delivery indefinite-quantity contracts valued at $35 million or more, were approximately 119 annually. The average cost of each award is approximately $114 million," at https://www.federalregister.gov/d/2022-17067/p-30.

[19] U.S. Census Bureau, Construction Spending Historical Value Put in Place, accessed Oct. 4, 2022, available at: https://www.census.gov/construction/c30/historical_data.html.

[20] https://www.gpo.gov/fdsys/pkg/FR-2009-02-11/pdf/E9-3113.pdf.

[21] https://www.regulations.gov/comment/FAR-2022-0003-0005.

[22] https://www.abc.org/Portals/1/2022%20Files/PLA%20Extension.pdf?ver=mva5r_nbZe7y2emr2wreCg%3d%3d.

The Biden administration's rule has been proposed at a time when the U.S. construction industry faces significant headwinds in the form of severe supply chain disruptions,[23] unprecedented materials cost inflation of 40.5% since the onset of the COVID-19 pandemic,[24] declining investment[25] and a widespread shortage of 650,000 skilled workers in 2022 alone.[26] By needlessly restricting the pool of qualified bidders and excluding experienced and qualified nonunion construction workers, the proposal would exacerbate these issues and further increase costs for contractors and taxpayers.

In September 2022, ABC conducted a survey of its contractor members about government-mandated PLAs and the FAR Council's proposed rule.[27] Ninety-eight percent of respondents said they would be less likely to begin or continue bidding on federal contracts if the proposed rule is finalized and 97% said that government-mandated PLAs decrease economy and efficiency in government contracting.[28]

A PLA is a multiemployer, multi-union, pre-hire collective bargaining agreement that all general contractors and subcontractors on a jobsite must agree to in order to win a contract to build a federal construction project. Proponents argue PLAs serve as a tool to systemize labor relations between multiple construction trade unions and contractors on a specific construction site. While differences may exist in the specific language of each PLA document, PLAs typically contain provisions with anti-competitive and costly effects our comments will outline in detail.

As discussed in Section I of ABC's comment letter (pp. 7-16), ABC and the federal contracting community broadly oppose government-mandated PLAs as these schemes needlessly restrict competition, discriminate against nonunion employees and place nonunion general contractors and subcontractors at a significant competitive disadvantage. Government-mandated PLAs will exacerbate the construction industry's skilled labor shortage by discouraging participation from more than 87% of the U.S. construction industry workforce who do not belong to a union. In addition, certain unionized contractors and unionized workers are also prohibited from working on PLA projects because they interfere with existing collective bargaining agreements. Likewise, typical government-mandated PLAs are anti-competitive in nature and severely restrict fair and open bidding on taxpayer-funded projects from the best union and nonunion contractors, including small and disadvantaged contractors and their employees

As discussed in Section II of ABC's comment letter (pp. 16-33), the Biden administration and FAR Council's arguments justifying the proposed rule and the widespread use of government-mandated PLAs in federal contracting are unsubstantiated and run counter to a robust record of evidence supporting the benefits of fair and open competition free from PLA mandates. In contrast to the Biden administration's reasoning, evidence outlined in these comments establishes that government-mandated PLAs harm economy and efficiency in federal

[23] Sam Barnes, "Missing Links," *Construction Executive*, April 2022.
[24] "Monthly Construction Input Prices Dip in August, But Are Up 17% From a Year Ago, Says ABC," ABC, September 2022.
[25] "Nonresidential Construction Spending Down 0.4% in August, Says ABC," ABC, October 2022.
[26] "ABC: Construction Industry Faces Workforce Shortage of 650,000 in 2022," ABC, February 2022.
[27] Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive, ABC Newsline, Sept. 28, 2022.
[28] Additional results from the survey are shared in greater detail throughout these comments.

contracting, as government-mandated PLAs increase costs by 12% to 20% per construction project, expose federal agencies to bid protests and litigation and cause unnecessary delays during the procurement and construction phases of a PLA project. In addition, PLAs are a solution in search of a problem with respect to strikes caused exclusively by unions and will not achieve better safety, quality or project delivery outcomes for the federal government.

Section III of ABC's comments demonstrates how Executive Order 14063 and the FAR Council's proposed rule violate numerous federal laws and must be withdrawn. First, the proposed rule clearly violates the Competition in Contracting Act, which states that when awarding federal contracts federal agencies "shall obtain full and open competition through the use of competitive procedures."[29] By discriminating against nonunion contractors and employees who have freely chosen not to associate with a union, the proposed rule's PLA mandate would drastically restrict competition and give an unfair advantage to unionized businesses and employees. [See discussion in Section III. A. on page 34]

The proposed rule, and EO 14063 on which it is based, also exceed the authority of the executive branch under the Federal Property and Administrative Services Act.[30] Congress has never authorized across-the-board PLA mandates such as those being proposed here. As opposed to increasing economy or efficiency in federal procurement, the proposed rule's PLA mandates will increase costs and delay contract procurement and construction performance. [See discussion in Section III. B. on page 34].

The proposed rule also violates the arbitrary and capricious standard of the Administrative Procedure Act and/or other statutes governing the FAR, because the proposed rule changes course without adequate justification, in a manner contrary to the record of evidence, without addressing important aspects of the problems created by the proposed mandate, and without addressing reasonable alternatives or the longstanding reliance interests of the regulated community. [See discussion in Section III. C. on page 35].

The proposed rule will also impose significant obstacles to Congress's requirement that federal agencies encourage and give preference to small and disadvantaged businesses in procurement of government contracts. Therefore, the proposed rule is in violation of the Small Business Act.[31] [See discussion in Section III. D. on page 36].

The proposed rule's Expected Impact and Initial Regulatory Flexibility Analysis vastly underestimates the economic impact of the proposed rule, which is likely to exceed $100 million per year. [See discussion in Section III. E. on page 38].

The proposed rule directly interferes with and discriminates against rights of construction contractors and their employees that are protected by the National Labor Relations Act, ERISA and the National Apprenticeship Act, including the forced taking of nonunion workers' pay for

[29] 41 U.S.C. § 253. The Competition in Contracting Act of 1984 (41 U.S.C. 253) (FAR Subpart 6.1 "Full and Open Competition") is a public law enacted for the purpose of encouraging the competition for the award of all types of government contracts. The purpose was to increase the number of competitors and to increase savings through lower, more competitive pricing. CICA became law in 1984 as a foundation for the Federal Acquisition Regulation.
[30] 40 U.S.C. § 101.
[31] 15 U.S.C. § 637(d).

the benefit of union pension plans, without just compensation. [See discussion in Section III. F. on page 39].

The proposed rule improperly declares that "this rule is not a major rule under 5 U.S.C. § 804" and thereby violates the Congressional Review Act. [See discussion in Section III. G. on page 40].

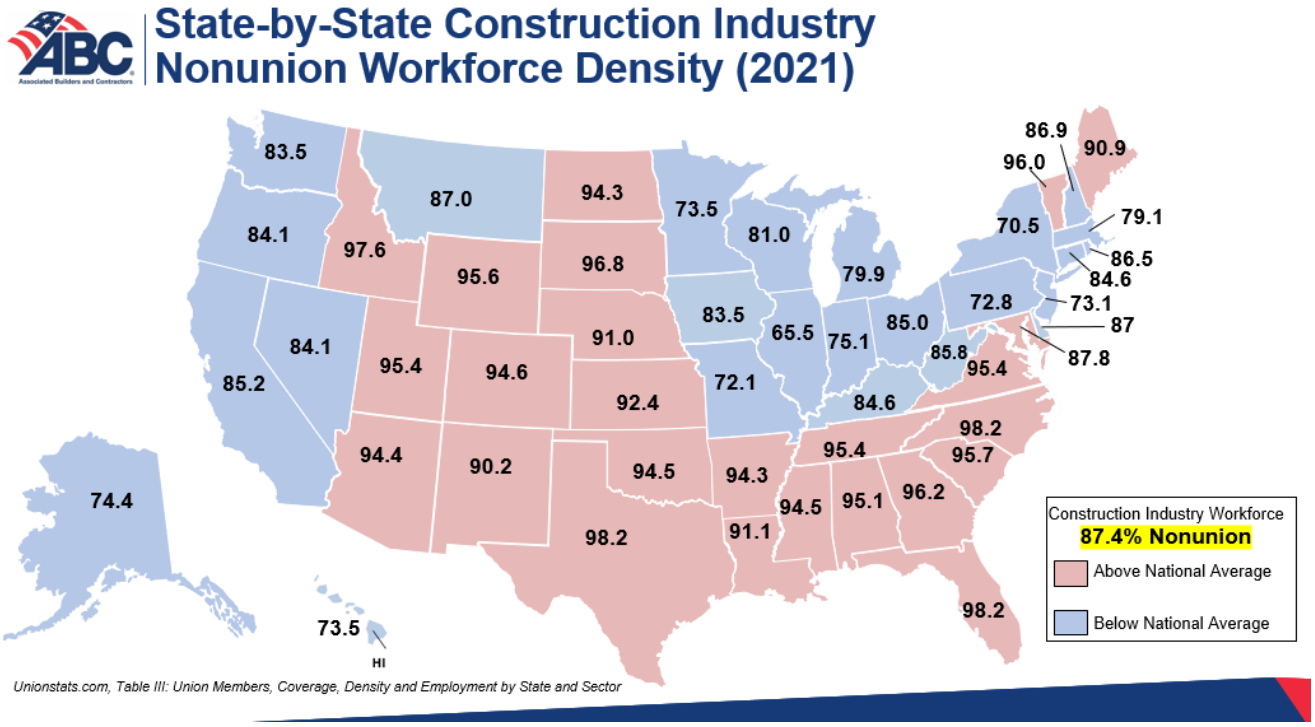
Finally, the proposed rule's blanket PLA policy establishes no meaningful criteria for federal agencies to follow in considering whether to grant exceptions to PLA requirements. Therefore, the resulting agency decisions will be inherently arbitrary and capricious and will delay construction projects. ABC has made recommendations concerning PLA inclusion and exception language and procedures [See discussion in Section III. H. on page 40 and I. on page 42].

I. Government-Mandated PLAs Required by the Proposed Rule Will Discriminate Against and Otherwise Deter the Majority of Construction Contractors and Their Employees From Bidding or Performing Work on Government Contracts

Typical government-mandated PLAs discourage competition from nonunion contractors, who employ the overwhelming majority of all construction workers, and deny jobs to their existing workforce through several common PLA provisions summarized in these comments.

A. PLA Mandates Force Contractors to Replace Most or All Existing Employees With Workers From Union Hiring Halls

First, under typical PLAs, nonunion companies must obtain most or all of their employees from union hiring halls. Most often, PLAs prevent contractors from using their existing nonunion workforce. This provision is problematic because firms cannot use most or all of their existing employees whose safety, training, productivity and quality is already quantified so contractors are able to submit an accurate bid and timeline. This provision excludes more than 87% of the U.S. construction workforce from working on federal construction projects.



In some PLAs, a nonunion contractor is permitted to use a small number of its existing nonunion workforce, but they must send these employees to the union hiring hall and hope the union dispatches the same workers back to the PLA jobsite, and/or the PLA requires existing nonunion employees to join a union within 10 days of employment on the project and/or pay union dues and fees as a condition of employment.[32] Survey responses by ABC contractors report that unfamiliar union workers may be of unknown quality and may delay time- and cost-sensitive construction schedules, making delivery of a quality, on-time and on-budget construction product less certain.

B. PLA Mandates Require Companies to Obtain Apprentices From Union Apprenticeship Programs, Undermining Workforce Development Strategies

Second, PLAs typically require nonunion companies to obtain apprentices exclusively from union apprenticeship programs.[33]

Therefore, apprentices enrolled in federal and state government-registered nonunion apprenticeship programs provided by employers, trade associations, schools and community stakeholders—including more than 300 government-registered apprenticeship programs provided by ABC chapters—cannot work on a job covered by a PLA. This means future construction industry workers enrolled in qualified government-registered apprenticeship programs will be excluded from working in their own community simply because these

[32] See TheTruthAboutPLAs.com, Understanding Core Workforce Provisions in Project Labor Agreements, April 7, 2014.
[33] See www.TheTruthAboutPLAs.com, Biden's Project Labor Agreement Schemes Exacerbate Construction Industry's Skilled Labor Shortage, June 29, 2022.

programs are not affiliated with construction unions. This strangles opportunities and career pipelines into the construction industry.

Respondents to ABC's recent survey of contractor members said PLAs negatively affect company workforce development efforts, with 96% stating that a PLA's union apprenticeship requirements harm their existing workforce development investments.[34]

Of note, in rare and limited instances, PLAs can contain language permitting participants from union and nonunion government-registered apprenticeship programs when permitted by local union CBAs. However, data demonstrates the government-registered apprenticeship system is not meeting the industry's demand for skilled labor and any government-registered apprenticeship participation requirements disparately favor union programs.[35]

According to data from the DOL,[36] in FY 2021, the construction industry's federal government-registered apprenticeship system produced 24,822 completers of its four-to-five-year apprenticeship programs. In addition, construction industry apprenticeship programs registered with state governments produced an estimated 15,000 to 20,000 completers in FY 2021.[37] At current rates of completion, it would take 14 years for all government-registered construction industry apprenticeship program completers to fill the estimated 650,000 vacant construction jobs needed just in 2022.

In addition, a 2015 report issued by construction unions[38] claims that, "among [government registered program] construction apprentices, 74% are trained in the unionized construction sector known as the joint apprenticeship training committee (JATC) system," according to DOL Employment and Training Administration data from 2014 referenced in the report.[39] If accurate, this means that roughly a quarter of all registered apprentices are enrolled in nonunion government-registered apprenticeship programs and a government-registered apprenticeship program requirement in a PLA would disproportionately favor unionized firms and participants in union programs.

Both concerns undermine federal apprenticeship investments and legal requirements for full and open competition and are key reasons why federal agencies do not require government-registered apprenticeship policies in federal solicitations for construction services. Simply put,

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[34] Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive, ABC Newsline, Sept. 28, 2022.

[35] See data tables in www.TheTruthAboutPLAs.com, Biden's Project Labor Agreement Schemes Exacerbate Construction Industry's Skilled Labor Shortage, June 29, 2022.

[36] According to the DOL Office of Apprenticeship's Registered Apprenticeship Partners Information Data System, in FY 2021 the construction industry's 6,573 federal government-registered apprenticeship programs had 239,107 active apprentices and produced just 32,068 completers. There are a handful of states that do not contribute to the RAPIDS program, roughly 40,000 to 45,000 apprentices completed programs in 2021. See data at https://thetruthaboutplas.com/wp-content/uploads/2022/08/Registered-Apprenticeship-Participants-Completers-and-Programs-for-Construction-Industry-in-RAPIDS-States-FY17-to-FY21-081722.xlsx.

[37] ABC: Government-Registered Apprenticeship System Woefully Inadequate to Meet Construction's Skilled Workforce Shortage, ABC, June 30, 2022.

[38] See page 6 of *Construction Apprenticeship, The "Other Four-Year Degree,"* by the North American Building Trades Unions available at https://partners.aflcio.org/system/files/2_bctd-appren-four-yr-degree-2015.pdf.

[39] Note: The DOL does not provide data of union vs. nonunion apprentices enrolled in registered apprenticeship programs to the public in an aggregate version/report. It is unclear if the DOL shared this data or if additional assumptions were made by report authors based on DOL data requested and calculated.

a PLA's union-only apprenticeship or government-registered apprenticeship requirements are likely to exacerbate the construction industry's skilled labor shortage and undermine industry, company and community investments in workforce development that relies on an all-of-the-above mix of upskilling in the construction industry, including government-registered apprenticeship programs.[40]

C. PLA Mandates Force Contractors to Follow Inefficient Union Work Rules

Third, PLAs require contractors to follow union work rules specified in each CBA of each construction union party to the PLA, which changes the way contractors 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 craft jurisdictional boundaries defined in each craft's relevant CBA. Open 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. This practice has tremendous labor productivity advantages for contractors, but it is forbidden by typical union work rules in union CBAs and, by extension, PLAs.[41]

Contractors forced to work under a PLA's restrictive work rules complain about the complexity of interpreting and matching each union's CBA/work rules to a corresponding construction activity on a jobsite. In addition, ABC contractors consistently raise concerns about how a PLA forces them to hire multiple workers from different unions with different and often conflicting CBAs to complete simple tasks across trade jurisdictions that can be performed by one of their existing employees or a smaller crew of existing employees.

D. PLA Mandates Force Contractors to Pay Employee Benefits Into Union Plans, Exposing Workers to Wage Theft and Employers to Multiemployer Pension Plan Liabilities

Fourth, PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds, even though these companies may have their own bona fide benefits plans. Workers cannot access any of their benefits accrued during the life of the PLA project in union plans unless they decide to leave their nonunion employer, join a union, work for union-signatory contractors and receive enough work and remain in good standing with the union until vested. Research suggests this loss in wages and benefits reduces nonunion employees' paychecks by 34% on PLA projects.[42] Because few nonunion employees choose to join a

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[40] Learn more about ABC's all-of-the-above approach to workforce development at www.workforce,abc/org.

[41] See www.TheTruthAboutPLAs.com, Understanding the Merit Shop Contractor Cost Advantage, May 17, 2010.

[42] An October 2021 report by Dr. John R. McGowan, Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers, 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 34%. 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 35% in benefit costs above and beyond existing prevailing wage laws as a result of "double payment" of benefit costs. See further

union after working on a PLA project, companies typically end up paying benefits twice: once to the union plans and once to the existing company plans to ensure employees have direct access to earned retirement and benefits assets and to keep their existing employees happy with their current employer in the face of a competitive labor market. Nonunion contractors must factor this double benefits cost into their bid, which research suggests increase nonunion contractors' wage and benefits costs by an estimated 35%,[43] needlessly putting them at a competitive disadvantage against union contractors that are not saddled with these unnecessary costs.

In addition, paying into underfunded and mismanaged union-affiliated multiemployer pension plans may expose merit shop contractors to massive pension withdrawal liabilities.[44] Depending on the health of a union-managed multiemployer pension plan, signing a PLA could bankrupt a contractor or prevent it from qualifying for construction bonds needed to build future projects for the federal government and other clients.[45]

E. PLA Mandates Force Employees to Join a Union and/or Pay Union Dues/Fees as a Condition of Employment

Finally, nonunion employees must pay nonrefundable union dues and/or fees and/or join a union to work on many PLA projects, even though they have decided to work for a nonunion employer[46] and have freely chosen not to affiliate with a union. 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, union representation is elected by the employer rather than the employees.[47] Construction 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.[48]

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analysis at www.TheTruthAboutPLAs.com, Nonunion Workers Suffer Up to 34% in Wage Theft Under Government-Mandated Project Labor Agreements, Oct. 22, 2021.

[43] See McGowan report, *ibid.*

[44] See discussion of this concern in the McGowan report and an example of multiemployer pension plan liability extended to a firm performing work on a PLA project in New Jersey in *Third Circuit Joins Sister Circuits in 'Employer' Definition Under Multiemployer Pension Plan Amendments Act,* JD Supra, April 15, 2022, available at https://www.jdsupra.com/legalnews/third-circuit-joins-sister-circuits-in-9647788/.

[45] See www.TheTruthAboutPLAs.com, Taxpayer Bailout of Multiemployer Pension Plans and Government-Mandated Project Labor Agreements, March 17, 2021.

[46] The legality of clauses in typical PLAs that require compulsory union membership and payment of union dues and fees to unions by workers in order to work on a PLA project depend on the state's right to work law status. See www.TheTruthAboutPLAs.com, Understanding PLAs in Right to Work States, July 20, 2009. *See also Janus v. AFSCME*, 138 S. Ct. 2448 (2018) (finding a constitutional violation in government action forcing employees to pay union dues or fees).

[47] While employed by a nonunion company, 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.

[48] Barriers to joining a union in the construction industry are relatively low. Any construction worker can go to the nearest union hiring hall and request to join a union. If admission is accepted by a union hiring hall, a worker typically pays initiation fees, regularly scheduled dues and must maintain good standing with the local union's rules in order to be dispatched to a union-signatory contractor's job. Union members may work for one or dozens of union-signatory contractors in a year or a career, depending on the trade, scope and volume of work and length of time a union-signatory company is going to be on a construction jobsite.

F. PLA Mandates Discourage Competition From Unionized Contractors and Union Labor By Interfering with Existing Union Collective Bargaining Agreements

Most ABC member general contractors and subcontractors are not signatory to construction union CBAs. However, some ABC member general contractors and subcontractors are signatory to CBAs with construction unions, which requires them to hire unionized labor only from union hiring halls they are signatory to and follow the CBA's work rules and pension/benefits obligations. Many of these unionized contractors report that PLAs interfere with existing CBAs with unions and prevent unionized firms from competing to build projects funded by taxpayer dollars.[49]

Union-signatory firms commonly argue that they invest substantial amounts of time and resources negotiating and executing a CBA with a specific union or unions they are signatory to. Yet a PLA will increase costs and stifle contracting opportunities by reintroducing inefficient and unfamiliar work rules, pay and benefits requirements that are not part of its existing CBA with a union(s).

In addition, union-signatory firms complain that, in order to work on a PLA project, they are required to sign an agreement with a union designated in a PLA that the contractor is not signatory to. This would take away work traditionally performed by its existing union member employees. In this example, signing such a PLA would be in direct violation of its existing CBA and would expose the firm to litigation for breaching its CBA. Therefore, contractors with CBAs with certain unions not designated in a specific PLA are contractually unable to pursue contracts subject to PLA mandates.

For these reasons, the proposal will injure competition from certain qualified unionized contractors and their unionized employees from union hiring halls.

G. PLA Mandates Are Likely to Decrease Hiring of Local, Minority, Women, Veteran and Reentering Construction Workers and Minority, Women, Veteran and Disadvantaged Business Enterprises

By discriminating against the 87.4% of the U.S. construction workforce that chooses not to belong to a union and discouraging competition from diverse and small contracting businesses predominantly unaffiliated with unions,[50] PLA mandates are likely to decrease opportunities for local, minority, women, veteran and reentering construction workers and minority, women, veteran and disadvantaged businesses that perform taxpayer-funded work in the construction industry.

In ABC's recent member survey,[51] 94% of respondents said government-mandated PLAs would result in worse local hiring outcomes on a project while 5% said PLA mandates would

[49] See examples at TheTruthAboutPLAs.com, Union Leaders and Contractors Oppose Government-Mandated Project Labor Agreements Too, March 1, 2021, including a March 16, 2021 op-ed syndicated in USA Today by Kevin Barry, director of the construction division of the United Service Workers Union based in Queens

[50] See discussion on the impact of government-mandated PLAs on federal contractor small businesses in Section III. D. of this comment letter.

[51] Ibid.

have no impact. Fully 68% of respondents said PLA mandates decrease hiring of minority, women, veteran and reentering construction workers while 28% said PLA mandates would have no impact. Finally, 70% of respondents said government-mandated PLAs will result in decreased hiring of minority, women, veteran and disadvantaged businesses while 27% said PLA mandates would have no impact.

In contrast, PLA advocates frequently claim that government-mandated PLAs ensure a steady supply of local labor and more jobs for minority, women, veteran and reentering construction workers. They also claim PLAs can be a tool to increase hiring of minority, women, veteran and disadvantaged business enterprises.

However, there is no credible evidence to support this erroneous claim. Likewise, there is no evidence that local and disadvantaged business and workforce hiring outcomes are better on government-mandated PLA projects compared to projects benefiting from fair and open competition free from PLA mandates.

Anecdotal evidence strongly indicates that government-mandated PLAs harm rather than benefit local and diverse workforce hiring and contract awards. Such harm has been documented by members of the local and minority construction workforce and contracting communities in Baltimore;[52] Boston;[53] Chicago;[54] Detroit;[55] Des Moines, Iowa;[56] Jersey City, New Jersey;[57] Las Vegas;[58] Los Angeles;[59] Meriden, Connecticut;[60] New Bedford, Connecticut;[61] New York City;[62] Oakland, California; [63] Philadelphia;[64] San Diego;[65] San

[52] See www.TheTruthAboutPLAs.com, Minority Contractor Speaks Out Against Proposed Baltimore City PLA Requirement, April 8, 2010.
[53] Boston Construction Sites Still Have Very Few Black Workers. Who's To Blame For That? WGBH.org, Paul Singer, Aug 1, 2022.
[54] Rahm Emanuel Blames Unions For Lack of African-American Jobs, NBC Chicago, Oct. 3, 2012.
[55] Detroiters Get 30% Fewer DPS Construction Jobs Than Promised, Detroit Free Press, July 15, 2011.
[56]See www.TheTruthAboutPLAs.com, Project Labor Agreement on Iowa State Penitentiary Fails to Fulfill Local Hiring Promises, Oct. 16, 2013, and Much Work on Prison Went to Non-Iowans, Des Moines Register, Oct. 11, 2013.
[57] See www.TheTruthAboutPLAs.com, Jersey City Project Labor Agreement Policies Fail to Deliver Local Jobs, Jan. 28, 2013.
[58] Ironworkers Union Settles Dispute Over 'Traveling', Las Vegas Review-Journal, May 14, 2010.
[59] See www.TheTruthAboutPLAs.com, Minority Contractors and Business Associations Take Leadership Role in Fighting Project Labor Agreements in California Coastal Cities, March 9, 2011.
[60] See www.TheTruthAboutPLAs.com, No Surprise: Big Labor Fails to Meet Meriden PLA Hiring Goals, May 19, 2014
[61] Dredging union struggles to provide local workers to South Terminal, SouthCoast Today, Sep. 14, 2013.
[62] See www.TheTruthAboutPLAs.com, Project Labor Agreement Fails On Tappan Zee Bridge Construction; Jobs Outsourced to Robots, June 9, 2014.
[63] Black Contractors Call Oakland's Proposed Project Labor Agreement 'Modern Day Slavery', San Francisco Bay View, Aug. 15, 2019. Black construction workers in Bay Area say employers don't stop abuse, San Francisco Chronicle, Sept. 28, 2020.
[64] See www.TheTruthAboutPLAs.com, National Black Chamber of Commerce Blasts Lack of Diversity in Construction Trade Unions, July 29, 2013.
[65] See www.TheTruthAboutPLAs.com, San Diego Unified School District PLA Fails to Meet Local Hiring Goals, July 11, 2011.

Francisco;[66] Seattle;[67] Washington, D.C.;[68] and other communities across America.[69] Local and minority construction industry leaders have complained that government-mandated PLAs and construction union hiring halls fail to deliver jobs for local and minority construction workers and contractors,[70] despite promises by pro-PLA lawmakers and construction trade unions.

Minority and small business advocates have long argued PLAs disproportionately harm minority- and women-owned contractors and their diverse workforces[71] because the vast majority of these firms are not signatory to a union[72] and minority craft labor employees are unlikely to belong to a union[73] due to a variety of factors, including historical[74] and institutional racism in the construction unions.[75]

One such advocate, the National Black Chamber of Commerce, opposes PLA mandates[76] because:

> "African American workers are significantly underrepresented in all crafts of construction unions. 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."

Likewise, in a 2020 letter to Virginia Gov. Ralph Northam (D), NBCC CEO Harry Alford wrote:[77]

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[66] See www.TheTruthAboutPLAs.com, Construction Fatalities and Protest by Minority Contracting Community Plague New 49ers Stadium Project, Oct. 15, 2013.
[67] See www.TheTruthAboutPLAs.com, Project Labor Agreement on Seattle Tunnel Mega-Project Fails to Deliver on Many Promises, Jan. 23, 2014.
[68] See Broken Promises, Big Losses: The Story of DC Workers Watching from the Dugout as the $611 Million Washington Nationals Ballpark is Built, District Economic Empowerment Coalition, Oct. 2, 2007, and The True Cost of the Washington Nationals Ballpark Project Labor Agreement, DC Progress, November 2009, In addition, data collected by Del. Eleanor Holmes-Norton, D-D.C., on federal projects subject to PLA mandates located in the District of Columbia under the Obama administration's pro-PLA policy demonstrated that PLAs delivered worse local hiring outcomes for District of Columbia residents than other large-scale federal projects not subject to a PLA in the region. See TheTruthAboutPLAs.com, Data Busts Myth That Project Labor Agreements Result in Increased Local Hiring, March 11, 2013.
[69] See www.TheTruthAboutPLAs.com, Project Labor Agreements and Big Labor Fail at Local Job Creation, Aug. 5, 2010.
[70] Many PLA projects experiencing issues with minorities and women are documented in ABC General Counsel Maury Baskin's report, Government-Mandated Project Labor Agreements: The Public Record of Poor Performance (2011 Edition).
[71] See testimony of Anthony W. Robinson, president of the Minority Business Enterprise Legal Defense and Education Fund linked in Congressional Testimony Says Project Labor Agreements Harm Minority Contractors and Employees, Oct. 26, 2010, and How Union-Only Labor Agreements Are Harming Women- and Minority-Owned Businesses, U.S. House Committee on Small Business hearing, Aug. 6, 1998.
[72] BLS and other government data sources do not track the union-signatory status of small and disadvantaged businesses. However, various trade associations and interest groups representing minority contractors and construction workers raise these concerns in public policy debates. See the National Black Chamber of Commerce's Policy Statement on Project Labor Agreements and other statements on PLAs here.
[73] Union Construction's Racial Equity and Inclusion Charade, Stanford Social Innovation Review, Travis Watson, June 14, 2021.
[74] Prevailing Wage Legislation and the Continuing Significance of Race, George Mason Law and Economics Research Paper No. 18-14, David E Bernstein, June 1, 2018.
[75] Why Are Philly's Construction Unions So White? Six Takeaways From Our Reporting On Racism In The Building Trades, The Philadelphia Inquirer, Sept. 1, 2022.
[76] See NBCC's Policy Statement on Project Labor Agreements and other statements on government-mandated PLAs here.
[77] Letter from NBCC CEO Harry Alford to Gov. Northam requesting veto of pro-PLA legislation, March 17, 2020.

> "African American-owned contracting firms are typically small businesses and employ their own core workforce of skilled construction workers who are not unionized and are generally more diverse than construction workers coming from union hiring halls. Despite efforts of various construction trade unions to diversify their membership over the years, they simply are not recruiting enough African American members into the trades. In addition, claims that a PLA can be a tool to ensure minority construction workers and businesses are used on a public project is a farce. These goals can be achieved via contracting and workforce requirements independent of a discriminatory PLA mandate."

As noted by the NBCC, many private owners and municipalities have local hiring goals for construction projects independent of a government-mandated PLA, which can be problematic when construction unions have few local union members or not enough available union labor to meet a project's workforce needs. When demand for union construction workers is greater than supply, union hiring halls frequently call workers from out-of-area union halls called "travelers" or "boomers" to address a union-signatory contractor's labor needs. Under PLAs and typical union hiring hall rules, these union travelers/boomers receive hiring preference over qualified local nonunion workers—who comprise more than 80% of the local construction workforce in almost all markets across the country.

For these reasons, the proposal is likely to undermine construction industry efforts to attract a local, diverse and inclusive workforce and pool of contractors.

H. Mandating PLAs Under the Proposed Rule Will Otherwise Harm Competition

Because of the significant adverse impact of PLAs on nonunion and some union general contractors and subcontractors and their nonunion and union employees described in these comments, the inevitable result of the proposed rule will be to limit competition for federal construction projects by significantly reducing the number of bidders for such projects in direct violation of federal statutes discussed in Section III. A. of these comments.

In response to ABC's recent survey,[78] ABC member contractors overwhelmingly opposed the proposed rule, with 99% stating they would be less likely to begin or continue to bid on federal construction contracts if the proposed rule is finalized and 97% agreeing that PLAs reduce competition from subcontractors. Among active federal contractors who responded to the survey, 93% stated the proposal would result in less competition from subcontractors. Additionally, 97% of respondents who self-identified as small business federal contractors said they would be less likely to bid on contracts if the proposed rule is finalized, potentially affecting the federal government's small business procurement goals. Likewise, 99% of respondents who currently do not perform federal contracting work said they would be discouraged from beginning to do so by the proposed rule, indicating the proposal would likely suppress competition from new federal contractors if finalized.

[78] Ibid.

Individual comments by survey participants repeatedly mention problematic terms and conditions in typical PLAs discussed in Section I. These comments are compelling reasons why PLA mandates injure competition for federal construction projects.

ABC's September 2022 survey results should be concerning to federal agency construction contracting officers and the Biden administration. From fiscal year 2009-2021, ABC member prime contractors performed 51.1% of all federal construction contracts over $25 million, including 57% of the total value of all large-scale contracts.[79] Given that the vast majority of ABC general contractor members would be discouraged from bidding on federal contracts under the proposed rule, it is undeniable that "full and open competition" would be impossible to achieve with this proposal.

ABC MEMBERS WON MAJORITY OF LARGE-SCALE FEDERAL CONTRACTS >$25M, FY2009-FY2021

	# of Contracts	Percent of # of Contracts	Value (in $ billions)	Percent of Total Value
ABC	1,061	51.11%	$73.46	57%
Non-ABC	1,014	48.9%	$55.27	43%
Total	2,075	100%	$128.73	100%

Source: USASpending.gov (accessed 2/22/22) cross-referenced with ABC membership as of 12/20/21

II. The Asserted Justifications for the Proposed Rule Run Counter to the Record Evidence

President Biden's EO 14063 and related sections of the proposed rule rationalize the use of government-mandated "project labor agreements in connection with large-scale construction projects to promote economy and efficiency in federal procurement."[80] However, the proposal fails to provide any quantitative or qualitative research supporting these broad generalizations in support of government-mandated PLAs.

[79] Federal contract award data downloaded from usaspending.gov compared to list of general contractors with membership in ABC, December 2021, available at: https://tinyurl.com/3ahjye7e. This data does not count general contractors who are not signatory to a union and are not members of ABC. This data does not include work performed by ABC member subcontractors because the federal government does not track this data.

[80] See Section 1 (c) of EO 14063: https://www.federalregister.gov/d/2022-02869/p-4.

In contrast, strong evidence presented in these comments illustrates how government-mandated PLAs and the Biden administration's pro-PLA policies will injure competition, harm the economy and reduce efficiency in federal procurement.

As discussed throughout these comments, the EO and proposed rule's rationale used to justify PLA mandates on federal construction contracts ranges from factually incorrect to preposterous.[81]

For example, Section 1 of the EO justifies the use of government-mandated PLAs because "Construction employers typically do not have a permanent workforce, which makes it difficult to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed."[82] The proposal and EO offer no support for this claim. In contrast, as discussed in these comments, ABC contractors assert that nonunion contractors do have a permanent workforce and a PLA's requirement to replace most or all of its existing workforce with unfamiliar workers from union hiring halls and obey unfamiliar union work rules will result in unpredictable labor costs and expose a firm to additional productivity, quality and safety risks that would not otherwise exist on a project subject to fair and open competition standards free from government-mandated PLAs.

In fact, unionized contractors are the parties that typically do not have a permanent workforce—they build projects in a geographic region and receive labor from various signatory union halls containing local and out-of-area traveler workers with union cards. Unionized firms are more likely to have concerns with a steady supply of labor because union hiring halls may not have enough labor to meet a project's needs in a tight labor market. This is consistent with the fact that less than 13% of the U.S. construction industry workforce is unionized and less than 10% of the construction industry workforce is unionized in 24 states.

As further discussed in these comments, the EO and proposal repeatedly make unsubstantiated claims that a PLA mandate will "advance the interests of project owners, contractors, and subcontractors, including small businesses." But the truth is that PLAs address areas of concern unique to union-signatory contractors and inefficiencies in union CBAs.[83] The PLA's solutions to these "union problems" chill efficiencies and robust competition by nonunion firms. In addition, many of the alleged benefits of PLAs related to workforce development, drug testing, targeted local and diverse hire and contracting goals, safety and labor dispute avoidance are routinely handled on large-scale federal, state, local and private construction projects without the need for discriminatory and costly language in typical PLAs. In short, to quality nonunion contractors, government-mandated PLAs are a solution in search of a problem.

Finally, contractors have always been able to negotiate and enter into PLAs with labor unions independent of this policy, as guaranteed by the NLRA. If PLAs are beneficial to a contractor and its government client, they can negotiate and execute one independent of a disruptive

[81] See policy rationale for Section 1 (a) and (b) of EO 14063.
[82] See https://www.federalregister.gov/d/2022-02869/p-2.
[83] See discussion on the impact of government-mandated PLAs on costs in Section II. A. of this comment letter.

government-mandated PLA. The EO and proposed rule are not needed to ensure the use of voluntary government-mandated PLAs.

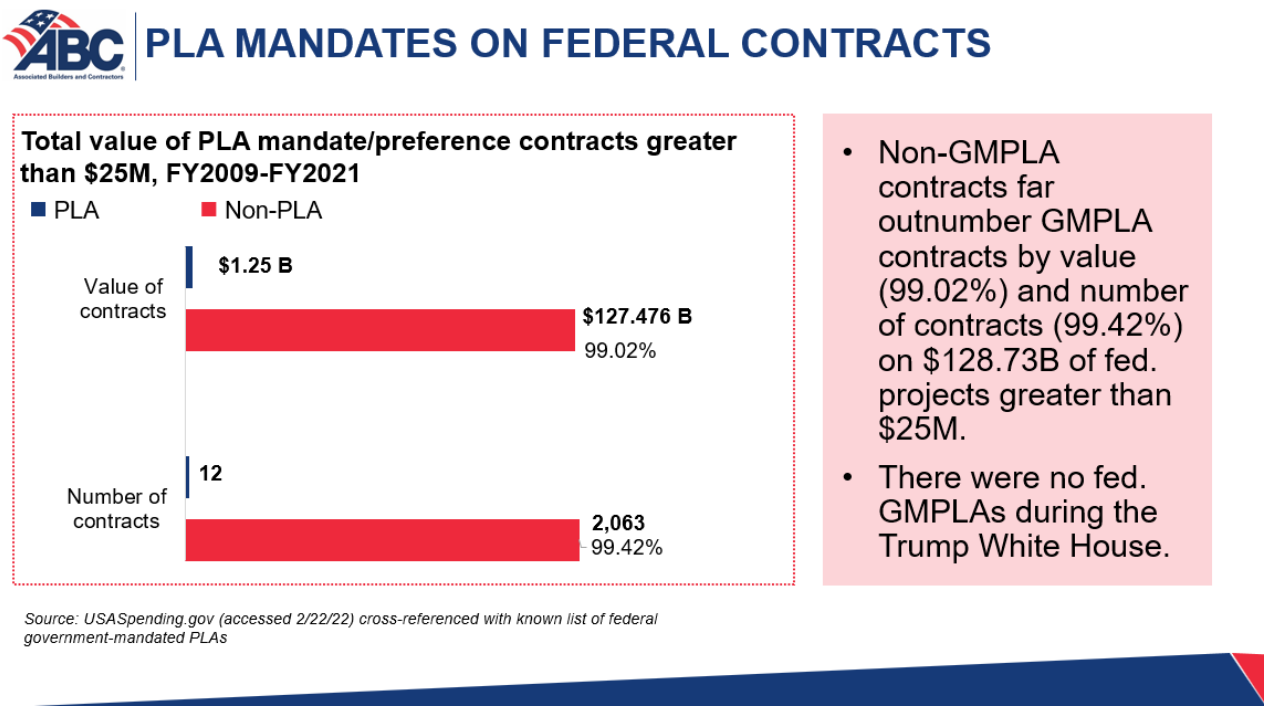
As such, the EO and proposed rule offer no factual justification for its claim that PLAs "promote economy and efficiency in federal procurement" and are necessary because "large-scale construction projects pose special challenges to efficient and timely procurement by the federal government."[84]

The truth is the federal government's pro-PLA policy of the last 12 years that encourages—but does not require—federal agencies to mandate PLAs provides the public with a comprehensive real-world demonstration that the proposed rule's assertion that PLAs "may provide structure and stability needed to reduce uncertainties for all parties connected to a large-scale construction project" has no basis in fact.[85]

In February 2009, President Barack Obama signed EO 13502, which encourages—but does not require—federal agencies to mandate PLAs on large-scale federal construction projects exceeding $25 million in total cost.[86] Notably, this policy allowed federal agency contracting officers to make decisions about PLA mandates on a case-by-case basis. It is not surprising that PLAs were rarely required.

Between fiscal years 2009 and 2021, 2,075 federal contracts worth $128.73 billion were subject to the Obama policy, but just 12 federal contracts worth a total of $1.25 billion were issued with a PLA mandated by a federal agency.[87] More than 99% of all federal construction contracts of $25 million or more during this time period were not subject to a government-mandated PLA.

[84] See Section 1 of EO 14063: https://www.federalregister.gov/d/2022-02869/p-2.
[85] See quoted language in the proposed rule preamble: https://www.federalregister.gov/d/2022-17067/p-10 and Section 1(b) of EO 14063: https://www.federalregister.gov/d/2022-02869/p-3.
[86] See https://www.gpo.gov/fdsys/pkg/FR-2009-02-11/pdf/E9-3113.pdf. EO 13502 also permits recipients of federal assistance to mandate PLAs on state and local public works projects.
[87] Chart available at: https://thetruthaboutplas.com/wp-content/uploads/2022/04/PLA-Mandates-on-Federal-Contracts-FY2009-FY2021-033022.png.



These data[88] illustrate that federal procurement officials—when given the freedom to assess whether government-mandated PLAs will benefit a large-scale construction contract—almost universally decided against requiring PLAs.

In addition, from 2001 to its repeal by the Obama policy, President George W. Bush's Executive Orders 13202 and 13208[89] prohibited government-mandated PLAs on $147 billion worth of direct federal construction projects.[90]

Yet for more than 20 years there have been no widespread reports of federal construction projects suffering from increased costs,[91] strikes,[92] labor shortages,[93] safety issues[94] or poor quality specifically attributable to the lack of a government-mandated PLA, which undermine common arguments PLA proponents use to justify PLA schemes.

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[88] This data is confirmed in the proposed rule, "According to the data collected by OMB, between the years of 2009 and 2021, there were a total of approximately 2,000 eligible contracts and the requirement for a PLA was used 12 times," at https://www.federalregister.gov/d/2022-17067/p-29.

[89] Executive Order 13202: Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, Feb. 17, 2001, and Executive Order 13208: Amendment to Executive Order 13202, Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects, April 6, 2001, also prohibited government-mandated PLAs on federally assisted construction projects procured by state and local governments.

[90] See research in Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem, The Beacon Hill Institute, August 2009: "One would expect there to be dozens of tales about labor strife, slowdowns and significant cost overruns that characterized this PLA-free world. Yet, we found no record of such tales."

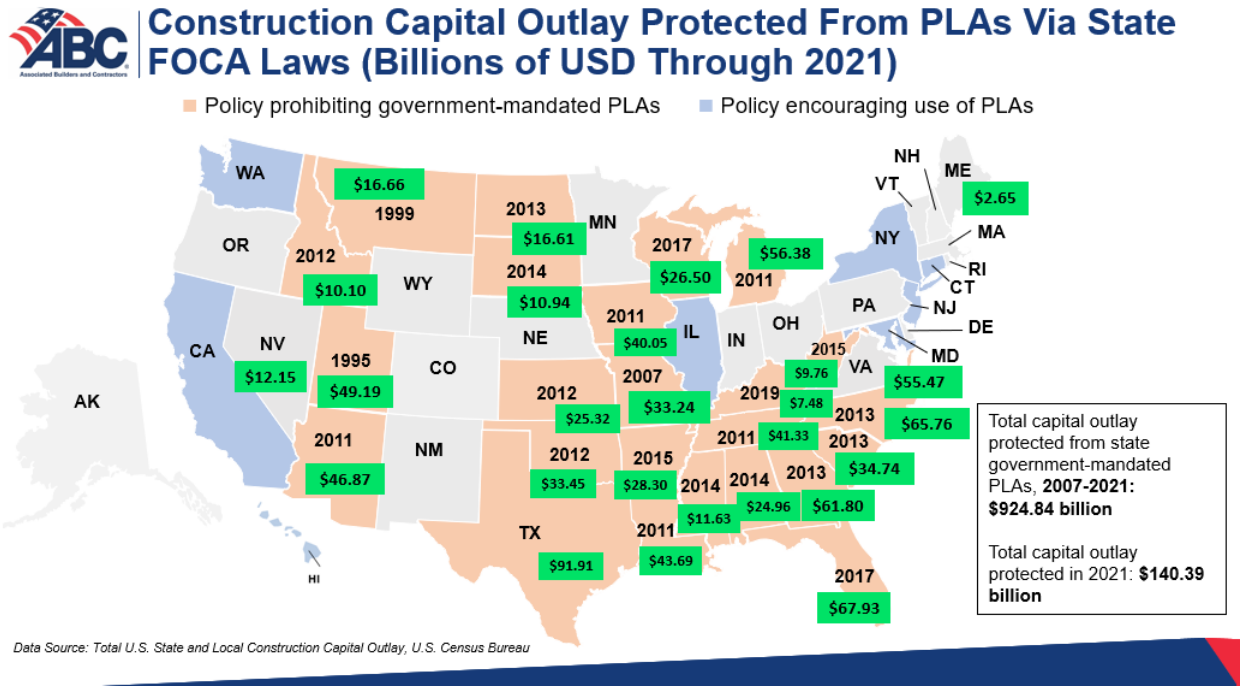
[91] Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects, March 10, 2021, https://tinyurl.com/3fefedna.

[92] See www.TheTruthAboutPLAs.com, Do Project Labor Agreements Stop Strikes on Construction Jobsites?, March 29, 2022.

[93] See www.TheTruthAboutPLAs.com, Biden's Project Labor Agreement Schemes Exacerbate Construction Industry's Skilled Labor Shortage, June 29, 2022.

[94] See www.TheTruthAboutPLAs.com, Setting the Record Straight: Do Government-Mandated Project Labor Agreements Really Improve Safety Performance? March 16, 2021, https://tinyurl.com/2fyyjkdm.

In addition, there have been no widespread reports of similar problems attributable to a lack of PLA mandates on public works construction projects in the 24 states that have passed laws restricting government-mandated PLAs on state, state-assisted and local construction projects to some degree—totaling almost $925 billion worth of public works construction put in place over the last 12 years.[95]



In fact, of the few federal construction projects subjected to government-mandated PLAs under the "PLA optional" Obama policy, many projects experienced delays,[96] poor local hire outcomes,[97] reduced competition and increased costs[98] as described in these comments.

Despite this evidence, the Biden EO 14063 and proposed rule's default pro-PLA mandate assumes a project procured with a PLA mandate will result in superior outcomes compared to a project procured via fair and open competition. As further discussed in Section II of this comment letter, the claimed justifications for the EO and proposed rule are contrary to the record of evidence and fail to justify PLA mandates at all.

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[95] See ABC analysis of U.S. Census Bureau data on value of state and local public construction projects at https://thetruthaboutplas.com/wp-content/uploads/2022/10/Cap-Outlay-for-Construction-in-PLA-Reform-States-through-2021-ABC-Update-080322.xlsx and related map at https://thetruthaboutplas.com/wp-content/uploads/2022/09/State-Map-Cap-Construction-Outlay-Protected-from-PLAs-Via-State-FOCA-Laws-Through-2021-080122.png.

[96] See www.TheTruthAboutPLAs.com, Delays and Increased Costs: The Truth About the Failed PLA on the GSA's 1800 F Street Federal Building, March 5, 2013.

[97] Data collected by Del. Eleanor Holmes-Norton, D-D.C., on federal projects subject to PLA mandates located in the District of Columbia under the Obama administration's pro-PLA policy demonstrated that PLAs delivered worse local hiring outcomes for District of Columbia residents than other large-scale federal projects not subject to a PLA in the region. See TheTruthAboutPLAs.com, Data Busts Myth That Project Labor Agreements Result in Increased Local Hiring, March 11, 2013.

[98] See www.TheTruthAboutPLAs.com, Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects, March 10, 2021, and GSA Wasted Millions on Union Handout, Where's the Outrage? April 10, 2012.

A. PLAs Will Not Achieve Economy But Will Instead Increase Costs Significantly

The proposed rule fails to identify any factual justification to support the claim that government-mandated PLAs reduce the cost of construction on large-scale federal construction contracts. There is no factual basis for claims that PLAs will reduce costs on federal construction projects.[99]

In contrast, recent surveys of federal contractors, robust academic studies and overwhelming evidence from the few PLA mandates on federal projects subject to the Obama administration's pro-PLA policy strongly suggests that PLA mandates needlessly increase costs that will be ultimately shouldered by taxpayers.

For example, a DOL Job Corps Center in Manchester, New Hampshire, was originally bid with a PLA mandate in 2009. After nearly three years of PLA-related delays and litigation, the project was bid with a PLA in January 2012 and then rebid without a PLA in October 2012. Results of bids without a PLA requirement prove PLAs increase costs and reduce competition. Without a PLA, there were more than three times as many bidders (nine versus three) and the low bidder's offer was $6,247,000 (16.47%) less than the lowest PLA bidder. In addition, firms that participated in both rounds of bidding submitted an offer that was nearly 10% less than when they submitted a bid with a PLA. Without a PLA, a local firm from New Hampshire won the contract and performed it safely, on time and on budget to the satisfaction of the DOL. In contrast, the low bidder under the PLA mandate was from Florida.[100]

In another example of increased costs and litigation[101] on a federal PLA project, in 2010, the General Services Administration awarded a $52.3 million contract to a general contractor to build the federal Lafayette Building in Washington, D.C., but then forced the contractor to sign a change order post-award and build it with a PLA. The PLA requirement needlessly cost taxpayers an additional $3.3 million.[102]

Another GSA project awarded in 2010, the GSA Headquarters at 1800 F St. in Washington, D.C., suffered a 107-day delay when members of a local construction trade council refused to accept the terms of a PLA the contractor presented for negotiations post award of the federal contract that had already been signed by the carpenters union not affiliated with the local

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[99] For example, the Beacon Hill Institute for Public Policy research has thoroughly debunked misleading claims and reports that PLA mandates reduce construction costs in Belaboring PLAs: A Critique of the Seeler Reports, Oct. 15, 2021, Affidavit of Prof. David G. Tuerck, PhD, before the Government Accountability Office, concerning Protests of Eckman Construction, Turnstone Corporation and Wu & Associates, Inc. No., B-406526,1; Solicitation DOL121RB20457, June 2012, and Pages 43-62 of Tuerck's Cato Journal article, Why Project Labor Agreements Are Not in the Public Interest, Winter 2010. It 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. There is no comparison of cost savings on a project with and without a PLA if the project was dominated by nonunion contractors and workers, as is the case in most markets across America.

[100] See www.TheTruthAboutPLAs.com for full details on the project, Union's Criticism Misses Mark on U.S. Department of Labor's New Hampshire Job Corps Center Project Labor Agreement Scheme, Sept. 3, 2013.

[101] Of note, prior to award, the project was delayed during the bidding process because the GSA was forced to remove a PLA mandate after a contractor filed a bid protest with the Government Accountability Office. See TheTruthAboutPLAs.com, GSA admits Jumping the Gun With PLA Gift to Unions, Dec. 29, 2009, Updated Feb. 2010.

[102] See TheTruthAboutPLAs.com, GSA Wasted Millions on Union Handout, Where's the Outrage? April 10, 2012.

construction trade council.[103] Following the impasse, the GSA instructed the prime contractor to proceed without a PLA with the trades council. This delay increased costs by millions of dollars and affected the project significantly. A subsequent review of documents related to change order negotiations between the GSA and the contractor revealed the GSA clawed back millions of dollars from the contractor built into its original bid related to the added costs associated with performing the project under a PLA.[104]

In addition to these real-world examples of added costs on federal construction projects under the Obama administration's pro-PLA policy, multiple academic studies of thousands of taxpayer-funded affordable housing[105] and school construction projects[106] found that government PLA mandates increase the cost of construction by 12% to 20% compared to similar non-PLA projects when all projects are subjected to prevailing wage regulations.[107]

In addition to these studies, PLA mandates on federally assisted construction projects procured by state and local governments,[108] as well as state and local government public works projects built without federal assistance, have revealed many instances in which PLAs have failed to achieve promised cost savings, and have instead led to cost overruns, delays,

[103] See www.TheTruthAboutPLAs.com, Delays and Increased Costs: The Truth About the Failed PLA on the GSA's Headquarters at 1800 F Street, March 5, 2013.
[104] On March 16, 2011, the House Oversight and Government Reform Committee's Regulatory Affairs, Stimulus Oversight and Government Spending Subcommittee held the hearing Regulatory Impediments to Job Creation: The Cost of Doing Business in the Construction Industry. GSA officials testified that the prime contractor on the 1800 F St. building could not finalize a PLA with numerous trade unions in the area. The contractor could only reach an agreement with the local carpenters' union, leading to delays and increased costs on the project. The financial impact of this delay has not been accurately calculated but is estimated to be in the millions of dollars.
[105] Ward, Jason M., The Effects of Project Labor Agreements on the Production of Affordable Housing: Evidence from Proposition HHH. Santa Monica, CA: RAND Corp., 2021. https://www.rand.org/pubs/research_reports/RRA1362-1.html.
[106] See multiple studies measuring the impact of PLA mandates on public school construction already subject to state prevailing wage laws in Connecticut, Massachusetts, New Jersey, New York and Ohio by the Beacon Hill Institute (http://beaconhill.org/labor-economics/); an October 2010 report by the New Jersey Department of Labor and Workforce Development, Annual Report to the Governor and Legislature: Use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008 (https://www.nj.gov/labor/forms_pdfs/legal/2010/PLAReportOct2010.pdf); and a 2011 study by the National University System Institute for Policy Research, Measuring the Cost of Project Labor Agreements on School Construction in California (http://www.nusinstitute.org/assets/resources/pageResources/Measuring-the-Cost-of-Project-Labor-Agreements-on-School-Construction-in-California.pdf).
[107] With or without a PLA, all federal projects are subject to federal labor and employment laws, including federal Davis-Bacon prevailing wage regulations, which require government-determined wages for building, heavy and highway projects that are typically union-scale wages where PLAs are most likely to be mandated. The research conducted looked at affordable housing and school construction projects subject to prevailing wage laws regardless of whether a PLA was required, which undermines arguments by PLA proponents that PLAs are needed to ensure high wages and savings from non-PLA projects are a result of undercutting wages and benefits.
[108] See www.TheTruthAboutPLAs.com, Government-Mandated Project Labor Agreement Failures on Federal and Federally Assisted Construction Projects, March 10, 2021.

local hire failures and safety incidents,[109] on such diverse public projects as stadiums,[110] convention centers,[111] civic centers,[112] power plants[113] and airports.[114]

In addition, ABC has collected more than a dozen examples of projects that were bid both with and without PLA mandates. 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.[115]

Finally, according to a September 2022 survey of ABC member contractors,[116] 97% of survey respondents said a construction contract that required a PLA would be more expensive compared to a contract procured via free and open competition. Survey respondents generally commented that PLA mandates increase construction costs by:

- Reducing competition from general contractors and subcontractors and their employees, including small and diverse subcontractors required to meet federal agency small business contracting goals;
- Imposing inefficient union work rules unique to union CBAs on nonunion contractors who use multiskilling strategies to increase labor productivity;
- Requiring contractors to contribute into union benefits programs, resulting in double benefits costs solely paid by nonunion contractors, as well as multiemployer pension plan withdrawal liability risk; and
- Added attorney costs and administrative staff costs needed to negotiate/understand a PLA, comply with the PLA and applicable CBA requirements and facilitate payments into unfamiliar benefits plans.

In light of the evidence in 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.

B. PLAs Will Not Achieve Efficiency But Will Instead Cause Contract Procurement and Project Construction Delays

[109] Many problematic PLA projects are documented in ABC General Counsel Maury Baskin's report, Government-Mandated Project Labor Agreements: The Public Record of Poor Performance (2011 Edition).
[110] 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; and "New Seattle Stadium Battles Massive Cost Overruns," ENR, July 27/Aug. 3, 1998, at 1, 9. By contrast, Baltimore's Camden Yards and Washington's FedEx Field, among many other merit shop stadiums built around the country over the past two decades, were built without any union-only requirements, with no cost overruns.
[111] Washington Business Journal (March 2003).
[112] "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.
[113] "Power Plant Costs to Soar," Pasadena Star-News, March 21, 2003.
[114] "SFO Expansion Project Hundreds of Millions Over Budget," San Francisco Chronicle, Dec. 22, 1999.
[115] See www.TheTruthAboutPLAs.com, Great Scott: Projects Bid With and Without PLA Mandates Show PLAs Increase Costs and Reduce Competition, April 18, 2013.
[116] Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive, ABC Newsline, Sept. 28, 2022.

According to a September 2022 survey of ABC member contractors,[117] 97% of respondents said that government-mandated PLAs decrease economy and efficiency in government contracting. Eighty-five percent said PLA mandates decrease the likelihood of completing a project on time and on budget, with just 9% saying there would be no impact.

As discussed already in ABC's comments, survey responses to open-ended questions illuminated compelling reasons why the Biden administration's EO and proposed rule is likely to result in delays during a federal agency's procurement of a federal contract subject to a PLA mandate, in addition to delays during the actual construction of the federal project subject to a PLA requirement.

This is particularly true for indefinite-delivery, indefinite-quantity contracts where the use of a PLA will for the first time be required on an order-by-order basis or for an entire contract, without any rational justification. Alternate III of the FAR Council's proposal gives contracting officers seemingly unbridled discretion to order IDIQ contracts to include PLA mandates with the order offer, prior to award or after award, thereby increasing the level of confusion and potential for delay in IDIQ construction projects.[118]

C. The Government Should Not Be Involved in Establishing the Terms of a PLA or Any PLA Negotiations Between Contractors and Unions

ABC is concerned that federal agency involvement in establishing the terms and conditions of a PLA—and the negotiation of a PLA in general—can harm competition and lead to needless delays and increased costs.

The proposed rule addresses the federal agency's involvement in PLA negotiations between a contractor and labor unions:[119]

> "FAR 22.504(c) is revised to remove direction that allowed agencies to specify terms and conditions of the PLAs and to engage in efforts to identify the appropriate terms and conditions for a particular construction project. DoD, GSA, and NASA believe the language at 22.504(b)(6), which authorizes agencies to ensure the PLA includes any additional requirements as the agency deems necessary to satisfy its needs, is sufficient. Further, the E.O. directs that an agency may not require contractors or subcontractors to enter into a PLA with any particular labor organization. The proposed rule replaces the current text at FAR 22.504(c) with this direction. Conforming changes are made in the provision at FAR 52.222-33, Notice of Requirement for Project Labor Agreement, and the clause at FAR 52.222-34, Project Labor Agreement."[120]

While it appears the FAR Council recognizes the perils of having federal agency representatives with insufficient expertise in construction industry collective bargaining insert themselves into PLA negotiations with specific language, ABC requests that the FAR Council

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[117] Ibid.
[118] See 22.504(d)(3) and 22.505(b)(3). See also https://www.federalregister.gov/d/2022-17067/p-127.
[119] See Sec. 4 of EO 14063 to review the general requirements of a PLA: https://www.federalregister.gov/d/2022-02869/p-12.
[120] https://www.federalregister.gov/d/2022-17067/p-20.

clarify this position by explicitly stating that federal agencies are prohibited from suggesting language and engaging in the PLA negotiation process in any form. Clarity is needed because a PLA's minimum terms still appear in the revised Alternate I[121] at FAR 52.222-34.[122]

ABC believes that if a PLA is to be required on a federal solicitation, its terms and conditions should be negotiated solely and directly by contractors with employees working on the PLA project and the labor unions representing workers covered by the PLA. It should only be these parties engaged in negotiating the terms of a PLA because they are the parties engaged in an employer-employee relationship, they may have appropriate experience and expertise to conduct such negotiations and they are the only parties explicitly authorized to enter into a PLA agreement under the NLRA.

In addition, ABC strongly urges the FAR Council to explicitly clarify that under no circumstances shall a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated in part or in whole by the federal agency or by a contractor (or group of contractors) not employing covered workers on the project. This is necessary in order to avoid reduced competition, litigation and delays, as ABC contractors frequently complain that solicitations containing a partially completed or final PLA that cannot be changed—in which they had no input—discourages them from submitting bids on a project.

D. The Timing of When a Federal Agency Requires an Executed PLA to Be Submitted During a Solicitation Can Create Delays and Increased Costs

ABC is concerned about the timing and mechanics of how a federal agency requires a PLA in a federal solicitation for construction services because all of the options in the FAR Council's proposal can result in needless delays, inefficiencies and increased costs for contractors, labor unions and federal agency contracting officers.

The proposed rule's changes to FAR provision at 52.222-33, Notice of Requirement for Project Labor Agreement,[123] provides a basic provision and two alternative provisions for the contracting officer to select from when including a PLA requirement in the solicitation. The basic provision says "(b)(1) [*all*] *offerors* shall negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract."[124] Alternate I says "(b)(1) *the apparent successful offeror* shall negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract."[125] Alternate II says, "(b)(1) *If awarded the contract, the Offeror* shall negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract."[126] (Emphasis added.)

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121 https://www.federalregister.gov/d/2022-17067/p-140.
122 https://www.federalregister.gov/d/2022-17067/p-133.
123 https://www.federalregister.gov/d/2022-17067/p-117.
124 https://www.federalregister.gov/d/2022-17067/p-119.
125 https://www.federalregister.gov/d/2022-17067/p-122.
126 https://www.federalregister.gov/d/2022-17067/p-125.

Each of these options requiring either—all offerors; the apparent successful offeror; or offerors awarded the contract, to submit an executed PLA during a project's solicitation process—create problems that may lead to delays when contractors negotiate and execute PLAs with labor organizations.

For example, federal agency language requiring all offerors on a particular project to negotiate a PLA with one or more unspecified labor organization and to submit an executed PLA with their bids is problematic. This inefficient practice wastes bidders' and labor unions' time and resources. It also wastes resources of federal agencies when a contracting officer reviews all of the PLA proposals from offerors.

In addition, ABC contractors complain that in geographic areas where merit shop contractors have dominant market share and unions have little or no presence, merit shop contractors have no idea which unions to contact to start required PLA negotiations as labor unions may not be local or have authorization to represent workers performing work in the project's geographic location. These factors are likely to result in needless delays and ultimately deter many qualified contractors from bidding on the project, in violation of federal statutes requiring full and open competition.

Moreover, ABC contractors cannot control whether they are able to fulfill the proposal's negotiation obligation with unions because they have no means to require union organizations to negotiate with them.

During ABC's September 2022 survey of members about PLAs and the proposal, ABC contractors raised concerns with a federal agency's requirement for contractors to execute a PLA with unions and submit it with a bid as a condition of winning a federal contract because it gives unions incredible leverage during PLA negotiations and undue influence in which contractors can be awarded a federal contract.

For example, if a prospective offeror successfully identifies correct representatives of appropriate labor organizations and attempts to contact them to request negotiations for a PLA, the contractor has no recourse if the labor unions do not respond or refuse to negotiate. Unions have no legal obligation to negotiate with any particular contractor and have no legal obligation to negotiate in a good-faith, nondiscriminatory and timely manner, absent an established collective bargaining relationship with the contractor under Section 9(a) of the NLRA.

Therefore, federal agency language requiring offerors to negotiate with labor unions—a party with which the contractor offeror has no authority to compel negotiations—effectively grants labor unions the power to prevent certain contractors from submitting an acceptable offer. Such a requirement enables the labor organizations to determine which contractors can submit a successful offer to federal agencies (by discriminating against contractors they do not want to negotiate with, i.e., because they are nonunion and compete with existing union-signatory contractors). The requirement also enables unions to determine which contractors will submit a competitive offer to federal agencies (i.e., by giving more favorable PLA terms to one contractor over another). Such a requirement violates EO 14063's directive that the PLA "allow

all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements."[127]

The proposal's PLA submission alternatives are not a solution for these concerns. For example, if a federal agency requires only the apparent successful bidder to execute a PLA after offers have been considered (Alternate I), or if it requires a bidder to execute a PLA after the contract has been awarded (Alternate II), then it puts offerors in an untenable position of submitting a bid on a project without knowing its likely labor costs on a project because the PLA has not been finalized prior to submitting a cost estimate. Ultimately, this can increase the likelihood of cost overruns and delays on the project in the long-term. In addition, once again, these options grant labor unions excessive bargaining leverage over contractors where labor unions can demand anything or the contractor risks losing the federal contract. This is exactly what happened on the GSA's 1800 F St. project, referenced previously, that led to a 107-day delay and increased costs and wasted resources for contractors, unions and contracting officers.

ABC urges the FAR Council to amend the proposal to explicitly confirm that parties involved in PLA negotiations shall never be required to reach an agreement with unions but should be required only to engage in good faith bargaining to impasse, consistent with the requirements of the NLRA.

E. PLA Mandates Will Result in Bid Protests, Litigation and Related Delays During the Procurement Process

Federal agencies will be exposed to costly bid protests, litigation and related delays if they mandate or use a PLA preference on federal construction projects. During the early years of the Obama administration's optional pro-PLA policy, federal contractors, with the support of ABC, filed five Government Accountability Office bid protests against PLAs mandated by four different federal agencies on large-scale federal construction projects. In each of the five GAO bid protests, federal agencies abandoned the PLA requirements after GAO officials suggested they violate federal contracting laws in specific circumstances.[128] In addition to GAO bid protests on individual projects, the Biden administration's pro-PLA policies are likely to be subject to broader litigation by ABC and/or other construction industry and taxpayer-advocate stakeholders seeking full and open competition and the best outcome for taxpayers, which is likely to delay any federal projects subject to PLA requirements and preferences.

F. PLA Mandates Will Lead to Delays During the Construction of Federal Projects

If a project were able to overcome legal challenges and move forward with a PLA requirement, the impact of a PLA on the performance of a contract may lead to delays.

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[127] https://www.federalregister.gov/d/2022-02869/p-14.

[128] See www.TheTruthAboutPLAs.com, Legal Challenges Against Federal Government-Mandated Project Labor Agreements During President Obama's First Term, Jan. 22, 2013.

According to ABC's September 2022 survey of ABC member contractors, 85% said PLA mandates decrease the likelihood of completing a project on time and on budget, with 9% saying there would be no impact. Respondents repeatedly referenced the following general reasons why a PLA mandate would specifically lead to delays during the construction phase of a project:

- PLAs reduce the pool of general contractors and subcontractors willing and able to compete for contracts to build a project. Less competition may exclude the best firms and/or result in weaker companies performing projects that can lead to delays related to inefficient use of labor, poor scheduling and construction quality.
- PLAs force contractors to replace its existing workforce with unfamiliar union labor that may harm a contractor's productivity, safety and quality construction practices that can lead to delays on a project.
- PLAs can artificially exacerbate the construction industry's skilled labor shortage by eliminating 87.4% of the industry's construction workforce because they have chosen not to affiliate with a union.
- PLAs will harm inclusion of small and disadvantaged businesses needed to meet federal agency prime and subcontracting goals because these firms are not unionized.

G. Strikes Are Rare in Today's Construction Industry, But Have Occurred on PLA Projects

The proposal and EO claim that PLA mandates are important tools to avoid project delays by preventing strikes and labor disputes on a project:

> "Challenges also arise because construction projects typically involve multiple employers at a single location, and a labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty 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 mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On large-scale projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.
>
> (b) Project labor agreements are often effective in preventing these problems from developing because they provide structure and stability to large-scale construction projects. Such agreements avoid labor-related disruptions on projects by using dispute-resolution processes to resolve worksite disputes and by prohibiting work stoppages, including strikes and lockouts. They secure the commitment of all stakeholders on a construction site that the project will proceed efficiently without unnecessary interruptions."[129]

However, the proposal presents no evidence of strikes and/or labor unrest on large-scale federal construction projects. ABC is unaware of any strikes or labor unrest on a federal

[129] See Section 1 of EO at https://www.federalregister.gov/d/2022-02869/p-2.

agency project subject to a PLA since ABC started monitoring federal contracts for such issues in 2001 through 2022, when PLA mandates were not used on more than 99% of hundreds of billions of dollars' worth of federal construction projects (as discussed in Section II of this comments letter).

In addition, the proposal fails to recognize other strategies to mitigate union-orchestrated strikes, work stoppages, slowdowns and other labor unrest through strong contracting language and other best practices commonly employed on projects independent of PLAs and their anti-competitive and costly provisions.

Historically, strikes and labor unrest executed by rank-and-file union members can shut down a jobsite and delay the opening of a project, potentially costing public and private construction owners time and money and harming the project end user's bottom line. In fact, one of the key reasons PLAs were originally developed in the 1930s was as a solution to prevent costly strikes on important large-scale public works projects like dams during an era when more than 80% of the U.S. construction workforce belonged to a union.

However, today, just 12.6% of the U.S. construction workforce belongs to a union, according to the U.S. Bureau of Labor Statistics[130]—a total reversal.

In addition, nonunion construction workers do not strike and there have been no reports of nonunion construction workers striking in the construction industry on federal projects.

PLA advocates display a classic case of "firefighter-arson syndrome" when promoting PLAs as a tool to prevent labor unrest. Unions offer lawmakers PLAs as a solution to a problem they create in exchange for a labor monopoly on taxpayer-funded construction projects. But the truth is that strikes in today's construction marketplace are relatively rare, and there have been strikes on PLA projects, which calls into question the value of these agreements preventing labor unrest.

In 2021, ABC reviewed the most recent data available from the U.S. Bureau of Labor Statistics' Work Stoppages Program, which tracks major work stoppages involving 1,000 or more workers, and found there were just 10 major work stoppages in the construction industry on public and private projects between 2010 and 2019.[131]

In addition, in 2021 ABC reviewed the most recent data available from the Federal Mediation and Conciliation Service[132] on historical construction industry work stoppages through FY 2019 and found there were just 45 construction industry work stoppages from 2015 to 2019 and 101 work stoppages from 2010 to 2014 on public and private projects.[133]

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[130] "Union Members – 2021," Bureau of Labor Statistics, January 2022.
[131] See https://www.bls.gov/web/wkstp/annual-listing.htm and ABC data at: https://thetruthaboutplas.com/wp-content/uploads/2021/03/BLS-Work-Stoppages-Over-1000-Employees-Data-Downloaded-031221.xlsx.
[132] See https://www.fmcs.gov/resources/documents-and-data/.
[133] See https://thetruthaboutplas.com/wp-content/uploads/2021/03/Construction-Industry-Work-Stoppages-1984-FY19-downloaded-from-FMCS-013021-V-022421.xls.

Likewise, a labor action tracker provided by Cornell University's School of Industrial and Labor Relations shows just six labor actions specific to the construction industry from January 2020 through October 2022.[134]

In the words of an ABC survey respondent, "Why lawmakers continue to rob taxpayers with a 20% cost premium markup on construction contracts because of a solution to a problem that is rare and rewards the party that creates the problem is baffling."

It's even more puzzling after examining the public record of union strikes on nonfederal public and private projects subjected to PLA mandates, despite promises that PLAs prevent strikes. For example, Joseph Hunt, who retired from serving as the president of the Ironworkers Union in 2011, devoted an entire column in a membership publication urging Ironworkers Union members not to strike on PLA projects:[135]

> "Once again, it is my duty to inform you there has been an increase in work stoppages on jobs governed by project labor agreements. A No Work Stoppage-No Lock Out clause is the most important because it is the foremost reason owners and contractors are willing to use the agreement [a PLA] to commit to an all-union job. They [owners] have a choice, and they know that the nonunion do not have jurisdictional disputers, nor do they have strikes."

Hunt's admission that government-mandated PLAs result in an all-union job, that nonunion workers don't disrupt jobsites and that ironworkers have been striking on PLA projects undermines decades of misinformation told by PLA advocates and sympathetic lawmakers who attempt to disguise what PLAs really are: schemes whereby government cronies cut competition from quality local nonunion contractors and union-signatory firms not affiliated with the unions favored in the PLA and steer contracts to political donors—in this case union-signatory contractors and union labor—at inflated costs shouldered by hardworking taxpayers.

Examples of strikes and walkouts on notable private and taxpayer-funded PLA projects across the country call into question the value of PLAs and their controversial no-strike promise.[136]

Media reports have called the federal, state and local taxpayer-funded Highway 99 tunnel mega-project underneath Seattle's downtown waterfront[137] the "West Coast's Big Dig,"[138] noting parallels to Boston's notoriously delayed and budget-busting series of tunnels and highway improvements.[139] The Seattle project has been plagued by delays, cost overruns, featherbedding, union strikes and labor disputes, a poor safety record, employees working on the jobsite while drunk, sexual harassment allegations and violations of state and federal

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[134] Search for construction in the Cornell ILR's tool at https://striketracker.ilr.cornell.edu/.
[135] See Hunt's President's Page column, Ironworkers Have Tradition and Honor in Project Labor Agreements, The Ironworker, February 2008.
[136] A chapter in ABC General Counsel Maury Baskin's report, Government-Mandated Project Labor Agreements: The Public Record of Poor Performance (2011 Edition), documents construction delays and cost overruns caused by strikes on more than a decade of various PLA projects across the country.
[137] https://www.fhwa.dot.gov/ipd/project_profiles/wa_alaskan_way.aspx.
[138] Seattle confronts prospect of its own long-delayed Big Dig, The Washington Post, Reid Wilson, Dec. 30, 2014.
[139] Editorial: Construction plans show state learned little from Big Dig, Gloucester Times, June 22, 2010.

minority contracting rules.[140] Both projects were procured with controversial government-mandated PLAs.

In 2018, the National Labor Relations Board imposed a settlement requiring that the Steamfitters Union stop illegal strikes and job actions against firms working at the $20 billion Hudson Yards multibuilding private development in New York City, which was subject to a PLA.[141] In 2015, the project was also subjected to a PLA-violating strike that impacted 30 other NYC jobsites and was resolved after a judge issued a restraining order against striking workers.[142]

Federally assisted projects that were part of the World Trade Center reconstruction following the 9/11 attacks in New York City suffered strikes in 2015,[143] 2013[144] and 2011,[145] despite no-strike promises contained in these projects' PLAs. Of note, the 4 World Trade Center jobsite suffered a crane accident in February 2012. In August 2012, the *New York Post* reported the Port Authority cracked down on drinking by construction union members following a series of accidents and reports of excessive workday boozing by union tradespeople employed at various World Trade Center construction projects, including 4 World Trade Center.[146]

In addition, Chicago was a relative hotbed of strikes on PLA projects in 2010,[147] but the most famous private project subjected to a strike in the city occurred on the $850-million Trump International Hotel and Tower in downtown Chicago. In June 2006, the Trump company developing the $850-million project in downtown Chicago sued three labor organizations for breaching the terms of a PLA after union members walked off the project during a strike.[148]

The Trump development company eventually settled the suit against the Chicago and Cook County Building and Construction Trades Council, the Construction and General Laborers' District Council of Chicago and Vicinity and Laborers' International Union Local 6.

Joseph Gagliardo, managing partner of the firm Laner, Muchin, Dombrow, Becker, Levin and Tominberg Ltd., represented 401 North Wabash in the action and told the media that the unfortunate lesson emerging from this strike and suit was to question the real value of PLAs with Chicago's construction unions.

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[140] See www.TheTruthAboutPLAs.com, The West Coast's Bid Dig Boondoggle Woes Continue: Seattle's Tunnel PLA Job Dangerous for Workers, March 22, 2016, and Despite Project Labor Agreement, Union Dispute Shuts Down Seattle Tunnel Job For Four Weeks, Sept. 18, 2013.
[141] Labor Board Requires Hudson Yards Unions to Stop Strikes, New York Post, Carl Campanile, July 31, 2018.
[142] Judge points to PLA in ordering union workers to end strike, Real Estate Weekly, July 6, 2015.
[143] See www.TheTruthAboutPLAs.com, NYC Union Strike Shuts Down Project Labor Agreement Jobsites Again, July 13, 2015.
[144] See www.TheTruthAboutPLAs.com, NYC Carpenters Union Breaks Project Labor Agreement's No-Strike Promise at 4 WTC Jobsite, July 2, 2013.
[145] See www.TheTruthAboutPLAs.com, Another PLA Myth Busted: PLAs Fail to Prevent Strikes on NYC Projects, Aug. 2, 2011.
[146] Port Authority cracking down on drinking by WTC construction crews, New York Post, Josh Margolin, Aug. 6, 2012.
[147] See www.TheTruthAboutPLAs.com, PLA Projects Delayed by Chicago Construction Union Strike: Another PLA Myth Busted, July 17, 2010.
[148] See case 401 North Wabash Venture LLC v. Chicago and Cook County Building and Construction Trades Council, N.D. Ill., No. 06-CV-3077, 6/5/06.

"The whole purpose of the project labor agreement is to prevent interruption and prevent delay and have labor peace," he said. "So the question this strike raises is—and I don't know the answer to it—what impact will this strike have on the willingness of other building owners to engage in a project labor agreement?"

This government data on the scarcity of construction industry strikes and examples of strikes on PLA projects undermine the proposal and EO's assertions that PLAs are needed to prevent strikes and labor unrest on large-scale federal projects.

H. PLAs Will Not Achieve Greater Efficiency in Terms of Safety, Quality or Project Delivery

There is no evidence to support claims that PLAs guarantee better safety, quality or construction project delivery. As demonstrated in Section II of these comments, ABC federal contractors have continued to win the majority of large-scale federal contracts and deliver quality work safely, on time and on budget without harmful government-mandated PLAs.

In addition, the majority of ABC's September 2022 survey respondents said PLA mandates would either result in construction projects that are less safe (65%) or have no impact on safety (34%). Three-quarters (75%) said PLAs would result in poorer quality or have no impact on quality (24%). Fully 85% said PLA mandates decrease the likelihood of completing a project on time and on budget, with 9% saying there would be no impact. [149]

Improved safety has been frequently cited as a justification for PLA mandates. However, there is no evidence to suggest that PLAs improve safety. Contractors are already required to follow all applicable federal, state and local safety regulations whether a project is built with or without a government-mandated PLA. Construction superintendents and others responsible for jobsite safety are required to comply with safety regulations that are constantly being issued and updated by the DOL's Occupational Safety and Health Administration.

Many states also have state and local workplace safety regulations that may be more expansive than federal OSHA regulations, and these also must be followed as a condition of complying with a government contract. These measures remain in place on jobs built with and without government-mandated PLAs.

Many construction contractors have additional internal company safety education programs, jobsite safety plans and in-house safety departments and rely on third-party experts and external safety professionals to bolster jobsite safety. ABC believes maintaining world-class safety is no accident and created the STEP Safety Management System, a program that helps industry contractors improve jobsite safety.[150] STEP measures how much leading indicators—proactive injury and hazard elimination tools on the jobsite—improve safety performance.

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[149] Survey: 97% of ABC Contractors Say Biden's Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive, ABC Newsline, Sept. 28, 2022.
[150] http://www.abcstep.org/.

ABC's Safety Performance Report[151] captures data on nearly a billion hours of construction work from STEP participants and identifies the best practices and core leading indicators that had the biggest impact on safety performance. In 2021, those included the use of personal protective equipment, supervisor safety meetings, pre-planning for project safety and employee participation in safety reporting and processes, among others. The findings of ABC's 2022 Safety Performance Report show that safety processes and planning are the keys to project safety. Top-performing STEP companies achieved incident rates 645% safer than the BLS industry average in 2021 by focusing on safety through a companywide commitment to safety as a core value.

Creating an effective company safety culture and formal process for tracking these leading indicators and acting on them has produced positive and meaningful safety outcomes without the necessity for a government-mandated PLA.

In addition, BLS data suggests that government-mandated PLAs do not measurably improve safety. The 2019 BLS Survey Occupational Injuries and Illnesses and the BLS Census of Fatal Occupational Injuries show that states with laws prohibiting government-mandated PLAs had average of 2.4 total recordable construction incidents, while states that allow and encourage government-mandated PLAs had an average of 3.5 total recordable construction incidents.[152]

In fact, a government-mandated PLA can undermine a company's safety culture by replacing all or most of its existing workforce with construction workers from union hiring halls with unknown safety education and no familiarity with a company's existing safety program and culture.

Likewise, a government-mandated PLA can also undermine a project's quality by requiring that contractors get most or all of their labor from union hiring halls and follow inefficient union work rules. ABC contractors raise concerns that both factors are likely to result in the performance of a project that fails to meet a company's quality standards. ABC contractors say the use of existing employees and multiskilling helps ensure quality work and consistent labor costs, but those are undermined when a PLA is mandated.

Based on the lack of evidence for improvements to safety, quality or project delivery, there is no "efficiency"-based justification for mandating a PLA on federal construction projects.

[151] ABC 2022 Safety Performance Report: Top-Performing STEP Members Are Six Times Safer Than Industry Average, ABC, April 29, 2022.
[152] See www.TheTruthAboutPLAs.com, Setting the Record Straight: Do Government-Mandated Project Labor Agreements Really Improve Safety Performance? March 16, 2021, https://tinyurl.com/2fyyjkdm.

III. Based on the Facts Set Forth Above, the Executive Order and the Proposed Rule Implementing It Violate Numerous Federal Laws and Must Be Withdrawn

A. The Proposed Rule Violates CICA's Mandate of "Full and Open Competition" in the Award of Federal Construction Contracts

The foundation for the federal government's procurement requirements is the Competition in Contracting Act of 1984.[153] CICA was enacted to assure that all interested and responsible parties have an equal opportunity to compete for and win federal government contracts. Full and open competition means that all responsible sources are permitted to submit competitive proposals on a procurement action, without favoritism or discrimination in the procurement process. CICA requires, with certain limited exceptions, that the federal government promote full and open competition in awarding contracts.[154]

Of particular significance to the proposed rule, CICA expressly bars federal agencies from using restrictive bid specifications 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."[155]

As discussed above, the proposed rule conflicts directly with CICA by requiring federal agencies to impose PLAs which discriminate against and injure competition among potential bidders, i.e., those contractors who are not signatory to certain favored union labor unions and corresponding CBAs.[156] By demonstrating a preference toward a narrow class of contractors, this proposal and government-mandated PLAs clearly do not "obtain full and open competition" and are therefore unlawful under CICA.

B. The Proposed Rule and Executive Order Exceed the President's Authority Under the Federal Property Administrative Services Act

The sole statutory authority for the proposed rule, and the president's EO 14063 cited therein, is the Federal Property and Administrative Services Act of 1949.[157] That FPASA is intended to "provide the Federal Government with an economical and efficient system" of government procurement. The act gives the president the authority to "prescribe policies and directives that [the President] considers necessary to carry out" the act, only so long as such policies are "consistent with" the act and with other laws, such as CICA. Unless President Biden has acted

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[153] 40 U.S.C. §471 *et seq*. and 41 U.S.C. §251 *et seq*.
[154] 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).
[155] *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).
[156] More than 87% of the U.S. construction industry workforce do not belong to a union and are employed by contractors who are not signatory to any union agreements, according to U.S. Bureau of Labor Statistics Table 3, Union affiliation of employed wage and salary workers by occupation and industry, accessed Oct. 4, 2022, available at: https://www.bls.gov/news.release/union2.t03.htm.
[157] 40 U.S.C. § 101, *et seq*.

in a manner consistent with this statutory authority, neither the proposed rule nor EO14063 is valid.[158]

No president has previously claimed the authority under the FPASA to mandate PLAs on federal construction projects throughout the government. Such an unprecedented arrogation of authority to the executive branch violates the Constitution in a manner squarely prohibited by the U.S. Supreme Court in West Virginia v. EPA.[159] In contrast, President Obama's EO 13502 only "encouraged" federal agencies to consider and, if appropriate, adopt PLAs if specific criteria were met. As discussed in ABC's comments, very few federal contracts were actually subjected to PLA mandates under the Obama EO 13502, which itself is proof that the government procurement officials recognized the harms caused by imposing PLAs on federal construction procurements across the board.

ABC's comments present overwhelming evidence of problems on projects subject to government-mandated PLAs which, in concert with the federal government's limited use and negative experiences with PLA mandates under President Obama's EO 13502 and related FAR regulations[160] since 2009, thoroughly undermines EO 14063 and the proposed rule's justifications for PLA mandates on federal construction contracts. As a result, the EO and the proposed rule cannot be found to be authorized by the FPASA.[161]

C. By Overturning Previous Regulations Governing PLAs Without Adequate Justification, The Proposed FAR Rule Is Arbitrary and Capricious in Violation of the Administrative Procedure Act

The Supreme Court has repeatedly held that agencies act arbitrarily when they change course without dealing with the important aspects of the problem addressed by the rule they purport to reconsider.[162] Here, the proposed FAR Council rule fails to address the injuries to competition, discrimination, increased costs and greater likelihood of delays in construction caused by PLA mandates, as demonstrated throughout ABC's comments in this document.

Agency reversals of policy have also been vacated where they rely on factors that they should not have considered, and where they offer explanations for new rules that run counter to the evidence.[163] As shown throughout ABC's comments, the proposed FAR Council rule offers explanations for the PLA mandate that run counter to the evidence. The use of internally

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[158] *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.").
[159] 142 S. Ct. 2587, 2608 (2022) (refusing to permit the executive branch to exercise powers of vast economic and political significance unless Congress has spoken clearly to authorize the agency to exercise such powers.). See also Georgia v. President of the U.S., 46 F. 4th 1283 (11th Cir. 2022) (rejecting president's claimed authority to impose vaccine mandates on government contractors under the FPASA).
[160] See FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects, published April 13, 2020, effective May 13, 2010, and EO 13502, *Use of Project Labor Agreements for Federal Construction Projects*, signed Feb. 6, 2009, (https://www.govinfo.gov/content/pkg/FR-2009-02-11/pdf/E9-3113.pdf).
[161] Because of the president's failure to justify his executive order with facts demonstrating a close nexus between government-mandated PLAs and increase economy and efficiency of federal procurement, such cases as *AFL-CIO v. Kahn*, 618 F. 2d 784 (D.C. Cir. 1979) are distinguishable.
[162] *See, e.g.*, *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020); *State Farm*, 463 U.S. at 43 (1983) ("An agency's action is arbitrary and capricious, … where it fails to consider important aspects of the problem.").
[163] *Id.*; *see also FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 515 (2009).

contradictory reasoning also indicates arbitrary action.[164] As shown throughout ABC's comments, the FAR Council's rationales plainly contradict themselves, as the PLA mandates do not promote greater efficiency or reduced cost but the exact opposite instead.

As the Supreme Court has also held, an agency that purports to be changing longstanding policies, as is certainly occurring here, must also consider costs to regulated parties, as well as the reliance interests of the regulated parties.[165] Government contractors in the construction industry have long relied on the principle of government neutrality in procurement to provide competitive, responsive and responsible bids. The proposed rule upends these longstanding principles without any consideration of the reliance interests of the regulated parties.[166]

In sum, the FAR Council's proposed PLA mandate rule is arbitrary and capricious because the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider important aspects of the problem, offers explanations for its decision that run counter to the evidence before the agency and/or fails to address the costs and reliance interests of the regulated parties. For all of these reasons, the proposed PLA mandate rule violates the APA, as a federal court is likely to find, and the proposed rule should be immediately withdrawn.

D. The Proposed Rule Discourages Small and Disadvantaged Businesses From Bidding on Federal Construction Projects, Thereby Violating the Small Business Act

The adverse economic impact of PLAs on small businesses in the construction industry directly contravenes Congress's repeatedly expressed intent to promote and encourage federal procurement to small businesses.[167] In 1978, Congress amended the Small Business Act to require all federal agencies to set percentage goals for the awarding of procurement contracts to small businesses.[168]

As referenced throughout these comments, the majority of ABC's contractor members are classified as small businesses. The companies represent the backbone of the construction industry. Unfortunately, the proposed rule would continue a trend of policies that have reduced small business participation in federal contracting. Small businesses have suffered a 60% decline in the number of firms awarded federal contracts from 2010-2020, according to SBA data.[169]

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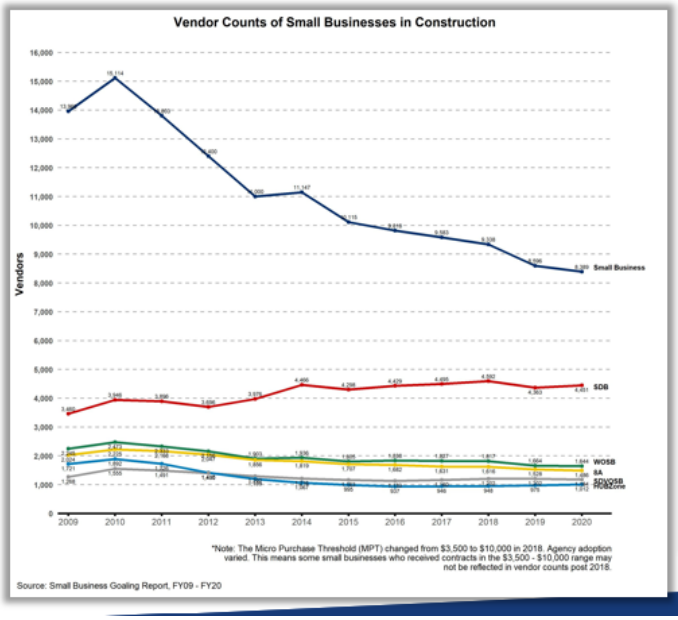
[164] *See Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999, 1030 (5th Cir. 2019) ("[T]he agency's rationales contradict themselves...and therefore cannot stand.").
[165] *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016); *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021) (*en banc*).
[166] *See also Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 387 (5th Cir. 2021).
[167] See discussion in An Overview of Small Business Contracting, Congressional Research Service, updated July 29, 2022.
[168] P.L. 95-507 (1978), 15 U.S.C. 644 (g).
[169] Chart available at: https://thetruthaboutplas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png. The data was prepared by an SBA economist who said, "The charts represent data on vendors who have received obligations. The definition of 'small' comes from the contracting officer's determination when the contract was awarded. The COs follow the NAICS size standards." Data is from FPDS that can be publicly accessed through SAM.gov: https://sam.gov/reports/awards/standard.

Number of Construction Industry Small Businesses Awarded Federal Contracts Declined 60% From 2010-2020



Vendor Counts of Small Businesses in Construction

FY	Small Business	SDB	SDVOSB	HUBZone	WOSB	8A	SBGR
2009	13960	3460	1268	1721	2245	2024	16186
2010	15114	3946	1555	1892	2473	2225	17644
2011	13803	3896	1491	1726	2333	2168	16335
2012	12400	3696	1400	1416	2156	2047	14510
2013	11000	3976	1292	1199	1903	1856	12690
2014	11147	4466	1216	1067	1936	1819	12706
2015	10115	4298	1163	995	1805	1707	11724
2016	9818	4429	1133	937	1838	1682	12465
2017	9583	4495	1160	946	1827	1631	12146
2018	9338	4592	1202	948	1817	1616	11424
2019	8596	4363	1202	975	1664	1528	10504
2020	8389	4451	1184	1012	1644	1486	10191

The decline in small business participation in federal contracts directly correlates with increasing federal regulatory burdens. Small business contractors may choose to bid on private sector and state/local government contracts when increased regulatory clarity and lower regulatory burdens reduce costs related to the need for expertise from attorneys and compliance professionals.

The proposed rule's imposition of government-mandated PLAs represents another burden for small businesses, despite EO 14063's erroneous claim that "the use of project labor agreements is fully consistent with the promotion of small business interests."[170]

The truth is the discriminatory nature of government-mandated PLAs in the proposed rule will have a disparate impact on federal small business general contractors and subcontractors, many of whom are minority-, women-owned and disadvantaged businesses and employ a diverse workforce. The majority of these firms are not unionized and would be disenfranchised by the costly requirements of government-mandated PLAs, which larger construction firms are more capable of absorbing because a greater proportion of larger firms are unionized, although the majority of large contractors are not signatory to a union and would also be harmed by government-mandated PLAs and this proposal.

Responses to ABC's September 2022 survey of federal contractors support this point. Ninety-seven percent of respondents who self-identified as small business owners said they would be less likely to bid on contracts if the proposed rule is finalized, and 73% of these respondents stated that PLAs decrease the hiring of minority, women, veteran and disadvantaged business enterprises.

[170] See discussion in EO 14063: https://www.federalregister.gov/d/2022-02869/p-3.

E. The Proposal's Expected Impact and Initial Regulatory Flexibility Analysis Vastly Underestimates the Economic Impact of the Proposed Rule

The proposed rule's Expected Impact section estimates an impact of only $549,136 annually,[171] and the rule's Initial Regulatory Flexibility Analysis states that the FAR Council "[does] not expect this rule to have a significant economic impact on a substantial number of small entities."[172] However, these assessments are based on a number of deeply flawed assertions, and the IRFA should be redone prior to any finalization of the proposed rule. This is especially important as a corrected analysis is likely to find that the proposed rule will have an impact on the economy greater than $100 million per year, qualifying the rule as a major rule under the Congressional Review Act.[173]

First, the analysis estimates that between 40 and 80 hours will be spent by each party involved in negotiating a PLA on behalf of a contractor.[174] Given the protracted nature of PLA negotiations, as demonstrated throughout ABC's comments, it is likely that this is a significant underestimation.

As well as relying on a flawed estimate of the hours spent on negotiations, the analysis also underestimates attorney fees by calculating attorney costs at $71.17 per hour.[175] Reports indicate that lawyers specializing in employment/labor matters charge an average of $319 to $341 per hour,[176] again indicating that the FAR Council has massively understated costs associated with PLA negotiations.

The FAR Council also estimates that each prime contractor submitting a PLA for a construction contract of $35 million or more is likely to have approximately two subcontractors.[177] It is highly unlikely that the vast majority of prime federal contractors at this scale would hire so few subcontractors. In ABC's 2022 survey, 93% of respondents disagreed with the proposed rule's inaccurate estimate. Respondents most frequently stated that such a project would require 10 to 15 subcontractors, illustrating that the estimate is seriously flawed.

Further, the proposed rule estimates that subcontractors will only take one to 10 hours to read, understand and implement PLAs negotiated by prime contractors.[178] Given the lengthy and complex nature of PLAs, this estimate is unrealistically low and further undermines the accuracy of the analysis.

Given the significant inaccuracies and underestimations outlined above, the FAR Council must reconduct its analysis of the rule's expected impact and its IRFA to obtain an accurate

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[171] See preamble: https://www.federalregister.gov/d/2022-17067/p-34.
[172] See preamble: https://www.federalregister.gov/d/2022-17067/p-40.
[173] 5 USC § 804(2).
[174] See preamble: https://www.federalregister.gov/d/2022-17067/p-32
[175] Ibid.
[176] "2022 Legal Trends Report," Clio, Oct. 10, 2022.
[177] See preamble: https://www.federalregister.gov/d/2022-17067/p-48.
[178] See preamble: https://www.federalregister.gov/d/2022-17067/p-34.

understanding of the impact this proposed rule will have on small businesses, federal procurement and the overall construction industry.

F. The Proposed Rule Constitutes Regulatory Interference With Private Employment Rights Under the NLRA, ERISA and National Apprenticeship Act

Although the proposed rule purports to serve the federal government's proprietary interests, its establishment of a new governmentwide policy requiring PLAs constitutes unlawful regulation which interferes with private sector labor relations and fringe benefit programs in violation of the NLRA and ERISA. The proposed rule is not protected from challenge by the Supreme Court's limited holding in Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("Boston Harbor"),[179] because it is not limited in its scope to a single project.[180]

In addition, the proposed rule violates Section 8(d) of the NLRA, which was not addressed in Boston Harbor, because it imposes labor agreements on construction contractors over their objection.[181] The proposed rule is also inconsistent with Sections 8(e) and 8(f) of the NLRA, which the Supreme Court referred to as exempting public entities from NLRA preemption, solely to the extent that such entities acted in a manner that was authorized for private construction users under the NLRA. Sections 8(e) and 8(f), however, only authorize PLAs to be entered into by "employers in the construction industry" and even then, only in the "context of collective bargaining" on a voluntary basis, uncoerced by either unions or governments.[182]

The proposed rule likewise violates ERISA[183] by encouraging federal agencies to mandate employer participation in union benefit programs covered by that act, which ERISA has long declared to be voluntary, not mandatory. In addition, the proposed rule discriminates against nonunion benefit programs that are supposed to be protected by ERISA, including nonunion apprenticeship training programs. Employees of nonunion contractors who are forced by federal agencies to sign PLAs will no longer receive credit toward their existing apprenticeship programs, and such employees will be forced to enroll in union apprenticeship programs (or alternatively, the nonunion contractors will be forced to hire existing union apprentices instead of their own). Such government-mandated discrimination violates the National Apprenticeship Act, which has been previously found to prohibit union versus nonunion discrimination.[184]

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[179] 507 U.S. 218 (1993).
[180] *See Chamber of Commerce v. Brown*, 522 U.S 60 (2008) ("In finding that the state agency had acted as a market participant, we stressed [in *Boston Harbor*] that the challenged action "was specifically tailored to one particular job," and aimed "to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost."
[181] *See* 29 U.S.C. § 158(d), which expressly states that neither party to collective bargaining can be compelled by the government to agree to a proposal. *See also H.K. Porter v. NLRB*, 397 U.S. 99, 103 (1970).
[182] *See Glen Falls Building and Construction Trades Council*, 350 NLRB 417 (2007) (Invalidating a PLA imposed by an owner on construction contractors outside the context of the owner's collective bargaining).
[183] 29 U.S.C. § 1001, *et seq*.
[184] *Associated Builders and Contractors, Inc. v. Reich*, 963 F. Supp. 35, 38 (D.D.C. 1997).

G. The Proposed Rule Violates the Congressional Review Act

The proposed rule incorrectly states that "this rule is not a major rule under 5 U.S.C. 804."[185] ABC disagrees. The Congressional Review Act (as codified at 5 U.S.C. §804(2)) defines a major rule as including any rule likely to result in:[186]

> (A) an annual effect on the economy of $100,000,000 or more;
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
> (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

As discussed above, the imposition of PLAs on federal agency construction projects will have significant adverse effects on competition, will cause major increases in construction costs for federal agencies and are likely to have an annual effect on the economy of $100 million or more. In addition to added regulatory costs to the federal contracting community discussed in ABC's comments in Section III. E., if federal agencies mandate PLAs on just 10 federal construction projects, the CRA's $100 million annual effect on the economy threshold will be reached.[187] This means that the FAR Council is required to conduct a proper cost benefit analysis of the proposed rule and government-mandated PLAs, and otherwise comply with the "major rule" requirements of the CRA.

For each of these reasons, ABC believes that the FAR Council must reclassify the proposed rule as a major rule and comply with all of the requirements of the Congressional Review Act.

H. The Proposed Rule Fails to Establish Any Meaningful Criteria for Federal Agencies to Apply in Considering Whether to Impose PLAs

The proposed rule amends the FAR[188] to require federal agencies to mandate a PLA on all large-scale federal construction contracts of $35 million or more. This ABC-opposed blanket PLA requirement fails to establish any meaningful criteria or analysis about why a PLA is appropriate for a specific project. The proposal presumes that all government-mandated PLAs will lead to economy and efficiency in federal contracting, despite overwhelming evidence that PLA mandates injure competition and undermine economy and efficiency in federal contracting, as discussed in ABC's comments on the proposal. In addition, the proposal fails to

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[185] See proposed rules' preamble VI. Congressional Review Act: https://www.federalregister.gov/d/2022-17067/p-39.
[186] See U.S. Government Accountability Office resource and FAQs on the CRA at: https://www.gao.gov/legal/other-legal-work/congressional-review-act and The Congressional Review Act (CRA): Frequently Asked Questions, Congressional Research Service, Updated Nov. 21, 2021.
[187] The FAR Council's proposal says the rule will cover roughly 120 projects annually, at an average cost of $114 million per project, totaling more than $13 billion worth of federal construction per year. The FAR Council's proposal says that not all of these projects are likely to have PLAs mandated on them. Academic research suggests that PLA mandates increase the cost of construction by between 12% and 20% per project. Therefore, it would take less than 10 federal construction projects—at an average of $114 million per project—to be subjected to PLA mandates to exceed the CRA's $100,000,000 major rule economic impact threshold if each of these PLA projects experienced a conservative 12% cost inflation resulting from the PLA mandate.
[188] See revisions to FAR 22.503 at: https://www.federalregister.gov/d/2022-17067/p-amd-8.

assess the stronger likelihood that a PLA mandate will have a greater negative impact in certain regions and construction markets across America where union contractor market share and union labor membership is insignificant.

Instead, the onus is placed on federal contracting officers to plead with federal agency senior procurement officials to opt out of the PLA mandate for a particular construction project. The proposed rule's revisions to the FAR at 22.504[189] allows senior procurement officials to approve exceptions to the blanket PLA mandate policy[190] "by providing a specific written explanation of why at least one of the following conditions exists with respect to the particular contract":[191]

- Requiring a PLA would not achieve "economy and efficiency" in federal procurement;[192]
- Requiring a PLA would substantially reduce the number of potential bidders so as to frustrate full and open competition, i.e., where adequate competition at a fair and reasonable price could not be achieved;[193] or
- Requiring a PLA would be inconsistent with statutes, regulations, other EOs or presidential memoranda.

While ABC appreciates that the FAR Council's proposal may allow for some exceptions to inflationary and anti-competitive PLA mandates, the rationale for a blanket PLA requirement on all federal construction projects of $35 million or more—regardless of its schedule, complexity or location—is unfounded despite the existence of this exception procedure.

In addition, the proposed rule establishes five "factors in deciding whether the use of a project labor agreement is appropriate for a construction project where the total cost to the Federal Government is less than that for a large-scale construction project [$35 million]."[194] ABC strongly urges the FAR Council to remove this provision from the proposal as there is no evidence suggesting that PLA mandates are useful for projects below the $35 million project

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[189] See the proposals amended FAR language particular to exceptions to project labor agreement requirements at: https://www.federalregister.gov/d/2022-17067/p-96.

[190] See discussion in the proposed rule here: https://www.federalregister.gov/d/2022-17067/p-21.

[191] See FAR language at: https://www.federalregister.gov/d/2022-17067/p-96.

[192] The revised FAR language says the exception for this factor shall be based on one or more of the following factors:

(A) The project is of short duration and lacks operational complexity.

(B) The project will involve only one craft or trade.

(C) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors.

(D) The agency's need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable.

[193] The revisions to the FAR at 22.504 say "(ii) Market research indicates that requiring a project labor agreement on the project would substantially reduce the number of potential offerors to such a degree that adequate competition at a fair and reasonable price could not be achieved. (See 10.002(b)(1) and 36.104). A likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage under this authority unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price" at https://www.federalregister.gov/d/2022-17067/p-102 and "(2) When determining whether the exception in paragraph (d)(1)(ii) of this section applies, contracting officers shall consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the requirement for a project labor agreement (*e.g.,* costs of labor or materials, supply chain costs). Agencies may rely on price analysis conducted on recent competitive proposals for construction projects of a similar size and scope," at https://www.federalregister.gov/d/2022-17067/p-104.

[194] https://www.federalregister.gov/d/2022-17067/p-86.

threshold. Eliminating the option for PLA mandates on smaller federal construction projects—including those procured under IDIQ—will support the inclusion of small and diverse businesses pursuing federal contracts, among other cost and inclusion benefits of fair and open competition discussed in these comments.

I. ABC Recommendations on PLA Inclusion and Exception Language

Of note, ABC supports the proposal's directive that such exceptions must be granted for a particular contract by its solicitation date—as opposed to after the solicitation has been issued with a PLA requirement. Submitting a bid on a federal construction contract costs federal contractors' time and money and additional opportunity costs of not pursuing other contracting opportunities. Compressing a bidding schedule to accommodate a project that is now free from an anti-competitive PLA mandate will deter full and open competition, even if the PLA is removed at some point in the solicitation process. For these reasons, ABC recommends that the FAR Council's proposal explicitly state that a PLA cannot be required by a federal agency after a project's solicitation date. ABC observed that federal agencies mandate PLAs at various phases of the procurement process following the issuance of a federal construction project's solicitation, which created a number of problems for contractors and was very disruptive to the procurement process in general under the Obama pro-PLA policy.

In addition, ABC recommends that when federal agencies conduct market research through a Request for Information advertised on SAM.gov to determine if a project should be exempt from a PLA mandate that federal agencies use a governmentwide uniform survey or set of questions with consistent formatting for federal contractors to respond to.

ABC also recommends that the FAR Council require contracting officers to give contractors at least two weeks to respond to the survey. ABC members have completed thousands of responses to hundreds of federal agency PLA surveys under the Obama PLA policy used to determine if a PLA is appropriate for a federal construction project of $25 million or more. ABC contractors broadly complain that each federal agency—and even regional offices within an agency—asked different PLA assessment questions (as many as 23 questions) and had different RFI formats. In most instances, federal agencies also gave contractors less than a week to respond to the surveys once published on SAM.gov, which is not enough time to respond to a survey with meaningful research and information.

Both of these factors undermine contractor participation and strategies to alleviate paperwork burdens that can be gained by establishing a uniform process and response time to determine if a PLA is appropriate or not appropriate for a project.

Conclusion

For all of the reasons discussed in this comment letter, ABC strongly urges the FAR Council to immediately withdraw the proposed rule. Instead of needlessly restricting the pool of eligible bidders and construction workforce, increasing costs, causing delays and exposing the Biden administration and individual federal construction projects to litigation, the federal government

should seek fair and open competition to ensure all of the construction industry can continue to safely provide taxpayers with the best possible construction product at the best possible price.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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EXHIBIT "2A"

FEBRUARY 04, 2022

Executive Order on Use of Project Labor Agreements For Federal Construction Projects

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and in order to promote economy and efficiency in the administration and completion of Federal construction projects, it is hereby ordered that:

Section 1. Policy. (a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise because construction projects typically involve multiple employers at a single location, and a labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty 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 mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On large-scale projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

(b) Project labor agreements are often effective in preventing these problems from developing because they provide structure and stability to large-scale construction projects. Such agreements avoid labor-related disruptions on projects by using dispute-resolution processes to resolve worksite disputes and by prohibiting work stoppages, including strikes and lockouts. They secure the commitment of all stakeholders on a construction site that the project will proceed efficiently without unnecessary interruptions. They also advance the interests of project owners, contractors, and subcontractors, including small businesses. For these reasons, owners and contractors in both the public and private sector

routinely use project labor agreements, thereby reducing uncertainties in large-scale construction projects. The use of project labor agreements is fully consistent with the promotion of small business interests.

(c) Accordingly, it is the policy of the Federal Government for agencies to use project labor agreements in connection with large-scale construction projects to promote economy and efficiency in Federal procurement.

Sec. 2. Definitions. For purposes of this order:

(a) "Labor organization" means a labor organization as defined in 29 U.S.C. 152(5) of which building and construction employees are members, as described in 29 U.S.C. 158(f).

(b) "Construction" means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

(c) "Large-scale construction project" means a Federal construction project within the United States for which the total estimated cost of the construction contract to the Federal Government is $35 million or more. The Federal Acquisition Regulatory Council (FAR Council), in consultation with the Council of Economic Advisers, may adjust this threshold based on inflation using the process at 41 U.S.C. 1908.

(d) "Agency" means an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A).

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

Sec. 3. Project Labor Agreement Presumption. Subject to sections 5 and 6 of this order, in awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, agencies shall require every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations.

Sec. 4. Requirements of Project Labor Agreements. Any project labor agreement reached pursuant to this order shall:

(a) bind all contractors and subcontractors on the construction project

through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

(b) allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) contain guarantees against strikes, lockouts, and similar job disruptions;

(d) set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(e) provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(f) fully conform to all statutes, regulations, Executive Orders, and Presidential Memoranda.

Sec. 5. Exceptions Authorized by Agencies. A senior official within an agency may grant an exception from the requirements of section 3 of this order for a particular contract by, no later than the solicitation date, providing a specific written explanation of why at least one of the following circumstances exists with respect to that contract:

(a) Requiring a project labor agreement on the project would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. Such a finding shall be based on the following factors:

(i) The project is of short duration and lacks operational complexity;

(ii) The project will involve only one craft or trade;

(iii) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors;

(iv) The agency's need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable; or

(v) The project implicates other similar factors deemed appropriate in regulations or guidance issued pursuant to section 8 of this order.

(b) Based on an inclusive market analysis, requiring a project labor agreement on the project would substantially reduce the number of potential bidders so as to frustrate full and open competition.

(c) Requiring a project labor agreement on the project would otherwise be

inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

Sec. 6. Reporting. (a) To the extent permitted by law and consistent with national security and executive branch confidentiality interests, agencies shall publish, on a centralized public website, data showing the use of project labor agreements on large-scale construction projects, as well as descriptions of the exceptions granted under section 5 of this order.

(b) On a quarterly basis, agencies shall report to the Office of Management and Budget (OMB) on their use of project labor agreements on large-scale construction projects and on the exceptions granted under section 5 of this order.

Sec. 7. Nothing in this order precludes an agency from requiring the use of a project labor agreement in circumstances not covered by this order, including projects where the total cost to the Federal Government is less than that for a large-scale construction project, or projects receiving any form of Federal financial assistance (including loans, loan guarantees, revolving funds, tax credits, tax credit bonds, and cooperative agreements). This order also does not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

Sec. 8. Regulations and Implementation. (a) Within 120 days of the date of this order, the FAR Council, to the extent permitted by law, shall propose regulations implementing the provisions of this order. The FAR Council shall consider and evaluate public comments on the proposed regulations and shall promptly issue a final rule, to the extent permitted by law.

(b) The Director of OMB shall, to the extent permitted by law, issue guidance to implement the requirements of sections 5 and 6 of this order.

Sec. 9. Contracting Officer Training. Within 90 days of the date of this order, the Secretary of Defense, the Secretary of Labor, and the Director of OMB shall coordinate in designing a training strategy for agency contracting officers to enable those officers to effectively implement this order. Within 180 days of the date of the publication of proposed regulations, the Secretary of Defense, the Secretary of Labor, and the Director of OMB shall provide a report to the Assistant to the President for Economic Policy and Director of the National Economic Council on the contents of the training strategy.

Sec. 10. Revocation of Prior Orders, Rules, and Regulations. Executive Order 13502 of February 6, 2009 (Use of Project Labor Agreements for Federal Construction Projects), is revoked as of the effective date of the final regulations issued by the FAR Council under section 8(a) of this order. Upon Executive Order 13502's revocation, the heads of agencies shall consider, to the extent permitted by law, revoking any orders, rules, or regulations implementing Executive Order 13502.

Sec. 11. Severability. If any provision of this order, or the application of such provision to any person or circumstance, is held to be invalid, the remainder of this order and its application to any other person or circumstance shall not be affected thereby.

Sec. 12. Effective Date. This order shall be effective immediately and shall apply to all solicitations for contracts issued on or after the effective date of the final regulations issued by the FAR Council under section 8(a) of this order. For solicitations issued between the date of this order and the effective date of the final regulations issued by the FAR Council under section 8(a) of this order, or solicitations that have already been issued and are outstanding as of the date of this order, agencies are strongly encouraged, to the extent permitted by law, to comply with this order.

Sec. 13. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

The White House,

February 4, 2022.

EXHIBIT “2B”

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2023–0051, Sequence No. 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2024–02; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2024–02. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective dates see the separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

RULES LISTED IN FAC 2024–02

Subject	FAR case	Analyst
Use of Project Labor Agreements for Federal Construction Projects	2022–003	Bowman.

ADDRESSES: The FAC, including the SECG, is available at *https://www.regulations.gov.*

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR rule, refer to the specific subject set forth in the document following this summary. FAC 2024–02 amends the FAR as follows:

Use of Project Labor Agreements for Federal Construction Projects (FAR Case 2022–003)

This final rule amends the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14063, Use of Project Labor Agreements for Federal Construction Projects. E.O. 14063 expands the definition of ''construction,'' raises the threshold for a large-scale construction project from $25 million to $35 million and establishes a series of exceptions to the PLA requirements. Additionally, the E.O. mandates that Federal Government agencies require the use of project labor agreements (PLAs) for large-scale Federal construction projects, where the total estimated cost of the construction contract to the Government is $35 million or more, unless an exception applies. The final rule is not expected to have a significant economic impact on a substantial number of small entities participating on a project that requires a PLA because the E.O. limits the requirement for mandatory PLAs to projects exceeding $35 million, unless an exception applies.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2024–02 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2024–02 is effective December 22, 2023 except for FAR Case 2022–003, which is effective January 22, 2024.

John M. Tenaglia,

Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Karla Smith Jackson,

Assistant Administrator for Procurement, Senior Procurement Executive/Deputy CAO, National Aeronautics and Space Administration.

[FR Doc. 2023–27735 Filed 12–21–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 22, 36, and 52

[FAC 2024–02; FAR Case 2022–003; Docket No. 2022–0003, Sequence No. 1]

RIN 9000–AO40

Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement an Executive Order pertaining to project labor agreements in Federal construction projects.

DATES: Effective January 22, 2024.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202–803–3188 or by email at *dana.bowman@gsa.gov,* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite FAC 2024–02, FAR Case 2022–003.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 87 FR 51044 on August 19, 2022, to amend the FAR to implement Executive Order (E.O.) 14063, Use of Project Labor Agreements for Federal Construction Projects, issued February 4, 2022 (87 FR 7363, February 9, 2022). E.O. 14063 mandates that Federal Government agencies require the use of project labor agreements (PLAs) for large-scale Federal construction projects, where the total estimated cost to the Government is $35 million or more, unless an exception applies. Agencies still have the discretion to require PLAs for Federal construction projects that do not meet the $35 million threshold. The E.O. also directs the Office of Management and Budget (OMB) to issue implementation guidance to agencies on exceptions and reporting. The preamble to the proposed rule contained detailed information on the use of PLAs.

DoD, GSA, and NASA received comments on the proposed rule from 8,334 respondents.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

The final rule removes proposed text that was intended to clarify direction that prevented agencies from requiring a contractor or subcontractor to enter into a PLA with any particular labor organization when there were multiple signatory labor organizations representing the same trade. While an agency still cannot require a contractor or subcontractor to enter into a PLA with any particular labor organization, the clarifying language added to the proposed rule did not reflect how PLAs are established. When a PLA is established by one or more labor organizations for a project, all entities are required to enter into that PLA as there are not multiple PLAs on a project. As a result, the text was removed at 22.504(c), Labor organizations.

The final rule also removes similar text that prevented contractors from requiring subcontractors to enter into a PLA with any particular labor organization at FAR provision 52.222–33, Notice of Requirement for Project Labor Agreement, and Alternates I, II, and III, and FAR clause 52.222–34, Project Labor Agreement, and Alternates I and II. The final rule text requires all subcontractors to become a party to the PLA negotiated by the prime contractor.

B. Analysis of Public Comments

1. Effects on Competition and Marketplace Diversity

Comment: Numerous respondents raised concerns that the policy shift reflected in E.O. 14063, from discretionary use of PLAs to a mandate, will have a negative impact on agencies' ability to use competition to achieve best value for the taxpayer. A respondent raised concerns that even if a solicitation is open to all contractors, a Government mandate for use of a PLA will limit the number of competitors able or willing to compete on a project, especially with respect to non-unionized contractors and small businesses. Based upon the results of a survey conducted of the construction industry, a respondent indicated that reduced participation would increase costs to the Government and, ultimately, the taxpayers. Another respondent requested the Government remain competitively neutral to open competition and to reduce barriers to marketplace entrants. Similarly, another respondent requested that the market dictate whether businesses will be successful. Numerous others support ''open competition.''

Response: Section 5 of the E.O. provides agencies with the authority to grant an exception, and specifically section 5(b) of the E.O. provides an exception to the requirement for a PLA if the requirement would substantially reduce the number of potential bidders so as to frustrate full and open competition. Agencies may consider criteria in FAR 22.504(d) to determine if the use of a PLA is appropriate for the construction project. In determining whether fair and reasonable pricing may be achieved, FAR 36.104(c)(2) directs contracting officers to undertake a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a PLA, and to understand the availability of unions, and unionized and non-unionized contractors.

While many respondents expressed concerns about competition, several other respondents argued that the E.O. and rule are consistent with competitive bidding. Several respondents cited a study of education construction spending indicating no statistically significant difference in bids between surveyed projects requiring PLAs and those that did not. See Emma Waitzman & Peter Philips, UC Berkeley Labor Ctr., Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California 3, 48 (2017)).

Comment: Some respondents were concerned that the rule limits non-union contractors bidding on Federal projects and requested justification for only allowing union contractors to bid on Federal contracts over $35M.

Response: Under the E.O., both union and non-union prime contractors and subcontractors may compete for contracts and subcontracts without regard to prior participation in collective bargaining agreements (CBAs).

Comment: Numerous respondents asserted that the rule violates the requirement for full and open competition in the Competition in Contracting Act of 1984 (CICA) because PLAs discriminate and injure competition among potential bidders who are not signatories to CBAs. Another respondent added that the rule is arbitrary and capricious because it requires Federal agencies to impose PLAs on bidders or contractors without knowing the PLAs' terms.

Response: The E.O. and final rule do not violate CICA, which generally requires full and open competition through competitive procedures that are best suited under the circumstances of the procurement, 41 U.S.C. 3301(a). CICA defines full and open competition as meaning ''that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.'' See 41 U.S.C. 107. Neither the E.O. nor final rule bar any responsible sources from submitting sealed bids or competitive proposals, nor do they provide a preference for contractors already a party to a CBA. Section 4 of the E.O. requires a PLA to allow all contractors and subcontractors to compete without regard to whether they are otherwise parties to CBAs.

The E.O. and the final rule require PLAs to contain various terms that guarantee against strikes, lockouts, and similar job disruptions. In addition, under the final rule, an agency maintains the authority to ensure that the PLA includes any additional terms that the agency deems necessary to satisfy its needs. As a result, an agency will know the material terms of any resulting PLA when it issues a solicitation that requires a PLA.

2. Cost

Comment: Numerous respondents expressed concerns that mandatory

PLAs and compliance would increase the cost of construction projects and undermine taxpayer investments in infrastructure projects, resulting in fewer infrastructure improvements, less job creation, and higher state and local taxes. Several respondents cited studies that indicate the increase in cost is estimated at 12–20 percent. These respondents relied on two reports from the Beacon Hill Institute, which found that PLAs raised construction costs on Massachusetts construction contracts by 12 percent or raised construction costs on Connecticut contracts by about 20 percent. Other respondents expressed concerns about costs and cited a report from the New Jersey Department of Labor & Workforce Development, Annual Report to the Governor and Legislature: use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008, which estimated that average costs per square foot were higher for PLA projects than for non-PLA projects.

Alternatively, some respondents cited analyses that compared projects built with PLAs to those built without and found that there was no statistically significant difference in project costs after controlling for factors such as the size and complexity of the project. See, *e.g.,* Dale Belman et al., Project Labor Agreements' Effect on School Construction Costs in Massachusetts, 49 Indus. Rels. 44, 60 (2010)). Some respondents asserted that PLAs are effective mechanisms for providing structure and stability to construction contracts, controlling construction costs, ensuring efficient completion of quality projects, and establishing fair wages and benefits for all workers. Another respondent asserted that there is no reason to assume union workers lead to higher costs because they are typically more productive. Higher wage rates also may induce contractors to substitute capital and other inputs for labor, which would mitigate the effects of higher labor costs.

Response: As expressed in the E.O., PLAs may help mitigate challenges to the efficient completion of quality construction projects, such as a shortage in the supply of labor or labor dispute delays. PLAs may provide structure and stability to construction projects by securing the commitment of all stakeholders on a construction project. There have been numerous studies which found that there is no definitive and compelling evidence to support the assertion that PLAs increase costs on Federal construction projects. In 2012, the Congressional Research Service report, R41310 Project Labor Agreements, studied the effects of PLAs on costs and found that the evidence was ''inconclusive.'' A study commissioned by the Department of Labor, Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation, was conducted in 2011 and concluded that the research supporting the New Jersey Department of Labor and Workforce Development report may be misleading, because it relied on bid costs without taking into consideration other key variables, like geographic location, project type, or work site environment. Subsequent research revisited the Massachusetts school construction contracts discussed in the Beacon Hill studies and concluded that, once additional variables were taken into account, the effects were not statistically significant. Dale Belman et al., The Effect of Project Labor Agreements on the Cost of School Construction (2005) and Dale Belman et al., Project Labor Agreements' Effect on School Construction Costs in Massachusetts (2010). Other research, that found no statistically significant difference in cost between projects that utilized PLAs and those that did not, includes Emma Waitzman & Peter Philips, UC Berkeley Labor Ctr., Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California (2017) and an analysis of 130 affordable housing projects in Los Angeles, California, ''Did PLAs on LA Affordable Housing Projects Raise Construction Costs?'' conducted by Peter Philips & Scott Littlehale, (Univ. of Utah Dep't of Econ., Working Paper No. 2015–03, 2015).

If it appears that a PLA will significantly raise costs on a particular Federal construction project and the Government could not obtain and determine a fair and reasonable price, the FAR would prohibit the award of the contract. The final rule provides an exception at FAR 22.504(d)(ii) in the event that market research indicates that requiring a PLA on a project would substantially reduce the number of potential offerors to such a degree that the Government could not meet its requirements at a fair and reasonable price.

Comment: Numerous respondents expressed concerns that employers and employees will incur additional costs for fringe benefits and union dues that are unnecessary and duplicative. The respondents were concerned that non-union employees paying union dues will never realize the benefits provided by the unions due to union vesting standards.

Response: Neither the E.O. nor the final rule require non-union employees to pay union dues or join a union. Non-union contractors are free to negotiate provisions in PLAs to accommodate existing fringe benefits. For example, a PLA may allow non-union contractors to opt out of contributing to health and welfare funds designated under the PLA, if the benefits provided by the non-union contractor are equal in value to those provided under the PLA.

Comment: Numerous respondents expressed concerns that inefficient union work rules limit an employer's ability to effectively manage employee skill sets and work assignments. The respondents claim that union rules prohibit productivity practices employed by non-union contractors such as multiskilling on contracts with PLAs. Numerous other respondents asserted that PLAs prevent disputes and ensure a steady workforce. Those respondents indicate that PLAs provide several important benefits when coordinating work performed by multiple contractors on complex projects, such as uniform work rules and project schedules, expeditious dispute resolution, craft and subcontractor jurisdictional alignment, and project scheduling trade sequencing.

Response: Generally, PLAs govern the work rules for all contractors and subcontractors on a project, regardless of whether the contractor or subcontractor has previously been party to a collective bargaining agreement. Contractors can negotiate PLAs that include flexibility in how work is assigned or to allow exceptions to generally applicable work rules to meet unique needs.

Comment: Numerous respondents expressed concerns that the proposed rule will increase the cost to the taxpayer for public works projects passed by Congress, such as those funded under the Infrastructure Investment and Jobs Act (IIJA) of 2021, which did not include PLA requirements. Another respondent is concerned that the PLA requirement contradicts the Congressional intent in the IIJA.

Response: The majority of projects funded by the IIJA will be conducted under federally funded grants, rather than FAR-based contracts. This final rule applies to FAR-based contracts; however, nothing in this rule or the IIJA precludes contractors working on grant-funded projects from entering into PLAs.

Comment: A respondent expressed concerns that the Government has not provided data on the costs or benefits of the PLA mandate. The respondent is concerned that the data does not justify

that the use of PLAs will promote economy and efficiency. Another respondent stated analysis based on information obtained via the Freedom of Information Act disproves the reasoning used in the E.O. that PLAs promote economy and efficiency.

Response: The E.O., as implemented in the final rule, reflects the President's judgment that large-scale construction projects may pose special challenges to efficient and timely procurement and that the increased use of PLAs may help address those challenges. (Section 1 of the E.O.) For example, because construction employers typically lack a permanent workforce, those employers may face difficulties predicting labor costs while bidding on contracts and securing a steady supply of skilled labor to complete those projects on time and on budget. Moreover, because construction projects typically involve multiple employers working on a single location, a labor dispute involving one employer can delay an entire project. A lack of coordination among various employers, or inconsistent or uncertain terms and conditions of employment among various groups of workers, can also create friction and disputes in the absence of an agreed-upon resolution mechanism. These problems tend to be especially pronounced on large-scale projects, which tend to be more complex and of longer duration. For these reasons, expanding the use of PLAs is expected to promote the economy and efficiency of Federal contracting by promoting efficient and timely completion of projects by skilled labor. Given these challenges, use of a PLA can further economy and efficiency in Federal contracting by increasing coordination amongst multiple employers and trade unions, preventing costly labor disputes, promoting labor management stability, improving reliable access to skilled labor (including by promoting equity), and bolstering contractors' compliance with employment law.

Expanding the use of PLAs on a large-scale Federal construction project can be particularly beneficial to the economy and efficiency of Federal contracting amidst a challenging construction labor market. As the Supreme Court explained in *Boston Harbor,* Congress expressly authorized PLAs in section 8(f) of the National Labor Relations Act (NLRA) ''to accommodate conditions specific to that industry'' including ''the contractor's need for . . . a steady supply of skilled labor.'' *Bldg. & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.* (''*Boston Harbor*''), 507 U.S. 218, 231(1993).

Today, the construction industry faces a significant nationwide labor shortage. See, *e.g.,* Garo Hovnanian, Ryan Luby, and Shannon Peloquin, Bridging the labor mismatch in US construction (2022). Meanwhile, demand for construction workers' skilled labor is only projected to grow. The Department of Labor projects, on average, that there will be 646,100 job openings in the construction and extraction occupations every year over the coming years. See, Bureau of Labor Statistics, Construction and Extraction Occupations, Dep't of Labor (Sept. 6, 2023). Measures that promote a steady supply of skilled labor are expected to improve the economy and efficiency of Federal contracting in the modern labor market.

PLAs can help reduce the effects of the construction labor shortage on Federal contractors' projects in several ways. First, PLAs can attract more high-skilled workers to Federal construction projects by providing higher compensation for craft positions. Although both union and non-union contractors reported difficulty filling job openings for craft workers in 2021, after the pandemic-related disruptions to the construction labor market, union contractors were 14 percent less likely to struggle to fill craft positions. See Frank Manzo IV, Larissa Petrucci, & Robert Bruno, Ill. Econ. Policy Inst., The Union Advantage During the Construction Labor Shortage (2022). Second, PLAs provide access to union hiring halls, which can help ensure a steady supply of skilled labor. The same study found that union contractors were 21 percent less likely than non-union contractors to experience delays in completing projects due to labor shortages. This recent data is consistent with the Department of Labor (DOL) 2011 study, Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation, which found that a PLA reached by New York City schools on a construction contract helped avert skilled labor shortages over the course of the 5-year construction program. The study found that there were ''no instances of shortages in skilled labor on any of the'' city schools' projects, ''although such shortages occurred regularly elsewhere in the city during this same period.'' Non-union contractors are also more likely than union contractors to report struggling to hire qualified craft workers, suggesting that PLAs can promote high-quality, as well as on-time, construction of Federal projects. This final rule is expected to help the Federal Government efficiently complete important projects in a challenging construction market.

A study also found that using PLAs on Federal construction projects may reduce turnover and absenteeism. There is less turnover among craft workers working under CBAs than those that are not. See Frank Manzo IV, Larissa Petrucci, & Robert Bruno, Ill. Econ. Policy Inst., The Union Advantage During the Construction Labor Shortage (2022). Studies suggest that unionized workplaces may be safer than non-union workplaces, meaning that PLAs may promote productivity by preventing absenteeism or job losses due to workplace injuries. See, *e.g.,* Alison D. Morantz, Coal Mine Safety: Do Unions Make a Difference, Indus. & Labor Relations Review (2012).

Because all employers on a PLA are required to enter the same agreement with coordinated work rules, PLAs can streamline administration of large-scale construction projects. On complex projects without a PLA, contractors may work with multiple trade unions and, as a result, may struggle to coordinate multiple collective bargaining agreements providing for different start times, break times, rules governing overtime, holidays, and dispute resolutions procedures. Those differences can create undue costs, delays, and inefficiencies in Federal construction projects which can be effectively addressed through a PLA. As a study commissioned by the Department of Labor explained, uniform work rules on PLAs promote efficiency, productivity, and cost savings. See Dep't of Labor, Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation (2011). Moreover, the study concluded, by standardizing the terms and conditions of employment at the outset of a project, PLAs can promote predictability of project costs. Id. at 3–4. For example, a four-year PLA used by the New York City School Construction Authority (NYCASA) to rehabilitate and renovate city schools saved $221 million dollars over a five-year PLA by standardizing construction workers' shifts. Id. at 4–5.

The E.O. requires PLAs on Federal construction projects to contain no-strike and no-lockout clauses. As a result, this requirement is expected to prevent costly delays associated with labor disputes. According to the 2011 DOL study, during the period covered by the NYCASA PLA, a strike by a trade union resulted ''in a shutdown of numerous large construction projects across the City and substantial delay and related costs'' to parties involved—while construction on the projects

covered by NYCASA's PLA continued uninterrupted. An audit analyzing the results of the NYCASA PLA found that there was ''no disruption of work or threat of strike on any of the projects'' covered by the PLA ''at any time'' that the PLA was in effect.

For these reasons and others, the final rule reflects the language provided in section 1 of the E.O., which states that the increased use of PLAs on large-scale construction projects can help address special challenges to efficient and timely Federal procurement. Finally, when an agency determines that a PLA requirement would not advance the Government's interests in achieving economy and efficiency, the agency may, on a case-by-case basis, utilize an exception provided in section 5 of the E.O.

3. Procurement Delays

Comment: Some respondents expressed concerns that mandatory PLAs will cause procurement delays, contradicting the rule's stated objective, to ''promote economy and efficiency'' in the administration and completion of Federal construction projects. These respondents assert that use of PLAs may result in costly bid protests, litigation, and other delays.

Response: While procurement delays may be caused by numerous other factors, there is no conclusive evidence to support that specifically requiring a PLA will be the sole reason for additional delays or litigation. Rather, the final rule reflects the judgment that the overall effect of PLAs is expected to promote timely construction of Federal projects. Section 1 of the E.O. states that expanding the use of PLAs will help prevent delays by preventing costly labor disputes on Federal construction projects, promote a reliable stream of skilled labor on Federal projects, and promote coordination across multiple employers and unions. For example, a PLA executed by the New York City School Construction Authority (NYCASA) to rehabilitate and renovate city schools helped avert substantial delays in construction. See Dep't of Labor, Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation (2011). During the period covered by the PLA, a strike by a trade union resulted ''in a shutdown of numerous large construction projects across the City and substantial delay and related costs'' to parties involved—while construction on the projects covered by NYCASA's PLA continued uninterrupted. An audit analyzing the results of the PLA found that there was ''no disruption of work or threat of strike on any of the projects'' covered by the PLA ''at any time'' that the PLA was in effect and that ''there were no instances of shortages in skilled labor on any of the NYCASA projects'' covered by the PLA—although similar shortages ''occurred regularly'' on other projects in the same city during the same time period. Id. Another study of school construction projects in San Diego found that ''project delays are considerably lower'' on projects covered by a PLA. Richard Parker & Louis Rea, San Diego Unified School District, San Diego Unified School District Project Stabilization Agreement: A Review of Construction Contractor and Labor Considerations iii (2011).

One study found that union contractors were 14 percent less likely than non-union contractors to struggle to fill craft positions and 21 percent less likely than non-union contractors to experience delays in completing projects due to labor shortages. See Frank Manzo IV, Larissa Petrucci, & Robert Bruno, Ill. Econ. Policy Inst., The Union Advantage During the Construction Labor Shortage 5 (2022).

Comment: A respondent is concerned that there are no meaningful criteria to grant exceptions; therefore, agency decisions will be inherently arbitrary and capricious and will delay construction projects.

Response: The rule reflects specific criteria provided in section 5 of the E.O, under which an agency may grant an exception. The rule provides additional details to ensure agency decisions comply with the E.O.

4. Effects on Workforce

Comment: Many respondents commented on the rule's likely impact on non-unionized contractors. Some respondents asserted that PLAs don't discourage or prevent non-union contractors from participating on projects with PLAs. However, another respondent expressed concerns that non-union contractors will not bid on projects that mandate a PLA since it requires that they recognize the union as the representative of their employees (without their input) on that job, and could require them to use the union hiring hall to obtain most or all construction labor, exclusively hire apprentices from union programs, follow union work rules, and pay into union benefit and multi-employer pension plans. While not specifically stating that it would prevent bidding on work, several other respondents expressed similar concerns. Numerous respondents were concerned that non-union contractors represent the vast majority of construction contractors in the country and their unwillingness to compete will potentially limit the Government's access to the best available contractors for a given construction project.

Response: Neither the E.O. nor the final rule preclude non-union contractors from bidding on projects requiring a PLA. Non-union contractors who choose to enter a project-specific PLA may do so without becoming a union employer for purposes of other projects. The E.O. expressly states that a PLA shall ''allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements.'' This language is reflected in the final rule. The DOL website contains useful information about the operation of PLAs. See *https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide.*

Studies and court cases have shown that PLAs can have significant non-union contractor participation. One study noted that on the Boston Harbor project, the subject of the Supreme Court's decision in *Bldg. & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R.I., Inc.* 507 U.S. 230, 231 (1993), 102 of 257 subcontractors were nonunion, notwithstanding that as much as three quarters of Boston construction contractors were unionized. See Robert W. Kopp & John Gaal, The Case for Project Labor Agreements, Constr. Law., (1999); *see also Associated Builders & Contractors, Inc., S. California Chapter* v. *Metro. Water Dist. of S. California,* 69 Cal. Rptr. 2d 885, 888 (Ct. App. 1997).

The E.O. and the rule contain an exception for solicitations where a market analysis suggests that there will not be sufficient bidders so as to frustrate full and open competition.

Comment: Numerous respondents stated that the proposed rule discriminates against non-union employees, placing non-union general contractors and subcontractors at a significant competitive disadvantage. A respondent explained that the requirement for offerors to negotiate with labor unions—a party with which the offeror has no authority to compel negotiations—effectively grants labor unions the power to prevent certain offerors from submitting an acceptable offer.

Response: PLAs have been used successfully for decades in construction projects in all parts of the United States, and there is no data to suggest that parties have been systematically unable to negotiate PLAs because of bad-faith bargaining by unions. Since the final rule applies to large-scale Federal

construction projects, the Government assumes that there is a significant economic incentive for both the union and the prospective offeror to reach agreement on a PLA.

Comment: Numerous respondents expressed concerns that mandatory PLAs will exacerbate nationwide labor shortages in the construction industry because unions will only hire from union halls/union apprenticeship programs and the majority of the workforce has opted not to join unions. Numerous respondents were similarly concerned that PLAs prevent the use of a contractor's current workforce, requiring the use of union members hired out of local union halls.

Response: The Government does not expect PLAs to negatively impact the outcome of the current nationwide labor shortage. Research indicates that the skilled labor shortage is less severe among union contractors than non-union contractors. One report revealed that union contractors are 14 percent less likely to experience difficulty in filling craft worker positions and 21 percent less likely to experience delays in project completion times due to labor shortages than non-union contractors. See Frank Manzo IV, Larissa Petrucci, & Robert Bruno, Ill. Econ. Policy Inst., The Union Advantage During the Construction Labor Shortage 5 (2022). Use of PLAs is expected to help the Government efficiently complete projects in a tight construction labor market. While many PLAs do require contractors to use the union's hiring hall for referrals, they do not necessarily prevent the use of a contractor's workforce. The union hiring halls are legally required to refer workers to the project without regard to whether the workers are union members. Ultimately, the contractor retains the right to decide whom to hire.

Comment: Some respondents expressed concerns that unions negatively impact local labor markets by bringing in non-local union labor rather than hiring locally. Numerous respondents were concerned that PLA mandates will result in more contract awards to union-signatory contractors whose employees are union members at the expense of taxpayers, fair and open competition, and local workers and businesses. Alternately, some respondents indicated that PLAs can benefit local labor markets by including local recruitment and hiring goals specifically targeting historically marginalized workers intended to expand the pool of skilled workers and promote diverse economic development. Participation in registered apprenticeship programs and pre-apprenticeship programs will also help to recruit women, people of color, and other underrepresented individuals into the construction industry.

Response: While unions have the ability to recruit skilled workers nationally to address local skilled labor shortages, the intent of the policy implemented in this rule is not to replace local workers for the sole purpose of employing union members. PLAs can offer opportunities to grow and train the local workforce, specifically targeting underrepresented individuals.

Comment: Numerous respondents expressed concerns that PLAs can interfere with existing CBAs that contractors have already negotiated with unions.

Response: Many PLAs include a ''supremacy clause'' that incorporates the individual CBAs of the trades by reference and supersedes any other labor agreement that might otherwise apply to the project. Use of the supremacy clause can be an important benefit of a PLA on long term projects because individual CBAs may expire and need to be re-negotiated during the project. The terms of the PLA would take over to prevent work stoppages and other jobsite delays.

Comment: A respondent asserted PLAs will mitigate increasing requests for equitable adjustments caused by workers walking off the job for higher pay.

Response: PLAs prevent work stoppages and other job disruptions. As a result, projects covered by PLAs can continue without additional costs or delays.

Comment: A respondent asserted that non-union entities produce better quality construction, pay employees, and provide benefits that are as good, or better than union shops. Another respondent asserted that employees do not want or need a union that will not give them additional benefits beyond what they have and will require them to pay dues. Alternatively, a respondent asserted that PLAs establish wages, benefits, and other terms of employment across an entire project and have been used in both the public and private sector for the better part of a century.

Response: Non-union contractors may negotiate with the union that is party to the PLA to opt out of certain terms, especially when current benefits are equivalent to those provided by the union. As a general matter, the U.S. Department of the Treasury report, Labor Unions and the U.S. Economy (2023) indicates that the costs of union dues or fair-share fees to workers is typically offset by increased wages and fringe benefits. In addition, for both contractors and for unions, the benefits of a PLA go beyond wages and fringe benefits. A PLA establishes work schedules for all contractors, ensures efficient utilization of labor, prevents job disruptions, and provides mutually binding procedures for resolving disputes.

Comment: Several respondents indicated that expanded use of PLAs will support workforce quality, safety, and stability, and help guarantee on-target and on-budget completion of projects that employ thousands of workers across various trades and industries. PLAs promote safe, timely, cost-effective execution of the most complex and national security conscious construction projects yet designed. In contrast, a respondent asserted that in the period from 2001 to 2009 during which PLA requirements were prohibited for Federal contracts and grants, there were no reports of widespread cost overruns, delays, strikes, or poor-quality construction on Federal projects attributable to the lack of a government-mandated PLA, indicating that PLA mandates are not needed to ensure economy and efficiency in government contracting. Another respondent asserted there is no evidence to support claims that PLAs guarantee better safety, quality, or construction delivery.

Response: Expanded use of PLAs is expected to support safe, on-time, efficient, and high-quality construction, in part by helping to secure a skilled workforce for Federal construction projects. Ensuring compliance with workplace laws on Federal construction projects has many important benefits to economy and efficiency for covered projects, including attracting skilled workers, reducing labor conflict and disruption, reducing turnover, and preventing workplace injuries.

One study found that union contractors (who are more likely to work on PLA-covered projects) have stronger safety records than non-union contractors. The study looked at more than 37,000 Occupational Safety and Health Administration (OSHA) inspections in the construction industry and estimated that union worksites were 19 percent less likely to have OSHA violations than non-union worksites. When OSHA inspections do uncover OSHA violations at unionized worksites, those worksites have 34 percent fewer violations per inspection that non-unionized worksites. See Frank Manzo IV, Michael Jekot, and Robert Bruno, Ill. Econ. Policy Inst., The Impact of Unions on Construction Worksite Health & Safety (2021). PLAs

may improve workplace safety by ensuring that construction workplaces have more apprentice-trained journeyworkers with critical safety skills. A study conducted in California found that construction contractors employing more apprentice-trained journeyworkers experienced significantly lower rates of injuries. See Emma Waitzman & Peter Philips, UC Berkeley Labor Ctr., Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California 10, 16 (2017). Improving worker safety is especially urgent in the construction industry, which has the second-highest number of occupational deaths of any industry in the United States. See Bureau of Labor Statistics, National Census of Occupational Injuries in 2021, USDL–22–2309 (2022).

Comment: A respondent asserted that PLAs are more advantageous than regular ''pre-hire'' agreements because they can systematize labor relations across multiple trades, contractors and subcontractors.

Response: While PLAs can cover large, multi-year projects with multiple unions, PLAs can also cover any construction project, regardless of size, when only one union is involved.

Comment: A respondent expressed concerns that PLAs can blur the line between employer and employee, which could result in ''co-employment issues.'' The respondent also suggested that PLAs will remove an important differentiating factor between subcontractors and will deter their engagement when they cannot negotiate the terms and conditions for their own employees. The respondent asked whether prime contracts will include terms related to ''co-employment risks'' when utilizing a mandated PLA.

Response: In Federal contracts, prime contractors are already responsible for every subcontractor's performance and compliance with the requirement to pay workers a prevailing wage under the Davis-Bacon Act (see FAR clause 52.222–11). Contractors can and do select subcontractors based upon criteria other than wage rates, such as subcontractor's records of experience, quality, safety, timeliness, or any other metric deemed critical to the success of the project.

Comment: Numerous respondents expressed concerns that specialists in the construction field employed by foreign firms would be unwilling to sign a PLA.

Response: The E.O. and final rule apply equally to foreign firms participating on a project within the United States that requires a PLA. The rule assumes that certain conditions that may impact the Government's interests in achieving economy and efficiency would be known prior to the performance of market research. Based upon those conditions and/or results of market research, the agency may determine that an exception would apply.

Comment: Numerous respondents expressed concerns that union apprenticeship requirements and completion rates would mean that it would take more than 14 years for all government-registered construction industry apprenticeship program completers to fill the estimated 650,000 vacant construction jobs needed just in 2022. These respondents argue that excluding the non-union workforce development practices and systems already in place exacerbates the skilled labor shortage by steering work to participants in union-affiliated, Government-registered apprenticeship programs at the expense of contractors that engage in alternative workforce development efforts. Alternatively, several respondents asserted that PLAs promote equitable development of a skilled workforce by supporting privately funded union training programs. Another respondent asserted higher skilled trades require the workforce development and skill training of the union-sector joint apprenticeship system to build and maintain the skill base of the industry.

Response: E.O. 14063 does not impose a requirement for union-affiliated apprenticeship programs, as both union and non-union contractors can participate on projects with a PLA. Neither the E.O. nor the rule require employers to use apprentices from union-affiliated and/or Government-registered apprenticeship programs. Non-union contractors may negotiate with the union that is party to the PLA to use their own apprenticeship programs during the project.

The number of apprenticeships programs and the number of apprentices graduating from those programs has been steadily increasing. In the ten-year period from 2013 to 2023, the number of workers enrolled in an apprenticeship program nearly doubled from 286,069 to 581,110. The number of women in these programs nearly quadrupled from 24,594 to 83,254. See Data and Statistics, *ETA.gov* (2023).

5. Compliance With Law

Comment: Several respondents asserted that PLAs are a deterrent to violations of various worker protection laws and protect against common workplace abuses to include worker misclassification, employment status, and wage theft. They asserted that PLAs ensure workers receive fair wages and benefits, which includes participation in federally-mandated programs such as Social Security and Medicare.

Response: Use of PLAs may help reduce the risk of noncompliance with labor laws in the construction industry under Federal construction projects. The presence of unions on construction work sites is expected to result in increased oversight, protection against retaliation, and grievance procedures that promote compliance with such laws and protect workers who raise concerns about an employer's conduct. Empirical research shows that union coverage generally is associated with fewer violations of employment law and suggests that unionization fosters reporting violations of law to enforcement agencies. See Ioana Marinescu, Yue Qiu, & Aaron Sojourner, Wage Inequality & Labor Rights Violations (National Bureau of Economic Research., Working Paper No. 28475, February, 2021).

Comment: A respondent urged the Council to amend the proposal to explicitly confirm that parties involved in PLA negotiations shall never be required to reach an agreement with unions but should be required only to engage in good faith bargaining to impasse, consistent with the requirements of the NLRA.

Response: Unless an exception is authorized, section 3 of the E.O. requires every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a PLA with one or more appropriate labor organizations. Agencies will consider all relevant circumstances in determining whether an exception is authorized.

Comment: A respondent expressed concern that the rule interferes and discriminates against the rights of construction contractors and employees under NLRA. That respondent also argued that the E.O. is preempted by the NLRA ''because it is not limited in its scope to a single project.'' Similarly, another respondent is concerned that the PLA rule is subject to challenge under labor law conflict preemption principles because it conflicts with policies in the NLRA which protects the rights of employees to refrain from union representation. By contrast, other respondents noted that PLAs are expressly authorized by section 8(f) of the NLRA and were unanimously upheld by the Supreme Court in *Building & Constr. Trades Council* v. *Associated Builders & Contractors of*

Mass. (*Boston Harbor*), 507 U.S. 218, 227–30 (1990).

Response: The E.O. and final rule are not preempted by the NLRA, nor do they unlawfully interfere with or discriminate against the rights of contractors or employees. PLAs are expressly authorized in section 8(f) of the NLRA. Section 4(f) of the E.O. expressly requires any PLA reached under it to allow contractors and subcontractors to compete for work on the project without regard for their union status. The E.O. also requires that PLAs reached under its authority fully conform to all statutes, including the NLRA which prohibits the use of union hiring halls in a manner that discriminates against non-union workers.

The E.O. as implemented in this final rule is not preempted by the NLRA because it reflects the Government's interests in efficient procurement of goods and services. The NLRA does not preempt Government agencies from reaching PLAs where the Government is acting as a ''market participant'' protecting its proprietary interests, rather than as a regulator. *Boston Harbor,* 507 U.S. at 227–30. The Government is acting in its role as a market participant by establishing a presumption in favor of PLAs to advance the economical and efficient use of Government funds—including, by promoting quality assurance, efficient and on-time completion, and stability. Courts have repeatedly found that uses of similar agreements in Government-funded projects are not preempted under the NLRA. For example, in *Airline Service Providers Association* v. *Los Angeles World Airports,* 873 F.3d 1074 (9th Cir. 2017), an appellate court held that a requirement that contractors enter labor peace agreements was not preempted by the NLRA. In another case, an appellate court held that a city requirement that parties receiving certain tax benefits use a neutrality agreement and no-strike agreement was not preempted by the NLRA because the conditions were tailored to protect the city's proprietary interest. *See Hotel Employees & Restaurant Employees Union* v. *Sage Hospitality,* 390 F.3d 206 (3rd Cir. 2004). In addition, the Government may also prohibit Federal agencies from requiring the use of PLAs because the Government acts in its proprietary capacity when it does so. *See Bldg. and Constr. Trades Dep't, AFL–CIO* v. *Allbaugh,* 295 F.3d 28, 34–36) (D.C. Cir. 2002).

While the NLRA does not provide a right to refrain from union ''representation,'' the NLRA does allow employees to choose not to become union members. Non-members may opt not to pay union dues and instead pay agency fees covering only the share of dues used directly for representation, such as for collective bargaining or grievance procedures. However, under Section 9(a) of the NLRA, a union is the ''exclusive'' representative for all employees in that unit. Similarly, under the NLRA, a union has a duty of fair representation to all employees, regardless of whether they are union members or not. As a result, the NLRA provides workers a right to opt out of union membership, but not union representation.

Although the E.O. and final rule addresses more than one project, the rule is not preempted by the NLRA. Section 5 of the E.O. establishes a presumption in favor of PLAs, but also contemplates a case-by-case analysis in which agencies may grant exceptions to that presumption where a PLA would not advance the Government's proprietary interests.

Comment: A respondent expressed concern that the rule interferes and discriminates against the rights of construction contractors and employees under the Employee Retirement Income Security Act of 1974 (ERISA) by ''taking nonunion workers pay for the benefit of union pension plans without just compensation.'' The respondent also suggested that the rule conflicted with the National Apprenticeship Act, which the respondent wrote prohibits ''union versus non-union discrimination.''

Response: The final rule does not interfere with employees' or contractors' rights under ERISA or the National Apprenticeships Act. PLAs reached under the E.O. and the final rule must conform to all applicable statutes, including ERISA and the National Apprenticeships Act. The possibility that non-union workers may contribute to benefit plans for which they may or may not ultimately vest does not violate ERISA, which permits and regulates defined benefit plans that do not vest immediately (29 U.S.C. 1053). In addition, ERISA does not bar government entities from establishing bidding conditions, *e.g.,* requiring a PLA, related to benefit programs when those entities act as market participants.

The National Apprenticeship Act does not prohibit PLAs or prohibit contractors from entering into CBAs that require the use of a particular apprenticeship program, as long as that program is appropriately registered where required. Neither the E.O. or final rule specify or limit PLA provisions regarding apprenticeship programs, which may be the subject of bargaining between the parties to the agreement within the bounds of applicable law.

Comment: A respondent suggested that this final rule is unnecessary because existing Federal law and enforcement by agencies like the Occupational Health and Safety Administration is sufficient to guarantee workers' rights, fair pay, and safety.

Response: Ensuring compliance with workplace laws on Federal construction projects has many important benefits to economy and efficiency for covered projects, including attracting skilled workers, reducing labor conflict and disruption, reducing turnover, and preventing workplace injuries. Despite Federal and local protections for construction workers and ongoing enforcement efforts by the Department of Labor and others, construction remains one of the country's most high-violation industries. See U.S. Department of Labor, Wage & Hour Division, Low-Wage, High-Violation Industries (2022) at *https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.* For example, a study (''An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry,'' dated January 2020, *http://www.nasrcc.org/wp-content/uploads/2021/03/Wage-and-Tax-Fraud-Report.pdf*) conducted on this topic estimates that up to one in five construction employees are misclassified as independent contractors, costing those workers at least $811 million in unpaid overtime and premium pay in 2017 alone. Additionally, the U.S. Department of Labor, Bureau of Labor Statistics News Release USDL–22–2309 (*https://www.bls.gov/news.release/pdf/cfoi.pdf*) revealed that Construction workers are also particularly vulnerable to health and safety violations: the industry has the second-highest number of occupational deaths of any industry in the United States.

6. Impact on Small Business

Comment: A respondent encouraged the Council to re-evaluate the excessive cost of compliance on small entities and explore alternatives to this rulemaking as it relates to small entities under the Regulatory Flexibility Act. Numerous respondents expressed concerns that the rule does not adequately calculate the disparate negative economic impact and expensive compliance costs shouldered by Federal small business general contractors and subcontractors, noting that the number of small businesses awarded Federal construction contracts declined 60 percent from 2010 to 2020.

Response: Unless an exception in section 5 of the E.O. applies, there are no alternatives that would reduce the impact on or exempt small entities from its requirements. The impact of the rule is updated to take into consideration the numerous public comments regarding the burden calculations. OMB and DOL will work with the Small Business Administration (SBA) to determine the best way to help small entities in understanding how to negotiate or participate in a construction project with a PLA.

Comment: Numerous respondents expressed concerns about the complexity and cost burdens associated with the rule. The respondents were concerned that PLAs will create a barrier to entry for many small, minority, and women-owned businesses, which will also negatively impact agency achievement of socio-economic and small business contracting goals. Some were concerned that these entities will choose to work on commercial projects rather than those that require PLAs.

Response: OMB and DOL intend to work with SBA to determine the best way to help small entities in understanding how to negotiate or participate in a construction project with a PLA.

Comment: A respondent recommended consideration of a requirement relieving a small business from having to join a union if it agrees to pay the prevailing wages and other benefits established in union negotiation. The respondent suggested that removal of this mandatory requirement would allow the Federal Government to achieve its objective with the PLA but at less cost to the small business.

Response: Neither the E.O. nor the final rule require any entity, regardless of size, to join a union. Contractors and subcontractors may negotiate with the union that is party to the PLA to opt out of certain terms, to include when current benefits are equivalent to those provided by the union.

Comment: A respondent recommended modifying the rule to reflect the diminishing cost-benefit to small firms by providing for a threshold contract value for covered subcontractors. The respondent stated that a proper cost-benefit analysis would show that a small firm that has only a few contracts per year will absorb a higher cost of compliance than a firm with multiple yearly contracts. Thus, this rule will have a negative economic impact on a substantial number of smaller firms, demonstrating why the mandatory flow down cutoff has merit. The respondent expressed concerns that the rule requires small business subcontractors to comply with the mandatory flow down but does not allow the small business to utilize the contracting agency resources to resolve disputes that may occur during contract performance.

Response: The E.O. does not provide a threshold for subcontractor participation. The E.O. requires that all subcontractors agree to become a party to the PLA negotiated by the prospective offeror or prime contractor in order to participate on the project unless an exception applies. Providing relief above a certain threshold for smaller dollar subcontracts could unintentionally frustrate the benefits of a PLA, which depend on the participation of all contractors and subcontractors working on the contract being part of the PLA. The final rule assumes that subcontractors will work with prospective offerors or the prime contractor to ensure terms and conditions are negotiated into a PLA prior to deciding to participate on a project that requires a PLA. PLAs are intended to prevent disputes and provide an avenue for quick resolution.

Comment: A respondent was concerned that small entity annual receipts would increase due to increased labor costs, which will result in the small entity outgrowing the size standard for the North American Industry Classification System (NAICS) to qualify for small business set-asides and recommends that such set-asides be exempt from PLAs.

Response: While construction costs do fluctuate over time, there is no evidence to support that PLAs specifically will increase costs and cause a small entity to outgrow the size standard for the associated NAICS code. See section II. B. 2 of the Preamble for the discussion of Costs related to the use of PLAs.

Comment: A respondent asserted that unions require a bond and other types of requirements that eliminate small companies.

Response: This rule does not amend or impose new bond requirements. 40 U.S.C. chapter 31, subchapter III, Bonds (formerly known as the Miller Act) requires performance and payment bonds, or an alternative payment protection, for any Federal construction contract exceeding $150,000 unless an exception applies. The bonds protect the Government's interests but also contain payment protections that are beneficial for subcontractors.

Comment: A respondent was concerned that the rule will discourage small business from bidding on covered Federal construction contracts and thereby impose obstacles on the use of small business preferences required by Federal agencies in violation of the Small Business Act (15 U.S.C. 637(d)).

Response: The final rule does not change the use of small business preferences in procurements subject to the Small Business Act. Implementation of the rule is not expected to impact the Government's ability to achieve its small business goals. For fiscal year 2022, the Federal Government reached 104.05 percent of its small business contracting goals. PLAs can be helpful to small businesses by providing them with a level playing field and access to expanded skilled labor pools, while streamlining project administration and the negotiation of workplace terms and conditions.

7. Alternative Approaches

Comment: A respondent recommended agencies include a provision to establish a Community Workforce Agreement (CWA) approach in 22.504(c) to promote diversity and inclusion, and local resident business opportunities.

Response: A CWA is an agreement that may be negotiated and incorporated as part of a PLA. A CWA may help agencies and prime contractors meet small business subcontracting goals and other objectives. The final rule permits, but does not require, CWAs. This is consistent with the language of the E.O. and provides appropriate flexibility for the parties to take unique local needs into consideration when negotiating PLAs on a project-by-project basis.

Comment: A respondent recommended requiring PLAs to include a ''core employee'' provision, which would allow non-union contractors to use their own employees without those employees registering with a union's hiring hall.

Response: Non-union contractors are currently able to negotiate core employee provisions in PLAs. Even when a PLA does not include a ''core employee'' provision, the PLA will not prevent using the contractor's workforce. If the union that is a party to a PLA operates an exclusive hiring hall, a non-union contractor's workers may register with that hiring hall for referrals to the project. If there is a non-exclusive hiring hall, contractors may hire their prior workers without those workers registering for a referral.

Comment: Some respondents requested that this final rule require that agencies use PLAs on projects that fall under the $35M threshold in certain circumstances. Alternatively, another respondent requested the rule eliminate

the option to use PLAs on small projects because of the respondent's concern about potential impacts on small and diverse businesses.

Response: The rule implements section 7 of the E.O., which allows an agency to require the use of a PLA in circumstances where the total cost to the Federal Government is less than that for a large-scale construction project if appropriate.

Comment: A respondent recommended that the rule consider exceptions for contractors regarding health and welfare plans if (1) a non-union contractor provides those benefits already and if less than the union benefits, the contractor should pay the employee the difference; (2) if the pension plan or healthcare fund is less than 70 percent funded based upon the most recent 5500 filings, the non-union contractor may pay the difference directly to employees; or (3) if a contractor would incur a pension withdrawal liability that exceeds the payments they are to make during the contract, exclude them from becoming a party to it and pay the employees instead.

Response: Non-union contractors may negotiate the recommended alternatives with the union that is party to the PLA.

Comment: Some respondents suggested there were other methods to ensure projects are completed on time and that there is no evidence that PLAs improve performance. Another respondent suggested that a series of alternative requirements would achieve the Government's goals such as: requiring contractors to reach agreements with private sector hiring agencies to meet workforce needs; requiring contractors to reach ''labor compensation agreements'' for the project; requiring contracts to use all non-union labor; or requiring contracts to have ''dispute resolution agreements.''

Response: The respondent's proposed alternatives would be inconsistent with the E.O., which reflects the President's judgment that PLAs are often effective in preventing special challenges to efficient and timely procurement related to large-scale construction contracts. This judgment is consistent with published research showing the benefits of PLAs and the long history of PLA use in the private and public sector. Federal agencies have used PLAs on large-scale Federal construction projects, dating back to the use of PLAs on Tennessee Valley Authority projects in the 1930s. PLAs can provide many advantages, including: eliminating risks of labor disruptions during the construction period; access to reliable skilled labor through union hiring halls and additional procedures to meet workforce needs in a timely fashion; and uniform work rules promoting efficiency. Dep't of Labor, Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation (2011). Research has shown that there are advantages and potential drawbacks of PLAs, but supports the conclusion that PLAs can advance the Government's interest in efficient Federal contracting.

Many of the alternatives proposed by the respondent (such as a Federal Government requirement that contractors use non-union labor, requiring agreements with staffing agencies rather than union hiring halls to fill time-sensitive needs for limited skilled craft labor, or requiring contractors to reach ''labor compensation agreements'') are relatively untested and unstudied. Without additional research, there is no way to determine whether the respondent's proposed alternatives would provide benefits that exceed the benefits provided by this final rule. PLAs provide many demonstrated, mutually-reinforcing benefits to the Federal Government's ability to achieve its goals in large construction projects. The final rule is preferable to alternatives that, whether individually or together, only seek to achieve a subset of the goals provided by PLAs.

Comment: A respondent asserted that the Government's interests in economy and efficiency would be best served by pausing the proposed rule, gathering and analyzing data to justify a reasonable threshold for requiring PLAs, and then revising any proposed rule.

Response: The E.O. reflects the judgment that a presumption in favor of PLAs on projects with an estimated cost of $35 million or more would promote efficient Federal contracting. The final rule provides for a case-by-case analysis to determine whether an exception to the general PLA requirement is authorized, including where application of the requirement would not promote economy and efficiency. As a result, it is unnecessary to pause the publication of the final rule.

Comment: Some respondents requested that regulations and guidance afford states and localities maximum regulatory flexibility, free from anti-competitive and costly pro-PLA policies, in order to deliver more value to taxpayers and create opportunities for all, including small businesses.

Response: The final rule applies to FAR-based contracts awarded by the Federal Government. The rule does not apply to grants or contracts awarded by states or localities.

Comment: A respondent urged the Council to implement regulations that include the best trade workers in the region to participate in Federal construction projects. Some respondents suggested maintaining the current policy established by E.O. 13502, which was issued in 2009 and authorized Federal agencies to require PLAs for large-scale construction projects on a case-by-case basis, considering factors like geographical location, construction market conditions, and the availability of skilled labor. One respondent asserted that the reliance interests of current contractors had not been adequately considered in adopting the change in policy under E.O. 14063. By contrast, some respondents argued that the current policy has led to an underutilization of PLAs and that the proposed rule, if finalized, would better advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. Another respondent argued that E.O. 13502 has not achieved its goals because, under the current policy, some agencies do not sufficiently consider the benefits of adopting PLAs.

Response: Neither the E.O. nor the final rule prevent the best trade workers in the region from participating in any Federal construction project. Section 10 of the E.O. provides that, upon the effective date of this final rule, E.O. 13502 is revoked. The final rule reflects the language in section 1 of the E.O. which states that large-scale construction projects pose special challenges to the efficient and timely procurement for the Federal Government. Additionally, the increased use of PLAs can help address those challenges. The E.O. provides that expanding the use of PLAs will help prevent costly labor disputes that delay Federal construction projects, ensure a reliable stream of skilled labor, and promote coordination across multiple employers and unions.

While current policy permits agencies to use PLAs on construction projects, PLAs have only been used on a small number of Federal projects. According to data collected by OMB, under current policy approximately 2,000 contracts were eligible for a PLA between 2009 and 2021, but PLAs were only required 12 times. This E.O. now requires the use of PLAs in connection with large scale construction projects unless an exception applies to promote economy and efficiency in Federal procurement. This is expected to expand the use of PLAs by Federal agencies and help agencies achieve construction goals

more effectively in the context of the nationwide skilled labor shortage in the construction industry.

While the respondent asserted that contractors have reliance interests in ''the principle of government neutrality in procurement,'' they did not explain why the prior policy generated legally cognizable reliance interests. The respondent did not specify what actions they may have taken in reliance on the prior policy under E.O. 13502 that they would not have taken if they had known the policy would change.

E.O. 14063 and the final rule apply prospectively and do not apply to or affect existing contracts already entered into by contractors. Both the E.O. and the rule apply only to new solicitations that are entered into on or after the effective date of this final rule. (See FAR 1.108(d) Application of FAR changes to solicitations and contracts.) Contractors will be able to decide whether or not to bid on contracts covered by the rule and to adjust their bidding strategy if necessary in response to any PLA requirement in the solicitation. Accordingly, while the Councils must implement the new requirements of the E.O. and do not have the discretion to depart from the mandate of the order, any reliance interests are outweighed by the benefits of this final rule.

8. Exclusion of Professional Engineering Services/Brooks Act

Comment: Several respondents expressed concern that the rule may be construed to require employees of professional engineering firms that perform various architectural and engineering professional services to become a party to a PLA. The respondents requested the rule exclude architectural and engineering services because such services are separate and distinct from construction services as recognized in 40 U.S.C. chapter 11, the Brooks Architect Engineer Act.

Response: Section 3 of the E.O. that applies the PLA requirement to contractors or subcontractors ''engaged in construction on the project'' excludes professional architecture and engineering services that are covered by the Brooks Architect Engineer Act. Given the distinction in FAR part 36 between construction and architect engineer contracts, architect engineer contracts issued under FAR subpart 36.6 are not covered by this rule.

9. Laws Associated With Rulemaking

Comment: Some respondents expressed concerns that the proposed rule fails to estimate the additional costs imposed on the public or the Government and claims that the lack of more comprehensive cost estimates violates the Administrative Procedure Act (APA). Some respondents asserted the proposed rule violates the arbitrary and capricious standards of the APA.

Response: The procedural rulemaking requirements of the APA do not apply to matters relating to public property, loans, grants, benefits, or contracts (see 5 U.S.C. 553(a)). This rulemaking is instead governed by 41 U.S.C. 1707, the OFPP Act. The proposed rule requested input from the public in response to the burden estimates, and the recommendations provided by the public have been considered in developing the final rule.

Comment: A respondent challenged the sufficiency of the legal authority used in the preamble for the proposed rule, 40 U.S.C. 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. 20113. The respondent claimed that as a result, the proposed rule does not comply with 5 U.S.C. 553(b)(2). The respondent claimed a statutory provision authorizing an agency head to engage in rulemaking does not give the agency the power to adopt a particular regulation.

Response: The APA (5 U.S.C. 553) does not apply to this rulemaking. The legal authority for the Federal Acquisition Regulations System is 40 U.S.C. 121(c), 10 U.S.C. chapter 4, and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016), and 51 U.S.C. 20113 because Congress has specified that those are the authorities under which DoD, GSA, and NASA ''shall jointly issue and maintain'' the FAR (41 U.S.C. 1303(a)(1)).

Comment: A respondent stated that the rule exceeds the authority of the executive branch under the Federal Property and Administrative Services Act, Federal procurement and labor laws, and the major questions doctrine. Another respondent stated that these requirements should not be extended to other projects without an act of Congress.

Response: While DoD, GSA, and NASA do not believe that this rulemaking implicates major questions principles, the E.O. and this final rule are a proper exercise of the executive branch's authority under the Federal Property and Administrative Services Act of 1949 (the Act) in any event. The Act authorizes the President ''to prescribe policies and directives that the President considers necessary to carry out'' the Act, as long as those policies are ''consistent'' with the Act (40 U.S.C. 121(a)). The E.O. and this final rule ''carry out'' and are ''consistent'' with the Act, including, for example, its provisions directing GSA to ''prescribe policies and methods for executive agencies regarding the procurement and supply of personal property and nonpersonal services and related functions'' (40 U.S.C. 501(b)(2)(A)); its requirements to ''implement the [congressional] policy'' that agencies ''achieve, on average, 90 percent of the cost, performance, and schedule goals established for major acquisition programs of the agency'' (41 U.S.C. 3103(a), (c)); its direction that agencies award contracts promptly to responsible sources whose proposals are most advantageous to the Federal Government, considering only cost or price and the other factors including in the solicitation (41 U.S.C. 3703; see 40 U.S.C. 111); and its stated objective of providing ''the Federal Government with an economical and efficient system'' for procurement activities, including ''[p]rocuring and supplying property and nonpersonal services'' (40 U.S.C. 101). Additionally, support for this rule is provided under the Act by provisions authorizing GSA to ''prescribe policies and methods for executive agencies regarding the procurement and supply of personal property and nonpersonal services and related functions (40 U.S.C. 501(b)(2)(A); see also 40 U.S.C. 121(c); 41 U.S.C. 1303).

The E.O. is also consistent with the longstanding, early, and consistent interpretation of the Procurement Act by several Presidents. The E.O. and rule reflect a decades-long tradition of executive orders across multiple Administrations that have invoked the Act to ''establish[ ] the policy of the Government with regard to the use of PLAs in Federal and federally funded construction contracts.'' *See Bldg. & Const. Trades Dept., AFL–CIO* v. *Allbaugh,* 295 F.3d 28, 30 (D.C. Cir. 2002). For example, E.O. 13302 (2001) provided that agencies could neither require nor prohibit the use of a PLA and was upheld on appeal by the D.C. Circuit. Presidents have also exercised their authority to prohibit agencies from using PLAs, see E.O. 12818 (1992), to revoke that prohibition, see E.O. 12836 (1993), and to encourage the use of PLAs, see E.O. 13502 (2009). ''[L]ongstanding practice'' is a strong indication that the E.O. as implemented in this final rule, like earlier applications of the President's authority, ''falls within the authorities that Congress has conferred upon him.'' *See, e.g., Biden* v. *Missouri,* 142 S. Ct. 647, 652 (2022).

Comment: A respondent claimed the rule violates the Congressional Review Act because the rule will cost more than $100 million and asserted that the proposed rule incorrectly stated that

this is not a major rule under 5 U.S.C. 804. Another asserted the rule is subject to the Congressional Review Act, and questions why the rule is subject to E.O. 12866 but is not a major rule.

Response: The Congressional Review Act requires submission of all interim and final rules, regardless of dollar value, to each House of the Congress and to the Comptroller General of the United States, as provided in section VI of the proposed rule (87 FR 51044). This final rule will be submitted in accordance with the Congressional Review Act. The determination of whether a rule is a major rule is made by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) (see Section VI of this preamble). OIRA also makes the determination whether or not a rule meets the threshold at section 3(f) of E.O. 12866.

Comment: A respondent asserted that the rule violates the Regulatory Flexibility Act because the FAR Council failed to consider the proposed rule's deleterious effect on small businesses that are deprived of business because they refuse to enter, or cannot enter, a PLA.

Response: The rule complies with the Regulatory Flexibility Act. The proposed rule examined the impact of the proposed rule on small businesses, small governmental jurisdictions, and small organizations. The rule solicited comments from the public pertaining to the estimated burden which was used to inform the final rule. The rule allows all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to a CBA.

10. Exceptions

Comment: Some respondents recommended that the final rule should insert ''Federal'' before statute and law to ensure state laws are not used to bypass PLA requirements.

Response: The final rule adopts this change because state and local statutes and regulations cannot regulate Federal procurement. *See United States* v. *Georgia Pub. Serv. Comm'n,* 371 U.S. 285, 292 (1963).

Comment: A respondent asserted that PLAs make several of the exceptions provided in the E.O. unnecessary. For example, the respondent recommended deleting the exception for a PLA not achieving economy and efficiency because economy and efficiency has been improved with PLAs on large industrial projects with many contractors and subcontractors. The respondent also asserted that the exception for reduction in competition is also unnecessary.

Response: The final rule implements the exceptions provided in Section 5 of the E.O.

Comment: Some respondents recommended that the rule require agencies to post approved exemptions to public websites before the solicitation date and allow a limited time to request reconsideration of the exemption decision before the solicitation is issued.

Response: The final rule implements section 6 of the E.O., which requires agencies to publish data and descriptions of the waivers granted on a centralized public website by the solicitation date to the extent permitted by law and consistent with national security and executive branch confidentiality interests.

Comment: A respondent was concerned that the one-trade exception will be misapplied.

Response: The contracting workforce will be provided training to ensure accurate application of the regulations in accordance with section 9 of the E.O, including 22.504(d)(1)(i)(B).

Comment: Some respondents recommended that the exceptions be very narrow and only utilized after a transparent decision-making process. A respondent was concerned that senior procurement executives will simply check a box to avoid a PLA.

Response: Exceptions will only be authorized in accordance with the direction in section 5 of the executive order.

Comment: A respondent stated that the proposed rule does not contain an exception for when inclusion of a PLA demand would impede economy and efficiency; a PLA could well have such an effect without triggering any of the clauses of the proposed exceptions. For example, agencies could choose a PLA bid that is twice as expensive as an otherwise similar bid that does not include a PLA. An exception from the PLA mandate should apply if it can be demonstrated that the mandate would increase construction costs by a substantial amount, for example by 15 percent or more. The respondent recommended additional exceptions: (1) if one or more contractors cannot obtain a stable workforce, (2) if contractors show that a PLA would increase their price by 5 percent or more and that not using a PLA would not negatively impact quality, timeliness, and safety, (3) if all contractors can sign the agreement that meet 2 terms of the PLA mandate, including the non-strike and procedures for disputes, and (4) if requiring a PLA reduces the number of qualifying bids below a certain threshold that would signal a lack of competition.

Response: The E.O. and final rule include several exceptions at FAR 22.504(d) that could be used to address the respondent's concerns. In addition to the exception specifically for economy and efficiency, market research will be used to determine whether a PLA would reduce competition to such a degree that it would not allow for a fair and reasonable price.

Comment: Some respondents requested the urgent and compelling limitation reflect that requiring a PLA on the project would result in serious injury, financial or other, to the Government.

Response: Agencies may grant an exception based upon a specific written explanation as provided under Section 5 of the E.O., including any exception based on unusual and compelling urgency.

Comment: A respondent requested that agencies find it inappropriate to characterize a project as short-term if data concerning the completion rates of similar Federal projects in terms of construction type (*e.g.,* work on GSA-managed buildings) and competing activities in the vicinity demonstrate that such projects are not generally completed in the calendar year in which the project commences.

Response: Each project is evaluated on a case-by-case basis to determine if the project duration or lack of operational complexity would qualify for an exception under section 5 of the E.O.

Comment: A respondent was concerned that the language omits key details of the E.O. with regard to potential exceptions, rendering them so broad that contracting officers can continue to disregard this guideline.

Response: The rule implements the exceptions provided in the E.O. The rule provides additional explanations to ensure agencies apply an exception appropriately.

Comment: A respondent requested the senior official referenced in section 5 of the E.O. to be the agency head and not the senior procurement executive.

Response: FAR 2.101 identifies the senior procurement executive as the responsible official for management direction of the acquisition system in an executive agency (41 U.S.C. 1702(c)).

Comment: A respondent expressed concerns that the lack of agency experience with PLAs will cause contractors to price additional risk into projects with PLAs.

Response: Agencies will receive training on the use of PLAs in accordance with section 9 of the E.O.

Comment: A respondent supported the requirement that exceptions must be granted by the solicitation date as opposed to after a solicitation has been issued with a PLA requirement. The respondent also wanted the FAR to expressly state that a PLA cannot be required after a solicitation has been issued.

Response: The rule requires agencies to grant an exception prior to the issuance of the solicitation (see 22.504(d)(3)) in accordance with section 5 of the E.O.

11. Definitions

Comment: A respondent recommended that the rule add a geographical definition of market because construction workers are mobile.

Response: Contracting officers will determine the applicable market based upon the project requirements.

Comment: A respondent recommended that the FAR clearly provide that whether the union with which a PLA has a membership or affiliation in a building trade construction council cannot be considered in bidding or the acceptance of bids on a PLA covered by E.O. 14063 or the proposed FAR rule.

Response: A union does not need to have membership or affiliation in a building trade construction council to become a party to a PLA when required for a construction project. Regardless of whether a PLA is required at the time of proposal submittal, award or postaward, all contractors working on the project are required to become a party to the PLA. However, the E.O. does require that the PLA be with a ''labor organization,'' which is defined as one in which ''building and construction employees are members, as described in 29 U.S.C. 158(f).''

Comment: A respondent requested removal of proposed text at FAR 22.504(c), which prevented agencies from requiring contractors and subcontractors to enter into a PLA with a particular labor organization when there were multiple labor organizations representing the same trade, because it is redundant, and the respondent recommended using the E.O. language. Another respondent stated that by its very nature, a PLA is an agreement through which the contractor requires subcontractors to enter into an agreement with a particular labor organization. By signing the PLA, the subcontractors enter into an agreement with all the signatories to the agreement, not with any particular labor organization.

Response: The final rule text has been revised to adopt this recommendation at FAR 22.504(c) with conforming changes in FAR solicitation provision 52.222–33, Notice of Requirement for Project Labor Agreement and FAR contract clause 52.222–34, Project Labor Agreement. See section II, paragraph A of the preamble.

Comment: A respondent supported the final rule's alignment of the definition of the term ''labor organization'' in the rule with the discussion of PLAs in section 8(f) of the NLRA, which defines PLAs (pre-hire agreements) as agreements with ''a labor organization of which building and construction employees are members.'' See 29 U.S.C. 158(f). The respondent, however, suggested that the final rule definition of ''labor organization'' should also require that the labor organization ''itself, its parent, or parent's affiliates establish, maintain, or participate in a registered apprenticeship program in the construction industry.'' The respondent stated that this language reinforces the registered apprenticeship programs that are regulated by DOL or a state apprenticeship program. Another respondent recommended that the rule revise the definition of labor organization to delete the word ''building'' so that it reads a labor organization ''of which construction employees are members'' instead of ''of which building and construction employees are members.''

Response: The rule implements the definition provided in the E.O., which is consistent with the description of PLAs in section 8(f) of the NLRA.

Comment: A respondent expressed support for the proposed rule's inclusion of the term ''structures'' in the rule's definition of ''construction,'' as consistent with the language of the E.O. and the FAR generally. Another respondent recommended replacing the E.O. definition of construction with language from the coverage provisions of the Davis-Bacon Act (40 U.S.C. 3142(a)) because the scope of those coverage provisions is widely accepted and understood. The respondent stated that the new definition in the E.O. increases opportunities for ambiguity.

Response: The final rule implements the definition provided in the E.O. The scope of coverage of Federal construction projects under the E.O. and the Davis-Bacon Act are not identical, and there may be work that is not covered under the Davis-Bacon Act that is covered under the E.O. Agencies ultimately must make independent determinations under the E.O. of whether a contract is for ''construction'' or whether a subcontractor is ''engaged in construction'' such that they are required to be a party to a PLA.

12. Market Research

Comment: A respondent recommended that labor organizations be consulted when applying the market exception because they can provide information on available contractors, workers, etc. The respondent also suggested adding ''Construction labor organizations that have geographical jurisdiction where the project is to be located shall be consulted on current market conditions, including, but not limited to, the availability of contractors and labor, potential bidders and the degree of unlawful employment practices.'' Additional respondents recommended that agencies confer with union and non-union contractor associations and labor unions during market research to determine whether certain exceptions apply.

Response: The E.O. requires contracting officers to perform an inclusive market analysis. The FAR currently requires agencies to conduct market research in FAR part 10 and, specific to construction, in part 36.

Agencies may use various tools to examine market conditions described in FAR part 10. Agencies generally confer with interested parties using sources sought notices and advance notices for construction contracts (see FAR 36.211 and 36.213–2). These notices are primarily published on the Government-wide point of entry (GPE) at *www.sam.gov,* which is accessible from a computer or mobile device connected to the internet. Also, agencies may be required by statute to publicize contract opportunities to increase competition, broaden industry participation in meeting Government requirements, and to assist small business concerns in obtaining contracts and subcontracts (see 5.002 and FAR subparts 5.1 and 5.2).

The GPE is available to the public, including union and non-union contractor associations and labor unions, through the internet without having to register as a potential offeror. It is also used to reach as many interested parties as practicable and offers extensive search functionality which allows the user to identify Governmentwide business opportunities at all phases. Those interested in participating in market research for construction projects can simply select ''sources sought'' under notice type and proceed to filter on additional factors such as organization or place of

performance. The user may then respond directly to the contracting officer conducting market research.

Comment: A respondent did not support language requiring a contracting officer to ascertain interest and availability of union and non-union contractors during market research surveys. The respondent suggested that it would be inappropriate to analyze whether contractors are union or non-union given that the E.O. allows contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. The respondent stated that surveys taken as part of market research have been used to undermine the process of fairly ascertaining overall contractor interest. As a result, the respondent urged that contractor interest include all contractors with no requirement for a certain segment of the industry to be included in the responses. Some respondents asserted agency efforts for market research on PLAs have been flawed because standard methods of publicizing contract opportunities, such as Fedbizopps, only reach contractors seeking work opportunities and the contracting community and not unions. Further, historically, many of the market survey questions about PLAs were not aimed at the particular market but asked generic questions about general attributes of PLAs. Documentation regarding the consideration of a PLA was nothing more than checking a box. Another respondent expressed concern that an examination of contractors' ''interest'' in working under a PLA will not yield reliable information about whether there will be sufficient competition. The respondent claimed that non-union contractors consistently assert in responses to market research that they have no ''interest'' in participating in projects conducted under PLAs and that they will not bid for such work; however, when actually presented with the opportunity to work on a large public works project, non-union contractors step forward.

Response: The language in FAR 36.104(c)(2) referencing the availability of both union and non-union contractors is not intended to suggest that only union contractors can or will bid on projects where a PLA is required. Rather, it is intended to assist with implementing the E.O.'s requirement that an exception be based on an ''inclusive'' market analysis. Contractors may bid on projects subject to this final rule regardless of whether they are otherwise party to CBAs, and available evidence suggests that non-union contractors do bid on projects with PLAs.

The goal of market research in the context of the E.O. and this final rule is to determine whether requiring a PLA would substantially reduce the number of potential offerors to such a degree that the Government could not meet its requirements at a fair and reasonable price. While the language of FAR 36.104(c)(2) seeks information about contractor ''interest,'' a potential bidder's claim that they are disinterested in bidding on projects with PLAs, alone, would not necessarily justify the exercise of an exception, in particular where other information suggests that a sufficient number of offers would be received.

Agencies conduct market research using the various tools and techniques in FAR 10.002, inclusive of direct communication with industry via online communication, interchange meetings, or pre-solicitation conferences, as needed and applicable. The final rule provides additional direction at FAR 36.104(c)(2) for projects that may require a PLA.

Use of the GPE at *www.sam.gov* to publish a sources sought notice is the primary method used and allows all interested parties equal access to the Government's market research efforts. All entities interested in contracting with the Government understand that the GPE is the statutory source for dissemination of contracting opportunities, to include notifications or announcements of future opportunities. Union and labor organizations are not precluded from searching and monitoring *www.sam.gov* as all other interested parties do, nor are unions prevented from responding to market research or sources sought notices. Union and labor organization utilization of the GPE at *www.sam.gov* to respond to market research or sources sought notices will help to inform contracting officer's determinations.

Comment: Some respondents recommended that the market research text under 36.104(c)(2) be revised to state that ''Contracting officers conducting market research for Federal construction contracts shall ensure that the procedures at 10.002(b)(1) involve a current and proactive examination of the market conditions in the project area to determine the availability of local, regional and national unions and contractors to participate in a project that requires a PLA. The contracting officer may use market research conducted within 18 months before the award of the construction contract only if the current and proactive examination of market conditions demonstrates that the information is still current, accurate and relevant. Contracting officers may coordinate with agency labor advisors, as appropriate.''

Response: Market research is conducted during acquisition planning to establish the most suitable approach to meeting an agency's needs. The direction at 10.001 and 10.002 currently provide sufficient guidance to contracting officers on the conduct and use of market research to inform a particular procurement. The final rule, at FAR 36.104(c)(2), adds specific direction for contracting officers for use in conjunction with FAR part 10 guidance, when a large-scale construction contract is contemplated.

Comment: A respondent recommended market research and requests for information use a standard set of questions with consistent formatting for contractors to use and to give contractors at least 2 weeks to respond. Another respondent recommended that the rule standardize PLA surveys for interested parties to comment and an automated system to process the inputs.

Response: While the Government understands and appreciates the interest in consistency when conducting market research, it is not possible to create a standard set of questions that will result in sufficient information for every size and type of construction project. Also, while there may be some elements of PLA surveys that can be standardized, the Government believes the uniqueness of each project and other elements like locality does not lend itself to a standardized document.

13. Application to Indefinite Delivery Indefinite Quantity (IDIQ) Contracts

Comment: A respondent asserted that IDIQ contracts are unusual but agrees that the PLA requirement should be associated with the award of a particular order.

Response: Data indicates that IDIQ contracts for multiple projects, regions, and types of construction are more frequently used than definitive contracts Governmentwide. The rule acknowledges that orders are primarily project- and location-specific, making the application of a PLA requirement appropriate at the order level.

Comment: Some respondents requested that the $35 million value should be applied at the IDIQ base contract level, not to individual orders.

Response: IDIQ contracts are often used for multiple, distinct construction projects in varied markets. As a result, there may be differing markets within the scope of the IDIQ, which could make one overarching PLA

inappropriate. Agencies are not precluded from requiring one PLA, but they should do so based upon market research.

14. Burden Estimates

Comment: A respondent asserted that the rule overestimates the costs of negotiating PLAs under the rule because PLAs are standardized in many markets, so they may not need to be negotiated from scratch.

Response: The rule assumes that most PLAs will be negotiated from scratch because PLAs have not been mandated prior to this E.O. Historical data does not support any other assumption.

Comment: A respondent stated the statistical process followed by the Government is generally reasonable but stated that assumptions and outcomes cannot be effectively evaluated. The respondent stated that it would be surprising if the actual totals were an order of magnitude larger than provided in the proposed rule. The respondent supported the Government's assumption that there are 4 bidders. The respondent also believed that the focus on total costs versus additional costs is appropriate. The respondent questioned the 20 percent assumption for small businesses because the Government has historically awarded 15 percent of its contracts to small businesses, which would drop the estimate to 18 to 32 small businesses. The respondent offered that according to *USAspending.gov,* since 2008 9.7 percent of prime construction projects of $35 million or more went to small businesses. The respondent also stated that if the Government had used wage data from the construction industry, it would have reduced estimates.

Response: The rule uses the fiscal years 2019, 2020, and 2021 data from the Federal Procurement Data System (FPDS) to establish the estimates. The impact of the rule has been adjusted to reduce the percentage of large scale construction contracts awarded to small entities to 15 percent.

Comment: Several respondents questioned the number of subcontractors used in the estimated impact of the rule. Respondents recommended using ranges of 8 to 10 or 15 to 20 based upon the size of the project. The increase will likely reflect a greater negative impact on subcontractors and small businesses.

Response: The impact of the rule is revised to account for an increased number of subcontractors for each project subject to the PLA requirements.

Comment: A respondent stated that the cost review should have taken into account that some exceptions may be denied, or it should be clarified that it only considers approved requests.

Response: The rule does not differentiate between the number of exceptions submitted, approved, or denied because the preparation, submittal, and review of an exception would occur regardless of whether an exception was approved or denied.

Comment: A respondent recommended the total estimated costs be defined as ''all estimated costs incurred for completion of the construction project, including, but not be limited to site acquisition, preconstruction environmental work, site preparation, design (including architectural, engineering, and other professional costs), labor costs, construction equipment, construction management, inspection, relocation, and refurbishing.'' The respondent asserted a standard definition would be beneficial to contracting agencies.

Response: Total estimated costs for purposes of this rule are only those associated with the PLA rule definition for construction at 22.502 and 52.222–3. While a construction estimate may include the cost of design for a project for which a design-build contract is contemplated, professional services provided by architecture and engineering firms are not subject to PLA requirements.

Comment: A respondent believed the estimate of the percentage of contracts that will be exempt appears to be a misconception of the mandate. Exemption of up to half the covered projects is clearly inconsistent with a requirement that contracting agencies use PLAs.

Response: The rule takes into account the potential exceptions that are provided in the E.O. DoD, GSA, and NASA have estimated the potential use of the exceptions with the knowledge that the market will influence whether a PLA is in the best interest of the Government.

Comment: Some respondents asserted the rule vastly underestimates the economic impact. Another respondent asserted the cost impact of the rule needs to be adjusted upwards. The respondent asserts that on average an experienced company takes 400 hours to negotiate a PLA, but that estimate does not include the hours needed to draft and revise the PLA, negotiate economic terms, factor economic terms into proposal pricing, obtain legal review, coordinate with prospective subcontractors, or factor in hours spent by other parties to the PLA. The respondent recommended the total hour estimates to negotiate a PLA be increased to at least 500 hours to provide a more reflective cost estimate.

Response: The final rule contains updated burden estimates in response to public comments.

Comment: A respondent expressed concern that the attorney hourly rate is underestimated.

Response: The rule uses Bureau of Labor Statistics (BLS) National Occupational Employment and Wage Estimates for May 2021 as the basis for the legal participants' hourly rates.

15. PLA Submittal

Comment: Several respondents recommended that the final rule require PLAs to be submitted before contract award, eliminating the third option which allows submittal after award. Another respondent recommended that PLAs be submitted before a final contract award so that contracting agencies can confirm bidder eligibility and influence PLA content. Another respondent was concerned that postaward submittals will not ensure that a project will be covered by a PLA.

Response: The final rule permits the submittal of PLAs with an offer, prior to award, or after award. Contracting officers have the discretion to select the most appropriate option for the particular procurement.

Comment: A respondent recommended that paragraph (e) be removed from 52.222–33 and the Alternate 1, and substitute para (b) of Alternate II. Because PLA negotiations take on average 90 days, an offeror would not be able to submit a PLA with its offer. This would favor affiliated companies and disincentivize non-affiliated ones from participation. This would reduce efficiency and Government selection in a fair bidding process. The respondent asserted postaward alternatives in 52.222–33 would better suit and satisfy the reality of the days taken to negotiate PLAs.

Response: The rule allows the contracting officer to determine, based upon market research, when to require the submittal of a PLA. The rule provides options for contracting officers to choose from.

16. Implementation

Comment: A respondent questioned whether the rule would be immediately implemented into all applicable construction contracts or only newly awarded applicable construction contracts.

Response: The final rule will be effective 30 days after publication. OIRA has determined that this rule is not a major rule. According to FAR 1.108(d), Application of FAR changes to

solicitations and contracts, FAR changes apply to solicitations on or after the effective date of the change, unless otherwise specified.

Comment: A respondent questioned how the rule will address different geographical locations within the United States where the construction industry does not use PLAs and where organized labor is less common.

Response: In addition to the market research conducted under FAR part 10, the final rule requires contracting officers to conduct an inclusive market analysis to evaluate whether a PLA requirement for any particular project would advance the Government's interests in accordance with the E.O. This inclusive market analysis must consider the market conditions in the project area and the availability of unions, and unionized and non-unionized contractors.

Comment: A respondent recommended the council evaluate the need for a PLA on a project-by-project basis, prioritize flexibility, provide for standardized solicitations, general waivers, and keep the waiver authority at the current level and NOT raise it to the senior procurement executive.

Response: The rule requires agencies to evaluate the feasibility of a PLA based upon market research and other considerations on a project-by-project basis. Solicitations and contracts for construction are generally standardized using the procedures authorized in FAR part 36, however requirements are specific to the particular project. The rule interprets the senior official referenced in the E.O. to be the Senior Procurement Executive as the responsible official for management direction of the acquisition system (see 2.101).

17. Negotiations

Comment: A respondent was concerned that the rule does not clearly prohibit an agency from engaging in PLA negotiations. The respondent asserted that the PLA should be negotiated solely and directly by contractors with employees working on the PLA project and the labor unions representing workers on the PLA project, as they are the only parties explicitly authorized to enter into a PLA agreement under the NLRA. The respondent also requested that the rule clarify that a PLA may not be unilaterally written by a labor organization or negotiated by parties who will not be employing workers on the project.

Response: PLAs are pre-hire agreements negotiated solely between labor unions and contractors working on a specific project. The Government does not participate nor is it a signatory to the PLA.

18. Out of Scope

Comment: A respondent recommended that the Government invest in workforce development training for the skilled trades at the high school level.

Response: This comment is outside the scope of this rule.

Comment: A respondent recommended formalizing the U.S. Army Corps of Engineer's PLA Survey process for all Federal agencies executing construction.

Response: This comment is outside of the scope of this rule because policy guidance will be developed separately by OMB.

Comment: A respondent requested the Council lessen barriers and increase opportunities for U.S.-owned and-operated construction firms to build with the Federal Government.

Response: This comment is out of scope of the rule.

Comment: A respondent requested the passage by Congress of the Fair and Open Competition Act (H.R. 1284) that would prohibit Federal construction contracts from requiring or prohibiting PLAs.

Response: This comment is out of scope of the rule.

Comment: A respondent assumed that agencies estimated their costs based on contracts that did not use a PLA because 99.4 percent of their projects did not use a PLA. The rule does not specify how agencies must estimate the cost of projects. Consequently, the agencies should either (1) require estimated project costs to be based on fair market costs or (2) apply an exception to bids of $35 million or less, regardless of the agencies initial estimated cost of the project.

Response: The development of independent Government cost estimates for construction contracts is out of scope of this rule.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), or for Commercial Services

This rule amends the provision at FAR 52.222–33 and the FAR clause at 52.222–34. However, this rule does not impose any new requirements on contracts at or below the SAT or for commercial products, commercial services, and COTS items. Since the provision and clause apply to large-scale Federal construction contracts, neither would apply to acquisitions at or below the SAT or to acquisitions for commercial products, commercial services, and COTS items.

IV. Expected Impact of the Rule

A PLA is defined as a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f). PLAs are a tool that can be used to provide labor-management stability and ensure compliance with laws and regulations such as those governing safety and health, equal employment opportunity, labor and employment standards, and others. Requiring a PLA means that every contractor and subcontractor engaged in construction on the project agree, for that project, to negotiate or become a party to a PLA with one or more labor organizations.

Currently, the regulations at FAR subpart 22.5 encourage the use of PLAs for large-scale Federal construction projects, which is defined as projects with a total cost of $25 million or more. According to the data collected by OMB, between the years of 2009 and 2021, there was a total of approximately 2,000 eligible contracts and the requirement for a PLA was used 12 times. Based on the data, on average there are approximately 167 eligible awards annually and approximately one award that includes the PLA requirement.

This rule implements E.O. 14063, Use of Project Labor Agreements for Federal Construction Projects, which requires the use of PLAs in large-scale Federal construction projects unless an exception applies. In accordance with the E.O., the definition of ''large-scale Federal construction projects'' is amended from $25 million or more to $35 million or more. Based on FPDS data from fiscal year 2019 through fiscal year 2021, the average number of construction awards, including orders against IDIQ contracts valued at $35 million or more, were approximately 119 annually. The average value of each award is approximately $114 million.

In accordance with the E.O., this rule provides exceptions to the requirement to use PLAs for large-scale Federal construction projects. Exceptions must be based on at least one of the conditions listed at FAR 22.504(d). These conditions include when the requirement for a PLA would not advance the Federal Government's interests; where market research indicates a substantial reduction in competition to such a degree that adequate competition at a fair and

reasonable price could not be achieved; or where the requirement would be inconsistent with other statutes, regulations, E.O.s, or Presidential memoranda. There is no data on the number of exceptions that may be granted since the mandate and associated exceptions are new. It is possible there may be a higher usage of exceptions in the initial year as industry and the Government work to implement the requirement. Considering the lack of available data on the proposed exceptions, it is estimated that exceptions may be granted for 10 percent to 50 percent of covered contracts; in other words, an estimated 60 to 107 construction contract awards may require PLAs.

The current FAR provision at 52.222–33, Notice of Requirement for Project Labor Agreement, provides a basic provision and 2 alternative provisions from which the contracting officer can select. The provision selected identifies whether all offerors, the apparent successful offeror, or the awardee must provide a copy of the PLA. There is no historical data on the selection of alternatives. Therefore, it is assumed each alternative will apply one third of the time. This implies one third of affected solicitations will require all offerors to provide a PLA, and two thirds of affected solicitations will only require one entity (apparent successful offeror or awardee) to provide a PLA.

To estimate the number of offerors that would be required to provide a PLA, the Government estimates an average of 4 offers would be submitted per award; *i.e.,* an estimated 80 to 144 offerors (20 to 36 awards * 4 offers). Therefore, the total number of estimated entities that would be required to submit PLAs at the prime contract level is 120 to 215 entities (40 to 71 apparent successful offerors or awardees + 80 to 144 offerors). The final rule reduces the estimated percentage of entities assumed to be small entities from 20 to 15 percent in response to public comments and updated analysis of FPDS data. As a result, approximately 18 to 32 small entities and 102 to 183 large entities may be required to submit PLAs.

For the estimated 120 to 215 entities that will be required to have a PLA to submit an offer or perform a contract, generally the entity will negotiate the terms and conditions of the PLA with one or more union(s). It is assumed an entity will require a total of 5 participants, the owner or a senior executive, legal counsel, a project manager, and 1 to 2 labor advisors, depending on the size of the workforce, to support the negotiations. In response to public comments, the final rule revises the scope and estimated hours required for each party involved in the negotiation of a PLA. Public comments indicated that, in addition to the negotiation of a PLA discussed in the proposed rule, entities performed several other requirements necessary to develop and ultimately implement a PLA. Taking those additional tasks into consideration, the final rule increases the estimated hours from 40 to 80 hours to 100 to 200 hours for each party involved in the development, negotiation, and implementation of a PLA between a prime contractor and a union.

According to the Bureau of Labor Statistics (BLS) National Occupational Employment and Wage Estimates for May 2021, the mean hourly wage for General and Operations Managers is $55.41/hour, $71.17 for Lawyers, and $102.41 for Chief Executives. To reflect the variety of labor categories necessary to estimate the impact, a mean hourly rate of $76.33 is used for this calculation. The current BLS factor of 42 percent is applied to the mean wage to account for fringe benefits and an additional 12 percent overhead factor is applied (see Attachment C of OMB Circular A–76 Revised issued May 29, 2003), for a total loaded wage of $121.40/hour ($76.33 * 142 percent * 112 percent).

It is estimated that 1 hour is required by one member of the contractor's workforce to submit the PLA to the Government on behalf of the contractor. Using the BLS wage estimates for Office and Administrative Support Occupations, the mean hourly rate for submitting the PLA is estimated to be $33.21 (20.88 * 142 percent * 112 percent). The total estimated impact for the development, negotiation, submission, and implementation of a PLA in response to a Government contract is $7.28 to $26.10 million (120 to 215 entities *((5 participants * 100 to 200 hours * $121.40) + (1 person * 1 hour * $33.21)). Taking midpoints of each range implies a primary estimate of $16.69 million.

The requirement for a PLA flows down to subcontractors through FAR clause 52.222–34, paragraph (c). There is no data source that identifies the number of subcontractors per contract; however, based upon public comments, the final rule increases the estimated number of subcontractors from 2 to an average of 14 for each contract. As a result, the final rule estimates that the requirements of a PLA will apply to approximately 1,680 to 3,010 subcontractors (120 to 215 * 14).

Subcontractors may, in certain circumstances, participate in discussions with a prospective offeror regarding desired PLA-specific conditions, such as core employee provisions or the opting out of certain union fees, prior to agreeing to perform as a subcontractor for a specific project. While subcontractors do not negotiate the PLA directly with the union, they will ultimately need to review the terms and sign on to the PLA negotiated by the prospective offeror or prime contractor in order to participate on the project. Based upon public comments, the final rule acknowledges that an attorney will most likely participate in any discussions with the prospective offeror and ultimately the review of the negotiated PLA. As a result, the number of participants on behalf of the subcontractor is increased from 2 to 3, the owner, project manager, and an attorney. In addition, the final rule increases the estimated number of hours required for the subcontractor's participants to review and implement the PLA. As a result, the estimated number of hours is increased to 2.5 to 25 hours.

Based upon the previously provided BLS data, a total loaded wage of $121.40 reflects the variety of labor categories necessary to estimate the impact of the proposed rule on subcontractors. The total estimated impact for subcontractors participating in discussions with prospective offerors, reviewing, implementing, and complying with a PLA in response to a government contract is estimated to be $1.53 to $27.41 million (1,680 to 3,010 subcontractors *(3 participants * 2.5 to 25 hours * $121.40)). Taking midpoints of each range implies a primary estimate of $ 14.47 million. The total annual estimated impact for prime contractors and subcontractors to develop, review, negotiate, submit, implement, and comply with a PLA in response to a government contract is estimated to be $8.81 million to $53.51 million.

For the Government, contracting officers will continue to conduct market research and consider factors to support a decision to use, or not to use, PLAs in large-scale construction projects. There will continue to be instances in which the use of PLAs will benefit the Government and others where it is not feasible to use PLAs. This rule establishes new procedures for the contracting officer to request an exception to the requirement to use PLAs. The new procedures require the contracting officer to prepare a written explanation to request an exception and route the request for approval by the senior procurement executive. The act

of preparing and routing an exception request is typically performed by a contract specialist customarily at the GS–12 step 5 level and is estimated to take an average of 2 hours. The hourly rate of $65.77 is based upon the Office of Personnel Management (OPM) Table for the Rest of the United States, effective January 2022, for a GS–12 step 5 employee ($43.10 per hour) plus a 36.25 percent factor to account for fringe benefits in accordance with current OMB memorandum M–08–13 and a 12 percent overhead factor (see Attachment C of OMB Circular A–76 Revised issued May 29, 2003). As stated previously, the estimated number of exception requests per year is between 12 and 60; therefore, the anticipated cost for preparing and routing requests is $1,578 to $7,892 (12 to 60 exceptions * 2 hours * $65.77). Taking midpoints of each range implies a primary estimate of $4,735.

The review of the exception request is expected to be performed at the GS–15 level or higher and may involve more than one level of review prior to approval or rejection. This process is estimated to take approximately 4 hours. The hourly rate of $108.71 is based upon OPM Table for the Rest of the United States, effective January 2022, for a GS–15 step 5 employee ($71.24 per hour) plus the 36.25 percent factor to account for fringe benefits and a 12 percent factor for overhead. The estimated cost for review and approval is between $5,218 to 26,090 (12 to 60 exceptions * 4 hours * $108.71). Taking the midpoint of the range implies a primary estimate of $15,654. The total annual estimated cost to prepare, route, review, and approve requests for exceptions is estimated to be $6,796 to $33,982.

The annual total estimated impact of PLAs to the public and Government is estimated to be $8.87 million to $53.54 million.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

Pursuant to the Congressional Review Act, DoD, GSA, and NASA will send this rule to each House of the Congress and to the Comptroller General of the United States. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this rule does not meet the definition in 5 U.S.C. 804(2).

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 14063, Use of Project Labor Agreements for Federal Construction Projects, dated February 4, 2022, which mandates that Federal Government agencies require the use of project labor agreements (PLAs) for large-scale Federal construction projects (total estimated value of $35 million or more), unless an exception applies. Agencies still have the discretion to require PLAs for Federal construction projects that do not meet the $35 million threshold.

The objective of the rule is to implement the E.O. 14063 change in policy from discretionary use to requiring the use of PLAs for Federal construction projects valued at $35 million or more, unless an exception applies.

Significant issues raised by the public in response to the IRFA are as follows:

Comment: Numerous respondents expressed concerns about the burden on small entities associated with the use of PLAs. Several respondents indicated that the burden estimates were significantly understated in terms of the number of subcontractors impacted and the hours necessary to negotiate and establish a PLA. The respondents were also concerned that the additional complexity and costs associated with a PLA would create a barrier to entry for small entities.

Response: In response to public comments, the burden estimates are revised for all entities, to include the number of subcontractors and hours required to implement a PLA at both the prime contractor and subcontractor level. Additional analysis of subcontractor data also resulted in an increase in the estimated number of subcontractors assumed to be small entities.

The Office of Management and Budget (OMB) and the Department of Labor (DOL) intend to work with the Small Business Administration (SBA) to determine the best way to help small entities in understanding how to negotiate or participate in a construction project with a PLA.

Comment: Several respondents are concerned that PLAs will create a barrier to entry for many small, minority, and women-owned businesses. The respondents are also concerned that the rule will discourage small businesses from bidding on covered Federal construction contracts and thereby impose obstacles on the use of small business preferences required by Federal agencies in violation of the Small Business Act (15 U.S.C. 637(d)).

Response: The final rule does not change the use of small business preferences in procurements subject to the Small Business Act. PLAs may help small businesses by providing them with a level playing field and access to expanded skilled labor pools, while streamlining project administration and the negotiation of workplace terms and conditions. The E.O. and final rule provides an exception if a PLA requirement would be inconsistent with statutes and regulations. OMB and DOL intend to work with SBA to determine the best way to help small entities in understanding how to negotiate or participate in a construction project with a PLA.

DoD, GSA, and NASA considered the public comments in the development of the final rule; however, no changes were made to the FAR text in response to the comments.

The Chief Counsel for Advocacy of the Small Business Administration submitted comments dated October 18, 2022, in response to the proposed rule published August 19, 2022, implementing Executive Order 14063, Use of Project Labor Agreements for Federal Construction Projects.

The following were the Office of Advocacy's chief concerns:

Comment: The Office of Advocacy encouraged the Council to re-evaluate the excessive cost of compliance of this mandatory rule on small entities and encouraged the FAR Council to explore alternatives to this rulemaking as it relates to small entities.

Response: An analysis of the rule's impact on small entities was conducted and updated for the final rule, the results are included in the preamble under section IV, Expected Impact of the Rule. The E.O. requires the use of PLAs on large scale Federal construction projects unless an exception applies. The exceptions in section 5 of the E.O. do not include entity size, therefore there are no alternatives available that would reduce the impact on or exempt small entities from its requirements. However, the E.O. and final rule do provide an exception if a PLA requirement would be considered inconsistent with statutes and regulations.

OMB and DOL intend to work with SBA to determine the best way to help small entities in understanding how to negotiate or participate in a construction project with a PLA.

Comment: The Office of Advocacy encouraged the Council to consider a requirement relieving a small business from having to join a union if it agrees to pay the prevailing wages and other benefits established in union negotiation. The Office of Advocacy also suggested that removal of this mandatory requirement would allow the Federal Government to achieve its objective with the PLA but at less cost to the small business.

Response: Neither the E.O. nor the final rule require any entity, regardless of size, to join a union. Contractors and subcontractors

may negotiate with the union that is party to the PLA to opt out of certain fees, to include when current benefits are equivalent to those provided by the union.

Comment: The Office of Advocacy contended that the mandatory requirement for a PLA means that every contractor on a Federal construction contract, regardless of size, must agree to negotiate or become a party to a PLA with one or more labor organizations. This creates a mandatory flow down requiring all affected small businesses to join a union, regardless of size or dollar value of the subcontract. This flow down will have a detrimental cost impact on those small entities. The rule requires small business subcontractors to comply with the mandatory flow down but does not allow the small business to utilize the contracting agency resources to resolve disputes.

Response: The E.O. requires all contractors and subcontractors to agree to become a party to a PLA to participate on a large scale Federal construction project, unless an exception applies. Neither the E.O. nor the final rule requires any entity, regardless of size, to join a union. Contractors and subcontractors may negotiate terms and conditions with the union on a range of topics to include dispute resolution procedures, fringe benefits, and union dues.

Comment: The Office for Advocacy encouraged modifying the rule to reflect the diminishing cost-benefit to small firms by providing for a threshold contract value for covered subcontractors because additional analysis would show that a small firm that has only a few contracts per year will absorb a higher cost of compliance than a firm with multiple yearly contracts.

Response: The E.O. requires the use of PLAs on large scale Federal construction projects unless an exception applies. The E.O. does not provide a threshold for subcontractor participation, therefore there is no legal authority to provide such a threshold. The E.O. applies the PLA requirements to all contractors and subcontractors, regardless of size.

An analysis of the rule's impact on all entities was conducted and updated for the final rule, and the results are included in the preamble under section IV, Expected Impact of the Rule. Corresponding updates are made to the burden estimates for small entities.

Comment: The Office of Advocacy contends that the rule conflicts with the Administration's goal to reduce economic barriers for small businesses that wish to enter the Federal marketplace as provided in its announcement on December 2, 2021, ''Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners.'' If this rule is finalized, it will place a greater burden on Federal agencies to meet their annual statutorily required small business goals.

Response: To support the administration's goals to increase small entity participation in the Federal marketplace, and in this particular market, OMB and DOL intend to work with SBA to determine the best way to help small entities in understanding how to negotiate or participate in a construction project with a PLA.

Comment: The Office of Advocacy requests that the rule include burden estimates for hiring an additional recordkeeper for each small entity subcontractor, similarly to the additional recordkeeper for small entity prime contractors.

Response: The burden estimates do not provide for the hiring of additional recordkeepers at the prime or subcontractor level, regardless of business size. The rule assumes that each entity will utilize existing employees.

DoD, GSA, and NASA considered the Office of Advocacy comments and conducted a thorough analysis of the authorities provided in the E.O. As a result, no changes were made to the final rule in response to the comments.

This final rule applies the requirement for PLAs to all construction projects valued at $35 million or more, unless an exception applies. However, it does not change the discretionary use of PLAs for projects that do not meet the $35 million threshold. As a result, small entities may be required to negotiate and become a party to a PLA, as a prime or subcontractor.

Data generated from the Federal Procurement Data System for fiscal years 2019, 2020, and 2021 has been used as the basis for estimating the number of unique small entities expected to be affected by the change from discretionary to mandatory use of PLAs for large-scale construction projects. An examination of this data reveals that the Government issued an average of 119 large-scale construction awards annually. Of those 119 awards, an average of 15 percent were awarded to an average of 16 unique small entities annually.

It is estimated that 60 to 107 of the 119 large-scale construction awards will require a PLA. An estimated one third of affected solicitations will require all offerors to provide a PLA, and two thirds of affected solicitations will only require one entity (apparent successful offeror or awardee) to provide a PLA. Therefore, the total number of estimated entities that would be required to submit PLAs at the prime contract level is 120–215 entities (40–71 apparent successful offerors or awardees + 80–144 offerors).

It is estimated, that under the new PLA requirements, the number of small entities impacted by the rule is 15 percent of the 120–215 entities. Therefore, it is estimated that approximately 18–32 small entities will be required to submit a PLA.

DoD, GSA, and NASA acknowledge there is no data source that identifies the number of subcontractors per contract; however, based upon public comments, the final rule estimates that each of the entities required to submit PLAs may have approximately 14 subcontractors; *i.e.,* 1,680 to 3,010 subcontractors (120 * 14) to (215 * 14). In addition, the final rule increases the percentage of subcontractors estimated to be small entities to 80 percent. As a result, it is estimated that 80 percent or 1,344 to 2,408 of the subcontractors are small entities (1,680 * 0.80) (3,010 * 0.80).

Based upon this updated analysis, the number of small entities that may be required to negotiate or become a party to a PLA is approximately 1,362 to 2,440 annually (18 + 1,344) (32 + 2,408). These numbers may fluctuate based on the use of discretionary PLAs, any exceptions granted to the required use of a PLA, or whether the PLA is required for all offerors, the apparent successful offeror, or the awardee.

When a PLA is required, the successful offerors are required to maintain the PLA in a current state throughout the life of the contract. Each of the estimated 18 to 32 small entities awarded prime contracts may require 1 recordkeeper to maintain a PLA through the life of the contracts.

There are no alternative approaches that are consistent with the stated objectives of the executive order.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Severability

If any provision of this rule, or the application of such provision to any person or circumstance, is stayed or held to be invalid, the remainder of this rule and its application to any other person or circumstance shall not be affected thereby. If this rule or E.O. 14063 is stayed or held invalid in its entirety, DoD, GSA, and NASA intend that provisions of the FAR implementing E.O. 13502 as those provisions existed prior to issuance of this final rule (*i.e.,* subpart 22.5, and sections 52.222–33 and –34) would remain in effect.

IX. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) applies to the information collection described in this rule. Changes to the FAR resulted in an increase to the paperwork burden previously approved under Office of Management and Budget (OMB) Control Number 9000–0066, Certain Federal Acquisition Regulation Part 22 Labor Requirements.

List of Subjects in 48 CFR Parts 1, 7, 22, 36, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 7, 22, 36, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 7, 22, 36, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend the table by:
■ a. Removing the entry for FAR segment ''22.5''; and
■ b. Adding in numerical order entries for ''52.222–33'' and ''52.222–34''.

The additions read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *

FAR segment	OMB control No.
* * * * *	
52.222–33	9000–0066
52.222–34	9000–0066
* * * * *	

* * * * *

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.103 by revising paragraph (x) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(x) Ensuring that agency planners use project labor agreements when required (see subpart 22.5 and 36.104).

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 4. Revise section 22.501 to read as follows:

22.501 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 14063, Use of Project Labor Agreements for Federal Construction Projects, dated February 4, 2022 (3 CFR, 2023 Comp., pp 335–338).

■ 5. Amend section 22.502 by revising the definitions of ''Construction'', ''Labor organization'', and ''Large-scale construction project'' to read as follows:

22.502 Definitions.

* * * * *

Construction means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5) of which building and construction employees are members.

Large-scale construction project means a Federal construction project within the United States for which the total estimated cost of the construction contract to the Federal Government is $35 million or more.

* * * * *

■ 6. Revise section 22.503 to read as follows.

22.503 Policy.

(a) Executive Order (E.O.) 14063, Use of Project Labor Agreements for Federal Construction Projects, requires agencies to use project labor agreements in large-scale construction projects to promote economy and efficiency in the administration and completion of Federal construction projects.

(b) When awarding a contract in connection with a large-scale construction project (see 22.502), agencies shall require use of project labor agreements for contractors and subcontractors engaged in construction on the project, unless an exception at 22.504(d) applies.

(c) An agency may require the use of a project labor agreement on projects where the total cost to the Federal Government is less than that for a large-scale construction project, if appropriate.

(1) 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—

(i) Advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and

(ii) Be consistent with law.

(2) Agencies may consider the following factors in deciding whether the use of a project labor agreement is appropriate for a construction project where the total cost to the Federal Government is less than that for a large-scale construction project:

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

(ii) There is a shortage of skilled labor in the region in which the construction project will be sited.

(iii) Completion of the project will require an extended period of time.

(iv) Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.

(v) A project labor agreement will promote the agency's long term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.

(vi) Any other factors that the agency decides are appropriate.

(d) For indefinite-delivery indefinite-quantity (IDIQ) contracts the use of a project labor agreement may be required on an order-by-order basis rather than for the entire contract. For an order at or above $35 million an agency shall require the use of a project labor agreement unless an exception applies. See 22.504(d)(3) and 22.505(b)(3).

■ 7. Amend section 22.504 by—
■ a. Removing from paragraph (b) introductory text the words ''The project'' and adding the words ''A project'' in their place;
■ b. Revising paragraph (c); and
■ c. Adding paragraph (d).

The revision and addition read as follows.

22.504 General requirements for project labor agreements.

* * * * *

(c) *Labor organizations.* An agency may not require contractors or subcontractors to enter into a project labor agreement with any particular labor organization.

(d) *Exceptions to project labor agreement requirements*—(1) *Exception.* The senior procurement executive may grant an exception from the requirements at 22.503(b), providing a specific written explanation of why at least one of the following conditions exists with respect to the particular contract:

(i) Requiring a project labor agreement on the project would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. The exception shall be based on one or more of the following factors:

(A) The project is of short duration and lacks operational complexity.

(B) The project will involve only one craft or trade.

(C) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors.

(D) The agency's need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable.

(ii) Market research indicates that requiring a project labor agreement on the project would substantially reduce the number of potential offerors to such

a degree that adequate competition at a fair and reasonable price could not be achieved. (See 10.002(b)(1) and 36.104). A likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage under this authority unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price.

(iii) Requiring a project labor agreement on the project would otherwise be inconsistent with Federal statutes, regulations, Executive orders, or Presidential memoranda.

(2) *Considerations.* When determining whether the exception in paragraph (d)(1)(ii) of this section applies, contracting officers shall consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the requirement for a project labor agreement (*e.g.,* costs of labor or materials, supply chain costs). Agencies may rely on price analysis conducted on recent competitive proposals for construction projects of a similar size and scope.

(3) *Timing of the exception*—(i) *Contracts other than IDIQ contracts.* The exception must be granted for a particular contract by the solicitation date.

(ii) *IDIQ contracts.* An exception shall be granted prior to the solicitation date if the basis for the exception cited would apply to all orders. Otherwise, exceptions shall be granted for each order by the time of the notice of the intent to place an order (*e.g.,* 16.505(b)(1)).

■ 8. Revise section 22.505 to read as follows.

22.505 Solicitation provision and contract clause.

When a project labor agreement is used for a construction project, the contracting officer shall—

(a)(1) Insert the provision at 52.222–33, Notice of Requirement for Project Labor Agreement, in solicitations containing the clause 52.222–34, Project Labor Agreement.

(2) Use the provision with its Alternate I if the agency will require the submission of a project labor agreement from only the apparent successful offeror, prior to contract award.

(3) Use the provision with its Alternate II if an agency allows submission of a project labor agreement after contract award except when Alternate III is used.

(4) Use the provision with its Alternate III when Alternate II of 52.222–34 is used.

(b)(1) Insert the clause at 52.222–34, Project Labor Agreement, in solicitations and contracts associated with the construction project.

(2) Use the clause with its Alternate I if an agency allows submission of the project labor agreement after contract award except when Alternate II is used.

(3) Use the clause with its Alternate II in IDIQ contracts when the agency will have project labor agreements negotiated on an order-by-order basis and anticipates one or more orders may not use a project labor agreement.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 9. Amend section 36.104 by adding paragraph (c) to read as follows:

36.104 Policy.

* * * * *

(c)(1) Agencies shall require the use of a project labor agreement for Federal construction projects with a total estimated construction cost at or above $35 million, unless an exception applies (see subpart 22.5).

(2) Contracting officers conducting market research for Federal construction contracts, valued at or above the threshold in paragraph (c)(1) of this section, shall ensure that the procedures at 10.002(b)(1) involve a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a project labor agreement, and to understand the availability of unions, and unionized and non-unionized contractors. Contracting officers may coordinate with agency labor advisors, as appropriate.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.222–33 by—
■ a. Revising the date of the provision;
■ b. Revising paragraphs (a) and (b);
■ c. Removing from paragraph (c) introductory text ''Consistent with applicable law, the project'' and adding ''The project'' in its place;
■ d. Removing from paragraph (c)(1) ''offeror and all'' and adding ''Offeror and'' in its place;
■ e. Removing from paragraph (c)(2) ''offeror'' and adding ''Offeror'' in its place;
■ f. Removing from paragraph (d) ''this contract'' and adding ''the resulting contract'' in its place;
■ g. Removing from paragraph (e) ''offeror'' and adding ''Offeror'' in its place;
■ h. In Alternate I:
■ i. Revising the date;
■ ii. Removing from the introductory text ''22.505(a)(1)'' and ''clause'' and adding ''22.505(a)(2)'' and ''provision'' in their places, respectively; and
■ iii. Revising paragraph (b);
■ i. In Alternate II:
■ i. Revising the date;
■ ii. Removing from the introductory text ''22.505(a)(2)'' and ''clause'' and adding ''22.505(a)(3)'' and ''provision'' in their places, respectively; and
■ iii. Revising paragraph (b); and
■ j. Adding Alternate III.

The revisions and addition read as follows:

52.222–33 Notice of Requirement for Project Labor Agreement.

* * * * *

Notice of Requirement for Project Labor Agreement (Jan 2024).

(a) *Definitions.* As used in this provision, the following terms are defined in clause 52.222–34, Project Labor Agreement, of this solicitation ''construction,'' ''labor organization,'' ''large-scale construction project,'' and ''project labor agreement.''

(b) Offerors shall—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract; and

(2) Require its subcontractors to become a party to the resulting project labor agreement.

* * * * *

Alternate I (Jan 2024) * * *

(b) The apparent successful offeror shall—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract; and

(2) Require its subcontractors to become a party to the resulting project labor agreement.

* * * * *

Alternate II (Jan 2024) * * *

(b) If awarded the contract, the Offeror shall—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the resulting construction contract; and

(2) Require its subcontractors to become a party to the resulting project labor agreement.

Alternate III (Jan 2024). As prescribed in 22.505(a)(4), substitute the following paragraph (b) in lieu of paragraphs (b) through (e) of the basic provision:

(b)(1) If awarded the contract, the Offeror may be required by the agency to negotiate or become a party to a project labor agreement with one or more labor organizations for the term of

the order. The Contracting Officer will require that an executed copy of the project labor agreement be submitted to the agency—

(i) With the order offer;

(ii) Prior to award of the order; or

(iii) After award of the order.

(2) The Offeror shall require its subcontractors to become a party to the resulting project labor agreement for the term of the order.

■ 11. Amend section 52.222–34 by—

■ a. Revising the date of the clause;

■ b. Adding in alphabetical order definitions for ''Construction'' and ''Large-scale construction project'' and revising the definition ''Labor organization'' in paragraph (a);

■ c. Removing from paragraph (b) ''this contract in accordance with solicitation provision 52.222–33, Notice of Requirement for Project Labor Agreement'' and adding ''the contract'' in its place;

■ d. Removing from paragraph (c) ''all subcontracts'' and adding ''subcontracts'' in its place;

■ e. In Alternate I:

■ i. Revising the date and paragraph (b);

■ ii. Removing from paragraph (c) introductory text ''Consistent with applicable law, the project'' and adding ''The project'' in its place;

■ iii. Removing from paragraph (c)(1) ''and all'' and adding ''and'' in its place;

■ iv. Removing from paragraph (c)(4) ''the project'' and adding ''the term of the project'' in its place; and

■ v. Removing from paragraph (f) ''clause in all subcontracts'' and adding ''clause in subcontracts'' in its place; and

■ f. Adding Alternate II.

The revisions and additions read as follows:

52.222–34 Project Labor Agreement.

* * * * *

Project Labor Agreement (Jan 2024)

(a) * * *

Construction means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5) of which building and construction employees are members.

Large-scale construction project means a Federal construction project within the United States for which the total estimated cost of the construction contract(s) to the Federal Government is $35 million or more.

* * * * *

Alternate I (Jan 2024) * * *

(b) The Contractor shall—

(1) Negotiate or become a party to a project labor agreement with one or more labor organizations for the term of this construction contract; and

(2) Submit an executed copy of the project labor agreement to the Contracting Officer as required in the solicitation.

* * * * *

Alternate II (Jan 2024). As prescribed in 22.505(b)(3), substitute the following paragraphs (b) through (f) for paragraphs (b) through (f) of the basic clause:

(b) When notified by the agency (*e.g.,* by the notice of intent to place an order under 16.505(b)(1)) that this order will use a project labor agreement, the Contractor shall negotiate or become a party to a project labor agreement with one or more labor organizations for the term of the order. The Contracting Officer shall require that an executed copy of the project labor agreement be submitted to the agency—

(1) With the order offer;

(2) Prior to award of the order; or

(3) After award of the order.

(c) The project labor agreement reached pursuant to this clause shall—

(1) Bind the Contractor and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

(2) Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, Executive orders, and agency requirements.

(d) Any project labor agreement reached pursuant to this clause does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Contractor shall maintain in a current status throughout the life of the order any project labor agreement entered into pursuant to this clause.

(f) *Subcontracts.* For each order that uses a project labor agreement, the Contractor shall—

(1) Require subcontractors engaged in construction on the construction project to agree to any project labor agreement negotiated by the prime contractor pursuant to this clause; and

(2) Include the substance of paragraphs (d) through (f) of this clause in subcontracts with subcontractors engaged in construction on the construction project.

[FR Doc. 2023–27736 Filed 12–21–23; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2023–0051, Sequence No. 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2024–02; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide (SECG).

SUMMARY: This document is issued under the joint authority of DoD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2024–02, which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding this rule by referring to FAC 2024–02, which precedes this document.

DATES: December 22, 2023.

ADDRESSES: The FAC, including the SECG, is available at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2024–02 and the FAR Case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

EXHIBIT “3”

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

December 18, 2023

M-24-06

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young

SUBJECT: Use of Project Labor Agreements on Federal Construction Projects

On February 4, 2022, President Biden signed Executive Order (E.O.) 14063, *Use of Project Labor Agreements for Federal Construction Projects*, to strengthen the federal labor construction market through the creation of a requirement, with enumerated exceptions, for the use of project labor agreements (PLAs) on large-scale construction contracts where the total estimated cost to the Government is $35 million or more. The agency members of the Federal Acquisition Regulatory Council -- the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration – issued a final rule amending the Federal Acquisition Regulation (FAR) to implement the E.O. The rule is temporarily available here and will be published shortly in the *Federal Register*.

Section 8(b) of E.O. 14063 requires the Office of Management and Budget (OMB) to issue guidance on the implementation of sections 5 and 6 of E.O. 14063, concerning exceptions to PLA requirements and reporting. This memorandum provides such guidance, and other relevant information, to federal agencies and the contracting workforce responsible for executing large-scale federal construction contracts throughout the Government.

Background

PLAs are pre-hire collective bargaining agreements with one or more labor organizations that establish the terms and conditions of employment for a specific construction project and are described in 29 U.S.C. § 158(f). *See* E.O. 14063 § 2(2); FAR 22.502. In accordance with section 4 of E.O. 14063 and FAR 22.504(b), PLAs are required to:

- bind contractors and subcontractors engaged in construction on the construction project to comply with the project labor agreement;

- allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

- contain guarantees against strikes, lockouts, and similar job disruptions;
- set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;
- provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
- fully conform to all federal statutes, federal regulations, Executive Orders, and Presidential Memoranda.

E.O. 14063 states that large-scale construction projects pose special challenges to the efficient and timely procurement for the Federal Government—challenges that increased use of PLAs can help address. Section 1(a) of the E.O. explains that construction employers typically do not have a permanent workforce, which makes it difficult to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise because construction projects typically involve multiple employers at a single location, and a labor dispute involving one employer can delay the entire project. Moreover, a lack of coordination among various employers, or uncertainty 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 mechanism.

Section 1(b) of the E.O. then explains that expanded use of PLAs can address these concerns by providing structure and labor-management stability to large-scale construction projects. In particular, PLAs standardize the work rules, compensation costs, and dispute settlement processes across multiple employers and unions to help avoid and resolve labor disputes and the attendant disruption they can cause.

As the preamble to the FAR rule explains, expanding federal use of PLAs can also help agencies cope more effectively with the nationwide skilled labor shortage in the construction industry.[1] By providing access to union hiring halls that will allow federal contractors to fill empty craft positions with skilled workers recruited from surrounding regions, PLAs help ensure a reliable stream of skilled labor. The preamble further explains that use of PLAs will help reduce the risk of noncompliance with labor laws in the construction industry under federal construction projects.

PLAs have been used on federal construction projects since the 1930s and have been expressly recognized in the FAR since 2010 with the implementation of E.O. 13502, *Use of Project Labor Agreements*. E.O. 13502 encouraged agencies to consider requiring the use of PLAs in connection with large-scale construction projects, which were defined as construction projects where the total cost to the Federal Government is $25 million or more. E.O. 14063 increases this threshold to $35 million and requires "every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations." E.O. 14063 § 3.

[1] *See* Rule preamble at __Fed. Reg. _____ (2023) (citing Garo Hovnanian, Ryan Luby, and Shannon Peloquin, Bridging the labor mismatch in US construction (2022)).

E.O. 14063 and the FAR rule do not require use of PLAs in three circumstances, namely, where: (1) requiring a PLA would not advance the Federal Government's interests in achieving economy and efficiency in federal procurement, (2) based on an inclusive market analysis, requiring a PLA on the project would substantially reduce the number of potential bidders so as to frustrate full and open competition; or (3) requiring a PLA on the project would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

Guidance

Agencies should ensure they are taking full advantage of PLAs on large-scale construction contracts, consistent with E.O. 14063 and the FAR rule. Specifically, in implementing the E.O. and FAR rule, agencies are required to: (1) conduct and document inclusive market research for all large-scale construction projects and require PLAs unless an exception applies, (2) ensure that any exception is approved by the senior procurement executive (SPE), and (3) report PLA activity and exceptions with supporting explanation of exceptions to OMB in accordance with this guidance. Agencies are encouraged, but not required, to consider use of PLAs for other than large-scale construction projects (i.e., those projects valued at less than $35 million). Factors for determining suitability of a PLA for these projects are set forth at FAR 22.503(c).

For indefinite-delivery indefinite-quantity (IDIQ) contracts, the agency may establish whether a PLA is required at the contract level ((i.e., for the basic IDIQ contract) or on an order-by-order basis. If the IDIQ contract is intended to support one large-scale construction project, the agency must require a PLA for the entire contract (i.e., all orders of any size), unless an exception applies.

1. ***Conducting inclusive market research***

   a. FAR requirement. Contracting officers conducting market research for construction contracts utilize the procedures at FAR part 10, Market Research, and those required in subpart 36.2, Special Aspects of Contracting for Construction. The FAR rule for PLAs augments these requirements at FAR 36.104(c)(2), which states that contracting officers conducting market research for federal construction contracts, valued at or above the threshold in FAR 36.104(c)(1), shall ensure that market research conducted pursuant to FAR part 10 involves "a current and proactive examination of the market conditions in the project area to determine national, regional, and local entity interest in participating on a project that requires a project labor agreement, and to understand the availability of unions, and unionized and non-unionized contractors. Contracting officers may coordinate with agency labor advisors, as appropriate."

   b. Additional management considerations.

      i. *Current and proactive determination*. The market analysis must be contemporaneous on a project-specific basis. A current and proactive examination will provide the most accurate reflection of the current market conditions present in the area for the prospective construction project. Agencies may use various tools to

examine market conditions described in FAR part 10, such as conferring with interested parties using sources sought notices and advance notices for construction contracts (see FAR 36.211 and 36.213-2). These notices are primarily published on the government-wide point of entry at www.sam.gov.

Consistent with FAR 10.002(b)(1), agencies may rely on market research conducted within 18 months of contract award, but only if the research was inclusive and met the requirements of FAR 36.104(c)(2). In addition, the fact that a PLA was not previously required does not, by itself, constitute inclusive market research to support exercise of an exception to the requirement for a PLA on a subsequent project.

ii. *Availability of unionized and nonunionized contractors*. As stated above, E.O. 14063 and the FAR rule provide that a PLA shall "allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements." E.O. 14063 § 4(b); *see* FAR 22.504(b)(2).

Accordingly, agencies must make sure that their market research is conducted in a manner that seeks to identify *both* union and non-unionized contractors that may be interested in participating in the competition. The Department of Labor's (DOL) Good Jobs Initiative website provides information on use of PLAs, found here. Among other resources, the website includes a link to a list of potential contractors that have used PLAs. The website also provides links to information to help contracting officers and potentially interested sources that are not unionized better understand why participation in a competition with a PLA should not put them at a competitive disadvantage. Examples cited in the FAR rule preamble include the following:

- While many PLAs require contractors to use the union's hiring hall for referrals, they do not prevent the use of a contractor's workforce. The union hiring halls are legally required to refer workers to the project without regard to whether the workers are union members. Non-union employers also may negotiate "core employee" provisions that permit retaining some employees without those employees registering at a union's hiring hall. Ultimately, the contractor retains the right to decide whom to hire.[2]

- Neither the E.O. nor the FAR rule require non-union employees to pay union dues or join a union. Non-union contractors are free to negotiate provisions in PLAs to accommodate existing fringe benefits or union dues. For example, a PLA may allow non-union contractors to opt out of contributing to health and welfare funds designated under the PLA, if the benefits provided by the non-union contractor are equal in value to those provided under the PLA.[3]

[2] Rule preamble at __ Fed. Reg. _____ (2022).
[3] Rule preamble at ___ Fed. Reg. _____ (2022).

iii. *National, regional and local interest*. The requirement to gauge national, regional, and local interest ensures that agencies can fully evaluate the extent to which sources in the marketplace, including new entrants, might compete. The FAR rule explains that, while unions have the ability to recruit skilled workers nationally to address local skilled labor shortages, its intent is not to replace local workers for the sole purpose of employing non-local union members. The E.O. and FAR rule provide flexibility for the parties to take unique local needs into consideration when negotiating PLAs on a project-by-project basis. As the FAR rule explains, PLAs can offer opportunities to grow and train the local workforce, specifically targeting underrepresented individuals. For example, the FAR rule permits, but does not require, Community Workforce Agreements, which may be negotiated and incorporated as part of a PLA to promote diversity and inclusion and local resident business opportunities, as well as to help agencies and prime contractors meet small business subcontracting goals and other objectives.

iv. *Timing for requirement*. Agencies are encouraged to use the results of their inclusive market research to help determine the best timing for requiring submission of the PLA. Pursuant to FAR 22.505, the contracting officer may require submission of the PLA by all offerors, by the apparent successful offeror prior to award, or by the awardee after contract award. If market research indicates that the prospective offerors have significant experience with PLAs, then it may be feasible for the solicitation to require that offerors submit their PLA with their proposal or bid. By contrast, if few of the prospective offerors have experience with PLAs (e.g., they are non-unionized contractors or small businesses that lack experience with PLAs), then permitting submission of the PLA after award may help to facilitate greater interest in the competition and avoid unintended barriers to entry. If submission is permitted post award, then the contracting officer should carefully consider establishing a deadline in the solicitation consistent with the Government's interest in ensuring timely performance on the project.

2. *Exercising exceptions*

a. FAR requirement. FAR 22.504(d)(1) provides that the SPE may grant an exception to the requirement for the agency to use a PLA for a large-scale construction project by approving a documented written explanation, prepared by the contracting officer or other appropriate official, of why one of following three conditions exist:

i. Requiring a PLA on the project would not advance the Federal Government's interests in achieving economy and efficiency in federal procurement. The exception shall be based on one or more of the following factors:
   (A) The project is of short duration and lacks operational complexity.
   (B) The project will involve only one craft or trade.
   (C) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors.
   (D) The agency's need for the project is of such an unusual and compelling urgency that a PLA would be impracticable.

ii. Market research indicates that requiring a PLA on the project would substantially reduce the number of potential offerors to such a degree that adequate competition at a fair and reasonable price could not be achieved. (See FAR 10.002(b)(1) and 36.104). A likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage under this authority unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price. Contracting officers shall consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the requirement for a PLA (e.g., costs of labor or materials, supply chain costs). Agencies may rely on price analysis conducted on recent competitive proposals for construction projects of a similar size and scope.[4]

iii. Requiring a PLA on the project would otherwise be inconsistent with federal statutes, regulations, Executive orders, or Presidential memoranda.

FAR 22.504(d)(3) states that an exception must be granted for a particular contract by the solicitation publication date. This includes IDIQ contracts if the basis for the exception cited would apply to all orders. Otherwise, exceptions shall be granted for each order by the time of the notice of the intent to place an order.

b. Additional management considerations.

i. *Exercising exception where the PLA would not promote economy and efficiency*. E.O. 14063 and the FAR rule recognize that projects of short duration, lacking of operational complexity or involving only one craft or trade should not present the same risks associated with the typical large-scale construction projects. If the agency concludes that use of a PLA would not promote economy and efficiency, the documentation should identify the rationales upon which the decision is based and document the information stated in the table below.

If the basis for the determination is . . .	**The documentation should . . .**
Project is of short duration & lacks operational complexity	Describe the nature of the work and state the expected performance period.[5]
Project involves only one craft or trade	State that only one craft or trade is involved in the performance of the contract.

[4] The direction to consider the source of price fluctuations is set forth at FAR 22.504(d)(2).
[5] For contracts which involve a design phase (e.g., design-build contracts), duration should be measured by the length of the construction portion of contract performance.

Specialized construction available from limited contractors or subcontractors	Address the inclusive market research that was conducted to reach the conclusion that the specialized work is only available from a limited number of contractors or subcontractors.
Unusual and compelling urgency	Describe the procurement acquisition lead time for similar construction projects, the time available for this project and the urgency that has caused the need for an accelerated schedule. In general, most large-scale construction projects involve long-lead times and extensive advanced planning. However, the ability for the Federal Government to respond to natural disasters and pandemics or the agility required to meet national security needs may require expedited time lines that make mandatory use of a project labor agreement impracticable (e.g., insufficient time for the Federal Government to conduct the inclusive market research necessary to identify the national, regional, and local entity interest in participating on a project that requires a PLA and insufficient time for construction contractors and their subcontractors to negotiate PLAs).

ii. *Exercising exception where PLA would inhibit competition*. In evaluating the anticipated impact of a PLA on the agency's ability to conduct a competition, the agency should focus on whether the results of inclusive market research point to a sufficient number of anticipated offerors to achieve fair and reasonable pricing. In general, two or more qualified offers is sufficient to provide adequate price competition for negotiated contracts (FAR 15.403-1(c)(1)) and three or more qualified bids is sufficient to provide adequate price competition for sealed bids (FAR 14.408-1(b)). If adequate price competition can be achieved, use of this exception would not be appropriate, even if the number of offerors who indicate they will not compete because of the PLA is significantly higher than the number of sources who have expressed an intent to compete. If, based on market research for a given project, an adequate number of offers may be submitted, but prices are expected to be higher than the government's budget, the agency should highlight the magnitude of the construction project in the solicitation, as required by FAR 36.204.

If an agency SPE determines through inclusive market research that a large-scale construction project can be set aside for two or more small business concerns but for the PLA requirement, the agency may grant an exception for the use of a PLA under this competition exception.[6] DOL and OMB will work with the Small Business

[6] Agencies have an obligation to set-aside acquisitions exclusively for small business participation if there is a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. FAR 19.502-2. Set-asides are an important tool for advancing equity through procurement as called for by E.O. 13985 and E.O. 14091.

Administration and their development centers, as well as DoD and the APEX Accelerators, to determine the best way to help small entities in understanding how to navigate construction contracts with PLAs.

Where agencies are aware of potential offerors that would have interest but for the PLA requirement, the acquisition team should seek to engage with those sources to understand the nature of the concern (e.g., a misperception that nonunionized contractors must allow workers to organize in order to enter a PLA; a need for information or training on how PLAs work) and consider what steps might be taken to allay similar concerns on future construction projects with PLAs.[7]

3. *Reporting on use of PLAs and exceptions*

Section 6(a) of E.O. 14063 requires agencies to publish, on a centralized public website, data showing the use of PLAs on large-scale construction projects, as well as descriptions of the exceptions granted, to the extent permitted by law and consistent with national security and executive branch confidentiality interests. Section 6(b) also requires this information to be reported to OMB.

In order to create a centralized repository and avoid duplicative reporting, agencies shall report information on a transactional basis for all exceptions granted and all contracts that use PLAs to OBX.OMB.OFPPv2@OMB.eop.gov.

Agencies shall complete the template at Attachment 1 for all exceptions granted and the template at Attachment 2 for all contracts awarded with a PLA requirement. When completing the template in Attachment 1 to report on use of an exception, agencies should ensure that the "basis for exception" field identifies which one of the three authorized exceptions was used (i.e., FAR 22.504(d)(4)(i), (ii), or (iii)) and provide a narrative explanation in accordance with the table below:

If the basis for the exception is . . .	**The explanation should . . .**
FAR 22.504(d)(4)(i)	Identify the specific factor or combination of factors used and provide a summary of the documentation required by § 2.b.i., above.
FAR 22.504(d)(4)(ii)	Summarize the actions taken as part of the inclusive market research required by FAR 36.104(c)(2), and the results of the research in sufficient detail to understand the basis for exercising the exception.

[7] The acquisition team should consider use of "Acquisition 360" surveys pursuant to FAR 1.102-3 to elicit voluntary feedback in a consistent and standardized manner to support continual improvement of the acquisition process.

FAR 22.504(d)(4)(iii)	Cite the statute, regulation, Executive Order, or Presidential Memorandum that creates an inconsistency with use of a PLA.

Exceptions should be reported to the Office of Federal Procurement Policy (OFPP), at the email address noted above, within three business days of the issuance of the solicitation. Contracts and orders awarded with PLA requirements should be reported within three business days of award. Agencies should designate any information they have submitted to OFPP for which public posting would be either inconsistent with law, national security, or executive branch confidentiality interests, and include a brief explanation for that designation. To fulfill the public-posting requirements of section 6 of the E.O., OFPP will work with GSA to make agency submissions available to the public here, to the extent permitted by law and consistent with national security and executive branch confidentiality interests.

4. Training the workforce

OMB and DOL are working with the Federal Acquisition Institute and the Defense Acquisition University on training for the acquisition workforce on PLAs, which will include coverage on the topics covered in this memorandum. In addition, agencies are encouraged to discuss with OMB and DOL resources they have developed to implement the E.O. and FAR rule, and share them with the Contract Labor Advisor Group established by OMB Memorandum M-23-08 so that agencies can learn from each other and work together in strengthening federal contractor compliance with federal labor laws.

Questions regarding this guidance may be sent to MBX.OMB.OFPPv2@OMB.eop.gov

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ATTACHMENT 1

TEMPLATE FOR REPORTING ON EXCEPTION TO PLA REQUIREMENTS

CONTRACTING AGENCY	
SENIOR PROCUREMENT EXECUTIVE (SPE)	
DATE EXCEPTION GRANTED BY SPE	
SOLICITATION NUMBER	
SOLICITATION DATE	
MAGNITUDE OF CONSTRUCTION	
PROJECT DESCRIPTION	
PROJECT LOCATION	
BASIS FOR EXCEPTION*	

***** See § 3 for instructions on completing this field.

ATTACHMENT 2

TEMPLATE FOR REPORTING ON USE OF PLAs

CONTRACTING AGENCY	
PROCUREMENT INSTRUMENT IDENTIFIER (PIID)	
CONTRACT SIGNED DATE	
BASE AND ALL OPTION VALUE	
PROJECT LOCATION	
PROJECT DESCRIPTION	

EXHIBIT “4”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. _____**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Matthew Ferguson, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Federal Market Leader of The Haskell Company. My firm is an integrated Design Builder performing private and public works construction projects throughout the World. Our public works construction is performed primarily in the United States. My firm is a member of Associated Builders and Contractors ("ABC"), and ABC's Florida First Coast Chapter.

2. I am familiar with my firm's performance of construction work on government projects that exceed $35 million in value. We have a strong success rate with winning these types of contracts. Each year, my firm typically performs work exceeding $50 million in revenue from projects of this magnitude.

3. My firm self-performs some aspects of our work by using employees in various trades and classifications, including pipefitters, carpenters, laborers and others. As a general contractor we also subcontract out work in various trades. For example, within the last year, we have subcontracted with many different entities, including union and merit shop or nonunion, subcontractors.

4. As a contractor performing Federal work, I am very concerned about the new Rule recently issued by the FAR Council. The Rule requires federal agencies to mandate project labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value.

5. My firm will face irreparable harm from the Rule as it will make it more difficult for my firm to secure work. I am already aware of several upcoming projects—construction work at Marine Corp Support Facility Blount Island Command, FL, Fort Liberty, NC (several), Naval Base Kitsap Bremerton, Puget Sound Naval Shipyard, WA, —that have been advertised as requiring a PLA. My firm has had a strong success rate performing this type of work for these agencies and a documented track record of being the successful bidder in other similar projects. We would plan to pursue the work at each location if it were not for the PLA requirement.

6. I am also aware of other upcoming projects now being bid by NAVFAC which have been announced as subject to the PLA mandate. One example is the $2B NAVFAC SE MACC program. Even though the FAR Rule allows exemption from the mandate where the agency's market research indicates that a PLA will injure competition on the IDIQ program, it is our understanding that NAVFAC has undertaken no market research to justify the PLA mandate on this project, and that no exemptions have been granted despite contractors, including our firm, informing NAVFAC that the PLA mandate will not result in improvements to efficiency and economy. The NAVFAC SE MACC Phase I solicitation had no less than 9 Requests For

Information submitted regarding the PLA requirement. Several of those RFI's had detailed information about how the inclusion of the PLA clause would decrease competition, reduce efficiencies, and increase prices. It is clear through NAVFAC's responses that filing for the well justified exception would not be considered.

7. I believe it would be inefficient and costly for my firm to prepare bids for projects that require PLAs for many reasons. I understand that under the Rule, my firm would have to sign a PLA before we can submit a bid or after being awarded a contract. Either way, this would impose new and costly burdens on my firm during the bidding process. Federal projects are firm-fixed price leaving no ability to clarify or revise pricing after award. For this reason, we rely on the participation and competition or our subcontract trade partners when preparing our bids. Our experience shows that the majority of subcontractors submitting proposals in the areas that we perform work are non-union. Although we do not discriminate between union and non-union subcontractors, we depend on the non-union participation simply because they are in the majority. Haskell recently conducted a survey of our subcontract partners regarding their willingness to sign a PLA. 73% of the respondents to our survey replied "Not interested in bidding if there is a Government mandated PLA." With a reduction of subcontractor participation of that extreme, 73%, in an industry that is already suffering from lack of labor availability, the risk of failure is extreme. As a result, if we chose to submit on a Federal project with a PLA, then our price would be significantly increased to account for administrative burdens, lack of subcontractor competition and to account for inefficiencies in working with trade partners with which we do not regularly contract.

8. Further, my firm does not have an ongoing relationship with any unions, particularly not in the Southeast region of the country where unions perform a small minority of

the work. In fact, my firm rarely if ever works with unions, and our employees have never voted to be represented by a union. Forcing our company to recognize and enter into a PLA with a union that does not represent our employees would infringe on our Constitutional right of freedom of association.

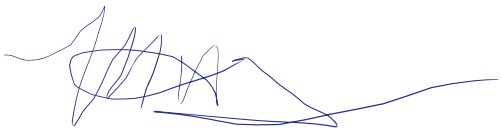
9. The Rule would also make it more difficult if not impossible for my firm to identify subcontractors when bidding for applicable federal construction projects. If the Blount Island Project and NAVFAC SE MACC program we want to propose on are subjected to the PLA mandate, my firm would need to find subcontractors who are willing to enter PLAs. Most of our regular subcontractors have already made clear that they will not perform work under a PLA, and without them our firm cannot successfully perform the project. The lack of subcontractors willing to bid under the PLA mandate would be an insurmountable challenge for our firm, or at a minimum will drastically decrease the number of subcontractors my firm could consider, given that most subcontractors who my firm typically works with will not participate in a project with a PLA. The result will be unnecessarily increased costs and higher bid prices to the Government due to lack of competition between subcontractors.

10. If my firm decided to pursue Federal projects with PLAs my firm would need to employ and train additional staff to comply with the new administrative burdens and compliance risks imposed by the new Rule at the bid stage. The additional staff will increase our project estimates resulting in higher prices to the Government.

11. Imposing a PLA on projects such as those mentioned herein will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. My firm is ready, willing and able to submit proposals for work on any of the projects mentioned above, and other federal projects that are being solicited; but the

PLA mandate will irreparably harm our ability to bid or perform work on these projects or any other project covered by the new FAR PLA rule.

12. I declare under penalty of perjury that the foregoing is true and correct.



3.19.2024
Date

EXHIBIT “5”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. _____**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Brian Murray, being duly sworn, hereby state the following based on personal knowledge:

1. I am a Vice President / Division Manager responsible for conducting federal contract work for Brasfield & Gorrie, L.L.C. ("B&G"). I have been in the construction industry for thirty-five years, having worked for B&G for the past fourteen years dedicated to federal contract delivery. During my tenure with B&G we have secured over $2 billion in federal contract awards, providing employment for over 100 persons and federal government contracting is one of our core business market sectors for the past twelve years.

2. B&G is a general contractor concentrating on construction projects predominantly in the Southwestern and Southeastern parts of the United States. For the past thirty years, B&G is consistently ranked by Engineering News Record ("ENR") as one the largest construction firms (Top

25 by contract volume) in the United States, and we are currently ranked No. 1 in the Southeast and the State of Florida by ENR Southeast.

3. Our firm is a member of Associated Builders and Contractors ("ABC"), ABC's Florida First Coast Chapter, and other chapters. This Affidavit is submitted to express the negative impact that the New PLA Rules (hereinafter defined) will have on B&G's ability to continue to competitively bid for federal contract work subject to the New PLA Rules.

4. I am familiar with B&G's performance of construction work on federal government projects. Examples of federal construction projects B&G has been contracted to complete in recent history include, but are not limited to, the following:

PROJECT	CONTRACT VALUE	CONTRACT #	Executive Agency	Location
Laredo 1 & 2 Land Ports of Entry	101,000,000	GS07P15HHC7001	GSA	Laredo, TX
US Courthouse Greenville	87,000,000	47PE0317C0004	GSA	Greenville, SC
US Courthouse San Antonio	131,000,000	47PH0818C0002	GSA	San Antonio, TX
Hebert Federal Building Repairs and Modernization	59,500,000	47PH0819C0001	GSA	New Orleans, LA
US Courthouse Charlotte	143,091,000	47PE0318C0004	GSA	Charlotte, NC
US Courthouse Wilmington Disaster Recovery and Modernization	*37,414,047*	47PD0121C0005	GSA	Wilmington, NC
US Courthouse Savannah	*95,588,495*	47PF0021C0017	GSA	Savannah, GA
US Courthouse Aberdeen	*26,770,000*	47PH0821D0004 / 47PH0821F0033	GSA	Aberdeen, MS
Federal Motor Carrier Safety Administration Inspection Facilities, Southern Border Program	*40,719,050*	47PH0821D0004 / 47PH0821F0030, GS07P03HHD0159_4740 / GSP0715HH5019	GSA	Del Rio and Brownsville, Laredo, El Paso, TX
US Courthouse Huntsville	*90,000,000*	47PE0321C0003	GSA	Huntsville, AL
US Courthouse Fort Lauderdale	*201,000,000*	47PE0323C0004	GSA	Fort Lauderdale, FL
Wallace Creek Marine Corps Barracks, Camp Lejeune	*88,395,478*	N4008511C4001	NAVFAC	Jacksonville, NC
Orlando VA Medical Center	*$543,693,474*	VA101CFMC0163, VA101CFMC0164, VA101CFMC0206	VA	Orlando, FL
US Coast Guard Buffalo Station	*$31,445,678*	70Z04721RNMACC03 / 70Z04723FPCNI0001	DHS	Buffalo, NY
Specialty Warehouse	*$35,110,000*	15F06719D0003691 / 15F06722F0001529	DOJ	Huntsville, AL
Technology Facility 2 and 3	*$397,000,000*	15F06719D0003691 / 15F06723F0000010	DOJ	Huntsville, AL

5. B&G self-performs portions of the work by using its own employees in various trades and classifications potentially subject to a project labor agreement, including carpenters, laborers,

equipment technicians, equipment operators, truck drivers, foreperson(s) and others. As a general contractor, we also subcontract out work in various trades, including electrical, mechanical, plumbing, fire protection, plaster and drywall, and painting.

6. B&G currently holds five multiple award contracts (IDIQ, MATOC, MAC) and we are actively pursuing other contracts via full and open competition. There are presently potential pending awards for projects including the following: the Brownsville (Gateway) Land Port of Entry (GSA), Auburn University, USDA ARS Lab (Army), NAVFAC Southeast Multiple Award Contract (Navy) and Anniston Army Depot ANAD (Army) (collectively, the "Upcoming Projects"). Each of these Upcoming Projects is subject to the recent amendments to the Federal Acquisition Regulations in FAR Case 2022-003 "Use of Project Labor Agreements for Federal Construction Projects" (the "New PLA Rules").

7. B&G is also a mentor to an 8(a), HUBZone small business in the U.S. Small Business Administration Mentor-Protégé program, Jordan Construction. Jordan Construction and B&G are currently completing an $85 million laboratory project at the University of Alabama for the Department of Interior, Geological Survey Administration. The Auburn University, USDA ARS Lab (Army) project is a key element of our protégé's business plan for 2024. Jordan Construction is a merit shop contractor that has no experience with PLAs.

8. B&G typically spends one to two years planning for specific pursuits and then four to six months and hundreds of man-hours on each bid or proposal we submit. The process is time-consuming and costly because of the great importance to B&G and the procuring agencies that we submit correct, competitive bids and proposals.

9. As we prepare to make proposals for these Upcoming Projects, B&G is being informed by our potential subcontractors they will not participate in preparing bids because of the New PLA

Rules, the uncertainty of labor cost created by the New PLA Rules, and the impact an agreement with a union would have on their companies and business operations.

10. B&G is also being informed that reaching agreement on a PLA may not be possible on these Upcoming Projects for a variety of reasons. I understand that under the New PLA Rules, agencies have three options when they require submission of a fully negotiated and signed PLA: (1) submission of the PLA with the bid or proposal, (2) submission of the PLA after responses are received but before contract award, or (3) after contract award. When a signed PLA is required with the bid or proposal and the Federal government is not a party to the PLA, that means the incumbent unions must negotiate and sign a PLA with every general contractor and subcontractor who wants to respond to the solicitation. There is no requirement that the incumbent unions do so, and no requirement that the incumbent unions treat all contractors the same. There is no requirement that the unions complete negotiations before bids or proposals are due. If B&G must submit a signed PLA after the bid or proposal is submitted but before contract award, there is no reliable way we can predict how negotiations with a union will play out, and this uncertainty must be reflected by a contingency in our bid/proposal pricing. If the PLA is required after the contract is awarded, the unions have significant negotiation advantage, because any failure to reach agreement on a PLA would necessitate a termination of the contract, presumably for default. The procuring agencies cannot avoid a termination by excepting the contract from the PLA requirement. As a result, B&G will not be able to confidently submit bids/proposals and will be forced to include significant contingency sums to account for the uncertainties that union contractors and subcontractors do not face.

11. B&G has submitted many questions to the contracting officers on the Upcoming Projects asking about the market condition information that might justify an exception to the New PLA Rules. In each case, the contracting officers have refused to either produce, share and/or

acknowledge the market research they are supposed to examine under the New PLA Rules, which likely substantiates a basis for exception(s) under the New PLA Rules.

12. After research and investigation, it is my understanding that under many PLAs, non-union companies such as B&G must obtain most or all their employees from union hiring halls and will not be able to use their existing non-union workforce. Under some PLAs, a non-union contractor is permitted to use a small number of its existing non-union workforce, but they must send these employees to the union hiring hall and negotiate the ability to have the union dispatch these employees to the jobsite. Either way, obtaining most of the craft workers from union hiring halls, rather than using existing employees, would make it difficult for B&G and its non-union subcontractors to successfully bid for work and perform contracts.

13. I further understand that PLAs typically require contractors to follow union work rules, such as those requiring work assignments by union craft jurisdictional boundaries defined in each craft's relevant collective bargaining agreement. That arrangement is different from the work arrangement that my firm typically employs. Usually, we 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, which again we believe contributes to the overall growth and development of our employees.

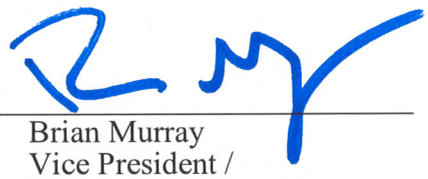
14. I understand that PLAs also typically require non-union companies to obtain apprentices exclusively from union apprenticeship programs on PLA projects. This would create another challenge for B&G, which typically uses apprentices from non-union apprenticeship programs provided by ABC chapters or our own Department of Labor approved apprenticeship program. B&G does not want to stop working with our current apprentices. Plus, it would be costly and time

prohibitive for my firm to stop using our current apprentices and to switch to using entirely different apprentices, as we have already invested time in our current apprentices' training.

15. I understand that PLAs typically require non-union companies to pay their workers' health and welfare benefits to union trust funds. However, B&G already has employee benefit plans, which means that any additional payments to union trust funds would increase the cost of B&G's bid on the Upcoming Projects.

16. If B&G decides to bid on the Upcoming Projects, B&G would need to employ and train additional staff to comply with the new administrative burdens and compliance risks imposed by the New PLA Rules at the bid stage. The cost of this new staff would have to be reflected in the price of the bid.

17. I declare under penalty of perjury that the foregoing is true and correct.

By 

Brian Murray
Vice President /
Division Manager
Brasfield & Gorrie, LLC

Date March 25, 2024

EXHIBIT “6”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	
Plaintiffs	§	**NO. _____**
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Justin Starnes, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Regional Vice President of the Southeast Region of Hensel Phelps Construction Co. My firm is a public works contractor concentrating on construction projects throughout the United States. The Southeast Region concentrates on construction projects in Florida, the Carolinas, Tennessee, Mississippi and Alabama. My firm is a member of Associated Builders and Contractors ("ABC"), and ABC's Florida First Coast Chapter.

2. I am familiar with my firm's performance of construction work on government projects that exceed $35 million in value in the Southeast Region. We have a strong success rate

with winning these types of contracts. Each year, the Southeast Region typically wins contracts on 4 such projects.

3. My region self-performs some aspects of our work by using employees in various trades and classifications, including carpenters, laborers, masons, cement finishers, operators and others. As a general contractor we also subcontract out work in various trades. For example, within the last year, we have subcontracted with many different entities, many of whom were merit shop, or nonunion, subcontractors.

4. As a merit shop contractor, I am very concerned about the new Rule recently issued by the FAR Council. The Rule requires federal agencies to mandate project labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value.

5. My region will face irreparable harm from the Rule as it will make it more difficult for the Southeast Region to secure work. I am already aware of one upcoming project—construction work at the USDA Lab Annex at Auburn University—that has been advertised as requiring a PLA. My region has had a documented track record of being the successful bidder in other similar projects. We would plan to pursue the work at the USDA Lab project if it were not for the PLA requirement. Additionally, I am aware of the upcoming JAX NAVFAC project that has been advertised as requiring a PLA. We would plan to pursue that project if it were not for the PLA requirement.

6. I am also aware of other upcoming projects at Patrick Space Force Base which have been announced as subject to the PLA mandate. We would plan to pursue these projects at Patrick Space Force Base if it were not for the PLA requirements.

7. Submitting bids for Federal contracts is a time-consuming process. For example, the Southeast Region typically spends approximately 700 hours on each bid we submit. The

process is time-consuming because we want to make sure we are submitting correct bids. Given that submitting bids is a time-consuming and costly process, my region does not have the capacity to submit bids when doing so will be futile.

8. I believe it would be futile for my firm to submit bids in the Southeast Region for projects that require PLAs for many reasons. I understand that under the Rule, my firm would have to sign a PLA before we can submit a bid or after being awarded a contract. Either way, this would impose irreparable burdens on my firm during the bidding process. If the Southeast Region had to submit a PLA to bid, we would not be able to meaningfully estimate how the PLA would impact our cost calculations, given that this region does not typically enter into PLAs nor do we work exclusively with union subcontractors. As a result, we would be unable to confidently submit an accurate bid.

9. Even if the Southeast Region did not need to sign a PLA until after my firm won the contract, we would still be unable to submit an accurate bid, knowing that a subsequent (and unnegotiated) PLA could alter the cost calculations. Under this scenario, my firm would have a minimal negotiating position in negotiating a PLA. Again, because of this challenge, the bid submission process would be futile.

10. Further, the Southeast Region does not have an ongoing relationship with any unions, particularly not in the southeast region of the country where union craft workers perform little if any work. In fact, the Southeast Region does not self-perform work with union craft labor, and rarely works with union subcontractors. Our employees have never voted to be represented by a union. Forcing our company to recognize and enter into a PLA with a union that does not represent our employees would irreparably infringe on our Constitutional right of freedom of association.

11. I understand that under typical PLAs, nonunion companies, such as mine, must obtain most or all their employees from union hiring halls and may not be able to use their existing nonunion workforce. Under some other PLAs, a nonunion contractor is permitted to use a small number of its existing nonunion workforce, but they must send these employees to the union hiring hall and hope the union dispatches the same workers back to the PLA jobsite. Either way, obtaining employees from union hiring halls, rather than using existing employees, would make it difficult for my region to successfully bid for work.

12. I further understand that PLAs typically require contractors to follow union work rules, such as those requiring work assignments by union craft jurisdictional boundaries defined in each craft's relevant collective bargaining agreement. That arrangement is different from the work arrangement that the Southeast Region typically employs. Usually, we 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.

13. I understand that PLAs also typically require nonunion companies to obtain apprentices exclusively from union apprenticeship programs on PLA projects. This would create another challenge for the Southeast Region, which typically uses apprentices from non-union apprenticeship programs provided by ABC chapters. My region does not want to stop working with our current apprentices. Plus, it would be costly for my region to stop using our current apprentices, and switch to using entirely different apprentices, as we have already invested time in our current apprentices' training.

14. Working on projects with PLAs would also make it more difficult for my region to retain employees. As noted above, our employees in the Southeast Region have never voted to be

represented by a union and many of my employees appear to have philosophical objections to union representation. Working on projects with PLAs would also increase my firm's costs relating to employee benefit payments. I understand that PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds. However, my firm already has employee benefit plans. My region's employees would not be able to obtain union benefits unless they leave my firm. As noted above, I do not want my employees to leave my firm. To ensure that my employees do not leave (which again, is already a challenge in this labor market), my firm would need to pay into union trust funds while still maintaining current employee benefit plans.

15. The FAR Council and OMB, in publishing the PLA mandate, assert that the rule does not mandate PLAs containing all of the foregoing requirements. But nothing in the Rule prevents unions from insisting on these common provisions found in most PLAs, and the burden is on the contractor/bidder – not the union(s) - to negotiate the PLA in order to qualify for the work. This is an irreparable burden on our bidding for work on any project subject to the new PLA mandate.

16. The Rule would also make it more difficult if not impossible for my region to identify subcontractors when bidding for applicable federal construction projects. If the project I want to bid on is subjected to the PLA mandate, my region would need to find subcontractors who are willing to enter PLAs. Many of our regular subcontractors have already made clear that they will not perform work under a union PLA, and without them my region cannot successfully perform the project. The non-union subcontractors in turn cannot estimate their own costs without knowing what sort of PLA will be negotiated with the Union or accepted by the government agency. The lack of subcontractors willing to bid under the PLA mandate would be an insurmountable challenge for the Southeast Region, or at a minimum will drastically decrease the

number of subcontractors my region could consider, given that many subcontractors who the Southeast Region typically works with are merit shop.

17. The Rule will also likely have the unintended consequence of reducing participation of small and disadvantaged subcontractors on federal projects. Federal construction projects all have small business and disadvantaged business goals as part of the contract requirements. Many small business and disadvantaged business subcontractors in this region are nonunion subcontractors and do not have the structure or financial wherewithal to replace their nonunion craft workers with union craft workers and comply with the paperwork and fringe benefit requirements of a PLA.

18. If my region decided to bid for federal projects mandating PLAs, despite the futility in doing so, my region would need to employ and train additional (un-reimbursable) staff to comply with the new administrative burdens and compliance risks imposed by the new Rule at the bid stage.

19. Imposing a PLA on the USDA Lab project will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. My region is ready, willing and able to bid for work on the USDA Lab project, and other federal projects that are being advertised for bids; but the PLA mandate will irreparably harm our ability to bid or perform work on this project or any other project covered by the new FAR Council PLA rule.

20. I declare under penalty of perjury that the foregoing is true and correct.

Digitally signed by Justin Starnes
Date: 2024.03.21 14:03:20-04'00'

_____ _____
Date

EXHIBIT “7”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	
Plaintiffs	§	**NO. _____**
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Michael Bennett, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Vice President of The Cianbro Companies. Cianbro is one of the United States' largest 100% employee-owned construction and construction services companies. We presently operate in more than 40 states and employ more than 4,000 team members. Cianbro manages and self-performs all elements of construction. We are a longtime member of Associated Builders and Contractors ("ABC") and Cianbro through its subsidiary R.C. Stevens, is a member of the Florida First Coast Chapter.

2. We have bid on and been awarded five government projects since 2020 each of which exceeded $35 million in value. We successfully performed the projects (some are still

active) without any project labor agreement ("PLA") requirement, and we would expect to continue providing such services to the government but for the PLA mandate. Imposing a PLA mandate will significantly impact our company, by disqualifying us from having an opportunity to secure work on federal projects. We need policies that are inclusive and encourage all qualified contractors and their skilled workforce to compete to build long-lasting quality projects throughout America.

3. As a merit shop contractor, we are very concerned about the new Rule recently issued by the FAR Council. The Rule requires federal agencies to mandate project labor agreements on federal construction projects that are $35 million or more in total value.

4. We believe in open, fair, and competitive bidding on public works projects. PLAs drive up costs of construction by 12% to 20% by reducing competition and effectively excluding merit shop contractors and their skilled team members from building projects paid for by their own tax dollars.

5. While the FAR PLA rule claims that it does not mandate specific working conditions as the outcome of PLA negotiations, the PLA mandate itself gives labor organizations all the leverage to insist on agreements that are antithetical to non-union contractors, including the following typical PLA provisions:

- Recognize unions as the unelected representatives of all employees on projects covered by the PLA.
- Use the union hiring hall to obtain most or all of their construction workforce.
- Obtain apprentices exclusively from union apprenticeship programs.
- Pay into union benefit plans.
- Obey costly, restrictive, and inefficient union work rules.

6. PLA mandates are not in alignment with our values, infringe on our freedom of association, and do not make sense for our organization. We hire and develop our own team members, we employ multiskilled tradespeople that can perform work across multiple disciplines, and we provide a competitive benefits package to our people.

7. It's important to note that we are not ani-union, we simply believe in inclusivity and that all contractors should have the right to be awarded work opportunities regardless of whether they agree to be bound by an agreement with unions that do not represent the contractors' employees. With all the construction needs that our great country is faced with, everyone needs to have a seat at the table. Especially where close to 90% of the construction workforce does not belong to a union and the industry as a whole is faced with a skilled labor shortage of close to half a million people.

8. I declare under penalty of perjury that the foregoing is true and correct.

DocuSigned by:
Mike Bennett
7312DE42D5ED454...

3/19/2024
Date

EXHIBIT “8”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. _____**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Dave Yencarelli, being duly sworn, hereby state the following based on personal knowledge:

1. I am the President/CEO of American-Electrical Contracting, Inc. My firm is a public works subcontractor headquartered in Jacksonville, FL. We perform electrical work on federal and commercial construction projects in the Jacksonville area and elsewhere in the United States. My firm is a member of Associated Builders and Contractors ("ABC"), and ABC's Florida First Coast Chapter.

2. I am familiar with my firm's performance of construction work on government projects that exceed $35 million in value. The general contractors with which we typically work have a strong success rate with winning these types of contracts. My firm has performed electrical

subcontracts on government projects valued above $35 million. None of our previous successful subcontracts on federal projects imposed any project labor agreement ("PLA") mandates.

3. As a merit shop subcontractor, I am very concerned about the new Rule recently issued by the FAR Council. The Rule for the first time requires federal agencies to mandate project labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value.

4. My firm will face irreparable harm from the Rule as it will make it more difficult for my firm to secure work. I am already aware of one upcoming project—construction work at B2480 Renovate Fourth Fleet Naval Station Mayport in Jacksonville, FL, that is expected to be advertised as requiring a PLA. My firm has had a strong success rate at similar federal installations and a documented track record of being a successful subcontractor in other similar projects. We anticipate that merit shop general contractors will plan to pursue the work at this project and many other federal projects valued above $35 million, and will ask us to participate as a subcontractor, if it were not for the PLA requirement.

5. Even though the FAR Rule and Office of Management and Budget (OMB) guidance makes reference to exemption from the mandate where the agency's market research indicates that a PLA will injure competition on federal construction projects, it is my understanding that Defense Department has either undertaken no meaningful market research to justify the PLA mandate on this project, or has ignored the results of such research which clearly shows dramatically reduced number of bidders for the prime contracts and subcontracts on projects imposing the PLA mandates and lack of available unionized firms to fill the workforce needs. That is certainly the case in the Jacksonville area but also in many other jurisdictions around the country.

6. I believe the PLA Rule will irreparably harm my firm. To start, I do not believe that the merit shop general contractors with which my firm normally works will bid for or successfully be awarded PLA-covered projects, which will make it difficult for my firm to obtain subcontracting work. I also do not believe union contractors would consider my firm as a subcontractor.

7. I understand that under the Rule, firms have to sign a PLA before they can submit a bid or after being awarded a contract. Either way, this would impose irreparable burdens on my firm. If a project required a PLA for bidding, my firm would not be able to meaningfully estimate how the PLA would impact our cost calculations, given that we do not typically enter into PLAs or work with unions. As a result, we would be unable to confidently submit accurate cost estimates to general contractors.

8. Even if a project did not require a PLA until after the bidding process completed, my firm would still be unable to submit accurate cost estimates to general contractors who may be considering my firm, knowing that a subsequent (and unnegotiated) PLA could alter the cost calculations. The situation would be particularly uncertain for my firm, because as a subcontractor, my firm would not play a role in PLA negotiations. Because of this challenge, I do not believe general contractors would select my firm as a subcontractor.

9. Further, my firm does not have a relationship with any unions. In fact, my firm has never worked with any union, and my employees have never voted to be represented by a union. I therefore do not think any unionized contractors would consider my firm as a subcontractor. Further, forcing our company to recognize and enter into a PLA with a union that does not represent our employees would irreparably infringe on our Constitutional right of freedom of association.

10. I understand that under typical PLAs, nonunion companies, such as mine, must obtain most or all their employees from union hiring halls and may not be able to use their existing nonunion workforce. Under some other PLAs, a nonunion subcontractor is permitted to use a small number of its existing nonunion workforce, but they must send these employees to the union hiring hall and hope the union dispatches the same workers back to the PLA jobsite. Either way, obtaining employees from union hiring halls, rather than using existing employees, would make it difficult for my firm to carry out its duties as a subcontractor or accurately provide cost estimates to general contractors who may consider selecting my firm as a subcontractor.

11. I further understand that PLAs typically require subcontractors to follow union work rules, such as those requiring work assignments by union craft jurisdictional boundaries defined in each craft's relevant collective bargaining agreement. That arrangement is different from the work arrangement that my firm typically employs. Usually, we 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.

12. I understand that PLAs also typically require nonunion companies to obtain apprentices exclusively from union apprenticeship programs on PLA projects. This would create another challenge for my firm, which typically uses apprentices from non-union apprenticeship programs provided by ABC chapters. My firm does not want to stop working with our current apprentices. Plus, it would be costly for my firm to stop using our current apprentices, and switch to using entirely different apprentices, as we have already invested time in our current apprentices' training.

13. Working on projects with PLAs would also make it more difficult for my firm to retain employees. As noted above, our employees have never voted to be represented by a union and many of my employees appear to have philosophical objections to union representation. Working on projects with PLAs would also increase my firm's costs relating to employee benefit payments. I understand that PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds. However, my firm already has employee benefit plans. My firm's employees would not be able to obtain the union benefits unless they leave my firm. As noted above, I do not want my employees to leave my firm. To ensure that my employees do not leave (which again, is already a challenge in this labor market), my firm would need to pay into union trust funds while still maintaining current employee benefit plans.

14. The FAR Council and OMB, in publishing the PLA mandate, assert that the PLA Rule does not mandate PLAs containing all of the foregoing requirements. But nothing in the Rule prevents unions from insisting on these common provisions found in most PLAs, and the burden is on the contractor/bidder – not the union(s) - to negotiate the PLA in order to qualify for the work. This is an irreparable burden on our subcontracting on any project subject to the new PLA mandate. Further, as subcontractor, my firm would not be involved in negotiations, so my firm would be required to adhere to whatever deal the general contractor reaches with a union.

15. If any general contractors ask my firm to serve as a subcontractor for a PLA project, my firm would need to employ and train additional (un-reimbursable) staff to comply with the new administrative burdens and compliance risks imposed by the new Rule.

16. Imposing a PLA on federal construction projects will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. My firm is ready, willing and able to serve as a subcontractor

for such projects, but the PLA mandate will irreparably harm our ability to perform work on such projects or be selected as a subcontractor in the first place.

17. I declare under penalty of perjury that the foregoing is true and correct.

3/25/24

Name DAVID J. YENCARELLI Date

Date

SWORN TO AND SUBSCRIBED BEFORE ME THIS 25th DAY OF MARCH 2024.

SHARI ZIGICH
Notary Public - State of Florida
Commission # HH 407445
My Comm. Expires Jun 24, 2027
Bonded through National Notary Assn.

EXHIBIT “9”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. _____**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, James Pattee, being duly sworn, hereby state the following based on personal knowledge:

1. I am a Vice President of M.C. Dean, Inc. in the Engineering & Construction Division focusing on federal construction opportunities for M.C. Dean. My firm performs electrical specialty contracting as a prime contractor and subcontractor on construction projects in the Virginia, Maryland, the District of Columbia, North Carolina, South Carolina, Georgia, Florida, Texas, and other locations throughout the United States for US Government clients, as well as large infrastructure and industrial commercial clients. My firm is a member of Associated Builders and Contractors ("ABC"), and ABC's Virginia Chapter. The firm is headquartered in Tysons, Virginia, and we have offices throughout the United States, to include Atlanta, Georgia and Oldsmar, Florida.

2. I am familiar with my firm's performance of construction work on government projects that exceed $35 million in value. We, and the general contractors with whom we typically work, have a strong success rate with winning these types of contracts. Each year, we submit numerous proposals as a prime contractor or as a subcontractor on federal projects of this magnitude and my firm has served as a prime or subcontractor on several projects.

3. As a merit shop contractor, I am very concerned about the new Rule recently issued by the FAR Council. The Rule requires federal agencies to mandate projects labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value. My firm will face irreparable harm from the Rule as it will make it more difficult for my firm to secure work. I am already aware of several upcoming projects that may be of interest to our firm that have been advertised as requiring a PLA. Those projects include the Bureau of Printing and Engraving in Washington, DC with the United States Corps of Engineers; the Secret Service Training Facility in Laurel Maryland with the United States Park Service, aid the FBI Headquarters in Greenbelt, MD. My firm has had a strong success rate with many of these customers, in these geographical areas, and a documented track record of being a successful subcontractor in other similar projects. We anticipate a general contractor would plan to pursue the work projects and ask us to participate as a subcontractor if it were not for the PLA requirement.

4. Even though the FAR Rule and Office of Management and Budget (OMB) guidance makes reference to exemption from the mandate where the agency's market research indicates that a PLA will injure competition on the projects, we are not aware that any of the

contracting agencies have undertaken such market research to justify the PLA mandate on these projects.

5. I believe the PLA Rule will irreparably harm my firm. To start, I do not believe that the merit shop general contractors with which my firm normally works will bid for or successfully be awarded PLA-covered projects, which will make it difficult for my firm to obtain subcontracting work. I also do not believe union general contractors would consider my firm as a subcontractor.

6. I understand that, under the Rule, firms have to sign a PLA before they can submit a bid or after being awarded a contract. Either way, this would impose irreparable burdens on my firm. If a projects required a PLA for bidding, my firm would not be able to meaningfully estimate how the PLA would impact our cost calculations, given that we do not typically enter into PLAs or work with unions. As a result, we would be unable to confidently submit accurate cost estimates to general contractors.

7. Even if projects did not require a PLA until after the bidding process completed, my firm would still be unable to submit accurate cost estimates to general contractors who may be considering my firm, knowing that a subsequent (and unnegotiated) PLA could alter the cost calculations. The situation would be particularly uncertain for my firm, because as a subcontractor, my firm would not play a role in PLA negotiations. Because of this challenge, I do not believe general contractors would select my firm as a subcontractor.

8. Further, my firm does not have relationship with any union in the construction industry. While my firm has entered into collective bargaining agreements as a successor contractor to hire incumbent staff on certain federal projects, my firm has never entered a collective bargaining agreement with a union on a construction project, and my employees have never voted

to be represented by a union. I therefore do not think any unionized contractors would consider my firm as a subcontractor. Further, forcing our company to recognize and enter into a PLA with a union that does not represent our employees would irreparably infringe on our Constitutional right of freedom of association.

9. I understand that under typical PLAs, nonunion companies, such as mine, must obtain most or all their employees from union hiring halls and may not be able to use their existing nonunion workforce. Under some other PLAs, a nonunion subcontractor is permitted to use a small number of its existing nonunion workforce, but they must send these employees to the union hiring hall and hope the union dispatches the same workers back to the PLA jobsite. Either way, obtaining employees from union hiring halls, rather than using existing employees, would make it difficult for my firm to carry out its duties as a subcontractor or accurately provide cost estimates to general contractors who may consider selecting my firm as a subcontractor.

10. I further understand that PLAs typically require subcontractors to follow union work rules, such as those requiring work assignments by union craft jurisdictional boundaries defined in each craft's relevant collective bargaining agreement. That arrangement is different from the work arrangement that my firm typically employs. Usually, we 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. Our firm's competitive edge relies on the investments that we have made in our workforce to train them in the manner in which we provide the most value to our customers. We spend considerable time, money, and company resources developing the processes and training our employees on our approach to safety, quality, performance, and customer relations. Our value to our general contractors and customers is enhanced by these investments and it is a market

differentiator. The requirement to use Union labor will disrupt our normal processes, undermine the investment we have placed in training and education of the workforce, and make us less likely to win work or perform within the pricing that we have proposed on a firm fixed price basis.

11. I understand that PLAs also typically require nonunion companies to obtain apprentices exclusively from union apprenticeship programs on PLA projects. This would create another challenge for my firm, which typically uses apprentices from non-union apprenticeship programs provided by ABC chapters. My firm does not want to stop working with our current apprentices. Plus, it would be costly for my firm to stop using our current apprentices, and switch to using entirely different apprentices, as we have already invested time in our current apprentices' training.

12. Working on projects with PLAs would also make it more difficult for my firm to retain employees. As noted above, our employees have never voted to be represented by a union and many of my employees appear to have philosophical objections to union representation. Working on projects with PLAs would also increase my firm's costs relating to employee benefit payments. I understand that PLAs require nonunion companies to pay their workers' health and welfare benefits to union trust funds. However, my firm already has employee benefit plans. My firm's employees would not be able to obtain the union benefits unless they leave my firm. As noted above, I do not want my employees to leave my firm. To ensure that my employees do not leave (which again, is already a challenge in this labor market), my firm would need to pay into union trust funds while still maintaining current employee benefit plans. We may also be required to supplement the pay of our employees in an effort to keep those individuals gainfully employed, or provide other incentive fees to our current employees to maintain our workforce.

13. Taking work with PLAs would also adversely affect our current employees. Our company has developed and retained thousands of employees with skills to provide construction services for complex industrial and government projects. These workers work on an hourly basis. Because of our ability to win work, those employees have the ability to work full work weeks, with overtime as needed, and with vacation and other benefits. Much of our workforce has been with the firm for several years. They benefit from our firm's ability to provide several options for projects that allow them to move from job to job as projects are completed. This provides many of them with a steady source of income on interesting projects, with teams of individuals with whom they have developed long-term working relationships. If we are required to use labor from unions under a PLA, we anticipate being unable to fully utilize our current employees for work, which will likely result in less pay for those employees, fewer opportunities for growth, and/or terminations and layoffs. In order to provide for themselves and their families, those individuals may be forced to leave the firm, lose the seniority and benefits that they have accrued while at the firm, and be required to take lesser paying jobs, with less certainty, in other localities far from home.

14. The FAR Council and OMB, in publishing the PLA mandate, assert that the PLA Rule does not mandate PLAs containing all of the foregoing requirements. But nothing in the Rule prevents unions from insisting on these common provisions found in most PLAs, and the burden is on the contractor/bidder – not the union(s) – to negotiate the PLA in order to qualify for the work. This is an irreparable burden on our subcontracting on any projects subject to the new PLA mandate. Further, as subcontractor, my firm would not be involved in negotiations, so my firm would be required to adhere to whatever deal the general contractor reaches with a union.

15. If any general contractors ask my firm to serve as a subcontractor for a PLA projects, my firm would need to employ and train additional (un-reimbursable) staff to comply with the new administrative burdens and compliance risks imposed by the new Rule, including the need to engage outside counsel to advise us and negotiate with the unions.

16. Imposing a PLA on federal construction projects such as the projects listed above will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. My firm is ready, willing and able to serve as a subcontractor for projects, but the PLA mandate will irreparably harm our ability to perform work on these projects or be selected as a subcontractor in the first place.

17. I declare under penalty of perjury that the foregoing is true and correct.

James Pattee

James Pattee

3/25/2024

Date

EXHIBIT “10”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. _____**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Cheryl Sment, being duly sworn, hereby state the following based on personal knowledge:

1. I am the President/CEO of Interstate Sealant & Concrete, Inc. My firm is a small, women-owned business performing work on federal and state construction projects in Florida and nationwide. My firm is a member of Associated Builders and Contractors ("ABC") in the ABC's Wisconsin Chapter. I was the 2010 Small Business Person of the Year for Wisconsin, (through SBA) representing small contractors that are women-owned and have been able to be successful in federal and state contracting projects as a Prime Contractor and as a Subcontractor.

2. I am familiar with my firm's performance of construction work on government projects that exceed $35 million in value. My firm has performed a number of subcontracts on

government projects valued above $35 million over the 26 years I have been in business. None of our previous successful contracts and subcontracts on federal projects imposed any project labor agreement ("PLA") mandates.

3. As a merit shop contractor/subcontractor, I am very concerned about the new Rule recently issued by the FAR Council. The Rule for the first time requires federal agencies to mandate project labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value.

4. My firm will face irreparable harm from the Rule as it will make it more difficult for my firm to secure work. I am already aware of upcoming projects that are being advertised as requiring a PLA. My firm has had a strong success rate at similar federal installations and a documented track record of being a successful subcontractor in other similar projects. We anticipate that merit shop general contractors would plan to pursue the work at this project and other federal projects valued above $35 million, and would ask us to participate as a subcontractor, if it were not for the PLA requirement.

5. I do not believe that the merit shop general contractors with which my firm normally works will bid for or successfully be awarded PLA-covered projects, which will make it difficult for my firm to obtain subcontracting work. I also do not believe union contractors would consider my firm as a subcontractor.

6. I understand that under the Rule, firms have to sign a PLA before they can submit a bid or after being awarded a contract. Either way, this would impose irreparable burdens on my firm. If a project required a PLA for bidding, my firm would not be able to meaningfully estimate how the PLA would impact our cost calculations, given that we do not enter into PLAs. As a result, we would be unable to confidently submit accurate cost estimates to general contractors.

7. Even if a project did not require a PLA until after the bidding process completed, my firm would still be unable to submit accurate cost estimates to general contractors who may be considering my firm, knowing that a subsequent (and unnegotiated) PLA could alter the cost calculations. The situation would be particularly uncertain for my firm, because as a subcontractor, my firm would not play a role in PLA negotiations. Because of this challenge, I do not believe general contractors would select my firm as a subcontractor.

8. Further, my firm does not have a relationship with any unions. In fact, my firm has never worked with any union, and my employees have never voted to be represented by a union. I therefore do not think any unionized contractors would consider my firm as a subcontractor for Federal Contracting opportunities, I have in the past been able to negotiate any union terms and agreements out of our subcontract when working with Union Contractors, I am certain if this PLA mandate is in place, my negotiations with Prime Contractors that are union will not allow our company under this mandate to waive PLA's. Further, forcing our company to recognize and enter into a PLA with a union that does not represent our employees would irreparably infringe on our Constitutional right of freedom of association. Working on projects with PLAs would make it more difficult for my firm to retain employees and increase my firm's costs.

9. It is my understanding that the Small Business Administration was highly critical of the PLA Rule and said it did not comply with the laws governing small business procurements. My firm is a small business that is directly impacted by the PLA Rule's failure to comply with such laws. The PLA Rule imposes an irreparable burden on our subcontracting on any project subject to the new PLA mandate. Further, as subcontractor, my firm would not be involved in negotiations of the PLA, so my firm would be required to adhere to whatever deal the general contractor reaches with a union in order to bid on the project.

10. If any general contractors ask my firm to serve as a subcontractor for a PLA project, my firm would need to employ and train additional (un-reimbursable) staff to comply with the new administrative burdens and compliance risks imposed by the new Rule. Not a light ask for a small women-owned subcontractor that does not have endless resources.

11. Imposing a PLA on federal construction projects will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. My firm is ready, willing and able to serve as a subcontractor for such projects, but the PLA mandate will irreparably harm our ability to perform work on such projects or be selected as a subcontractor in the first place.

12. I declare under penalty of perjury that the foregoing is true and correct.

3/27/24

Name Cheryl A Sment Date

EXHIBIT “11”

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

October 18, 2022

VIA ELECTRONIC SUBMISSION

Re: Comments on FAR CASE 2022-003, Mandatory Project Labor Agreement for Federal Construction Projects of $35 million or more.

Dear Regulatory Secretariat:

On August 19, 2022, the Federal Acquisition Regulatory Council (FAR Council) issued a proposed regulation to implement project labor agreements in federal construction contracts. This letter constitutes the Office of Advocacy's (Advocacy) public comments in response to the proposed regulation. Advocacy encourages the FAR Council to reevaluate the excessive cost of compliance of this mandatory rule on small entities. Advocacy also encourages the FAR Council to explore alternatives to this rulemaking as it relates to small entities as is required by the Regulatory Flexibility Act (RFA).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,[1] as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),[2] gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

[1] 5 U.S.C. §601 et seq.

[2] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

The Small Business Jobs Act of 2010 requires federal agencies to give every appropriate consideration to comments provided by Advocacy.[3] The promulgating agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.[4]

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."[5]

B. The Proposed Rule

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration are proposing to amend the FAR to implement Executive Order 14063, *Use of Project Labor Agreements for Federal Construction Projects*. The Executive Order was issued on February 9, 2022.[6] It mandates that federal government agencies require the use of project labor agreements (PLAs) where the total estimated cost to the government is $35 million or more. The rule provides three exceptions to this requirement. The first is when the PLA would not achieve economy and efficiency in federal procurement as described in 22.50(d) of the FAR. The second is when the PLA would substantially reduce the number of potential bidders, frustrating full and open competition. The third is when the PLA would be inconsistent with statues, regulations, and other Executive Orders or Presidential Memoranda.

The mandatory requirement of this rule means that every contractor on a federal construction project, regardless of how small, must agree to negotiate or become a party to a project labor agreement with one or more labor organizations. This creates a mandatory flow down requiring all affected small businesses to join a union, regardless of size or dollar value of the sub-contract. This flow down will have a detrimental cost impact on those covered small entities.

II. Advocacy's Small Business Concerns

C. Advocacy Roundtable

On September 29, 2022, Advocacy conducted a roundtable discussion on the proposed rule. Approximately 60 small businesses participated. The participants included a mixture of small business construction owners, small business construction trade organizations, and organizations that were in support of PLAs. The Associated Builders Contractors (ABC) presented findings

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[3] Small Business Jobs Act of 2010 (PL. 111-240) §1601.

[4] *Id*.

[5] *Id.*

[6] Executive Order, Use of Project Labor Agreements for Federal Construction Projects (February 04, 2022).

from a survey of its members.[7] According to the ABC, nearly all the small business member respondents said they would be less likely to bid on contracts if the proposed rule was finalized. This potential effect would greatly hamper federal small business goals. One federal construction contractor said she would not be able to participate in PLAs because of the compliance costs. Another contractor spoke about the proposal's estimation that only two small businesses per construction project would be impacted. They argued this estimate was entirely too low and unrealistic considering the nature of a construction project. Several other individuals spoke in support of PLAs, suggesting that the regulation would accomplish its objective of increasing efficiency in contract management. Others expressed a desire to return to the PLA requirements in place under the Obama Administration in which participation was not mandatory.

D. Advocacy Recommendations

In the RFA section of the proposed rule, the FAR Council stated that the rule will not conflict with any other law, regulation, or Presidential Memoranda. However, this proposed rule would seem to conflict with the December 2, 2021 presidential announcement on reforms to Increase Equity and Level the Playing field for Underserved Small Business Owners.[8] In this announcement, President Biden proposed increasing the number of new entrants to the federal marketplace, thereby reversing declines in the small business supplier base. According to a report cited by the President, the number of new small business entrants to the federal procurement process decreased by 60 percent over the past decade. A previously cited ABC survey indicates the majority of small businesses in the construction industry are not unionized. This rule will require all affected small businesses to be unionized in order to have PLA contracts and subcontracts. This mandatory requirement places an additional cost on small businesses that cannot absorb them. Thus, the regulation will have the unintended consequence of preventing President Biden's goal of increasing small entrants to the federal contracting market.

Additionally, many of the small business attendees at the roundtable stated that they would not participate in PLA contracts, an expectation reflected in the ABC survey. This would indicate that the pool of small businesses ready and willing to participate in PLA contracts is tiny. This will have a chilling impact on federal agencies ability to meet their annual small business contracting goals. Therefore, counter to the regulation's assertion, there appear to be inherent conflicts between this proposed rule and other federal laws and Presidential Memoranda.

The proposed rule suggests that there are no alternatives to the regulation that would reduce its impacts on covered small entities. This prevented the public from reviewing and commenting on

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[7] ABC SURVEY, https://www.abc.org/NEWS.

[8] Press Release, The White House, Statements and Releases, FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners, (Dec. 2, 2021), FACT SHEET: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners | The White House.

alternatives that would allow the FAR Council to meet its statutory goals while simultaneously reducing the costs of the regulation on small entities. Pursuant to its consultation with affected small businesses, Advocacy recommends that the FAR Council consider and analyze the following alternative approaches to this regulation:

1. The rule's estimate of two affected small business subcontractors per $35 million project is too low. This number needs to be increased to reflect the characteristics of the construction industry. In arriving at this number, the FAR Council said it used information from experts, but it could have consulted with small businesses in the construction industry to get a more accurate number. The FAR Council should revise the number after taking comment from small businesses and their industry organizations. A more accurate estimate will likely reflect a greater negative economic impact on small businesses.
2. The FAR Council should consider modifying this proposed rule because of the diminishing cost-benefit to small firms. A dollar threshold could have been provided for the mandatory flow down cut-off. This threshold number could have been achieved by examining the average dollar value of subcontracts awarded to small businesses. If the mandatory flow down remains unchanged, this rule will have a higher negative economic impact on small specialty companies with few employees. If a proper cost-benefit analysis had been performed for this rule, it may have shown that a small firm that has only a few contracts per year will absorb a higher cost of compliance than a firm with multiple yearly contracts. Thus, this rule will have a negative economic impact on a substantial number of smaller firms, demonstrating why the mandatory flow down cut off has merit.
3. The FAR Council should consider a requirement that a small business does not have to join a union if it agrees to pay the prevailing wages and other benefits established in union negotiation. The mandatory requirement of joining a union means a small business must pay union dues and other expenses that are not returned once the contract is completed. The removal of this mandatory requirement would allow the federal government to achieve its objective with the PLA but at less cost to the small business. This change should provide the small business with additional cash flow to be competitive in the marketplace.
4. The FAR Council places requirements on the small business subcontractor to comply with this mandatory flow but it does not provide the small business with an opportunity to utilize the resources of the contracting agency if pay and other disputes should occur during contract performance.
5. The FAR Council should carefully examine which industries are construction and exempt those that are not directly involved in the construction industry. For example, professional service companies are governed by other statutes such as the Brooks Act.

III. Conclusion

The Office of Advocacy encourages the FAR Council to re-evaluate the impact of this regulation on small entities and federal agencies. As proposed, this regulation will conflict with the Administration's goal to reduce economic barriers for small businesses that wish to enter the federal marketplace. If this regulation is finalized, it will place a greater burden on federal

agencies to meet their annual statutorily required small business goals. My office would be happy to assist in any way to ensure that the goal of the regulation is fulfilled with minimum negative economic impact on small businesses. I can be contacted at major.clark@sba.gov.

Sincerely,

Major L. Clark, III

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Copy to: Dominic Mancini, Deputy Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

EXHIBIT “12”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. 24-cv-318-WWB**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, James C. McReady, III, being duly sworn, hereby state the following based on personal knowledge:

1. I am the President/CEO of JCM Associates, Inc. My firm provides mechanical services throughout the Washington DC Metropolitan area and in other mid-Atlantic states. We perform new construction and renovation, among other services, on large scale commercial and public construction projects. Our services have included construction of public works projects exceeding $35M, including most recently Camp LeJeune P378 CH-53K Maintenace Hanger (NC), Camp LeJeune P707 BEQ (NC), MCS Cherry Point P197 Aircraft Maintenance Hanger (NC), Camp LeJeune 20P1800/1801 Package (NC), among others. My firm is a member of Associated Builders and Contractors ("ABC"), and ABC's Metropolitan Washington Chapter.

2. As a merit shop subcontractor, I have entered into a collective bargaining agreement (CBA) with the International Union of Journeymen and Allied Trades (IUJAT). Under that CBA, my company is contractually obligated to deal exclusively with the IUJAT and apply the terms of the CBA to all JCM employees performing covered work, including both private and public projects. I am very concerned about the new Rule recently issued by the FAR Council. The Rule for the first time requires federal agencies to mandate project labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value.

3. Of particular concern, the Rule calls for prime contractors to agree to be bound by a single PLA on each covered project and requires all subcontractors to be bound to the same agreement. All the prime contractors I know of who have signed PLAs on federal contracts have entered into agreements with the North American Building Trades Unions (NABTU). The IUJAT is not affiliated with the NABTU. Therefore, my firm will be excluded from performing work on any PLA-mandated project over $35M.

4. I am aware of a number of projects throughout the mid-Atlantic states where the mandate is being imposed, including Bureau of Engraving and Printing (MD), and Joint Base Andrews P207 Hanger 14 Renovation (MD), even though the mandate excludes my firm and others who have agreements with independent unions from performing the work. My firm has had a strong success rate at similar federal installations and a documented track record of being a successful subcontractor in other similar projects. But for the PLA requirement, we would pursue the work with general contractors we regularly subcontract to; but because of the PLA mandate, we will not be able to perform the work. This will cause us irreparable harm.

5. Even though the FAR Rule and Office of Management and Budget (OMB) guidance make reference to exemptions from the mandate where the agency's market research

indicates that a PLA will injure competition on federal construction projects, it is my understanding that the federal agencies have either undertaken no meaningful market research to justify the PLA mandate on covered projects, or have ignored the results of such research. The result is that on covered projects we would normally pursue, there are a dramatically reduced number of bidders for the prime contracts and subcontracts on projects imposing the PLA mandates and lack of available unionized firms to fill the workforce needs.

6. The FAR Council and OMB, in publishing the PLA mandate, assert that the PLA Rule does not mandate PLAs with any particular union. But the requirement that a single agreement cover all the trades will inevitably lead the prime contractors our firm bids with to agree to a PLA with NABTU, which will exclude our firm form competing for the work. This is an irreparable burden on our subcontracting on any project subject to the new PLA mandate. Further, as subcontractor, my firm would not be involved in negotiations for the PLA, so my firm would be required to adhere to whatever deal the general contractor reaches with a union.

7. Imposing a PLA on federal construction projects will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. In fact, in recent experience, we have observed NABTU competitors being very distracted by the Data Center market and not actively pursuing many government projects. JCM has won (6) Federal Government projects in the past (4) years where we are aware of no NABTU mechanical subcontractors showing interest and/or submitting a proposal. My firm is ready, willing and able to serve as a subcontractor for such projects, but the PLA mandate will irreparably harm our ability to perform work on such projects or be selected as a subcontractor in the first place.

8. I declare under penalty of perjury that the foregoing is true and correct.

4-23-24

Name Date

EXHIBIT “13”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS, FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. _____**
Plaintiffs	§	
vs.	§	
WILLIAM F. CLARK, DIRECTOR, OFFICE OF GOVERNMENT-WIDE ACQUISITION POLICY, OFFICE OF ACQUISITION POLICY, Office of GOVERNMENT-WIDE Policy, GENERAL SERVICES ADMINISTRATION, et al.	§	
Defendants.	§	

AFFIDAVIT

I, James P. Laurie III, being duly sworn, hereby state the following based on personal knowledge:

1. I am Corporate Counsel for ECC – Environmental Chemical Corporation ("ECC"). ECC is a federal government contractor engaged in construction projects for the Department of Defense world-wide. My firm is a member of Associated Builders and Contractors ("ABC").

2. I am familiar with my firm's performance of construction work on government projects that exceed $35 million in value. We have a strong success rate with winning these types of contracts. Each year, my firm typically performs work exceeding $800 million in revenue from projects of this magnitude.

3. As a general contractor we subcontract out work to various trades.

4. As a contractor performing Federal work, I am very concerned about the new Rule recently issued by the FAR Council. The Rule requires federal agencies to mandate project labor agreements ("PLAs") on federal construction projects that are $35 million or more in total value.

5. My firm will face irreparable harm from the Rule as it will make it more difficult for my firm to secure work from the federal government. I am already aware of several upcoming projects—construction work at Fort Liberty, NC, Cherry Point, NC (two projects), Key West, FL, Camp Eisenhower, GA, Eareckson AFB, AK —that have been advertised as requiring a PLA. My firm has had a strong success rate performing this type of work for these agencies and a documented track record of being the successful bidder in other similar projects. We would plan to pursue the work at each location if it were not for the PLA requirement.

6. We have requested an exception to the PLA requirement for each of these projects and demonstrated grounds for an exception to be granted, but have received no substantive response from any agencies, and only informal discussion on some that an exception will not be granted.

7. I believe it would be inefficient and costly for my firm to prepare bids for projects that require PLAs for many reasons. I understand that under the Rule, my firm would have to sign a PLA before we can submit a bid or after being awarded a contract. Either way, this would impose new and costly burdens on my firm during the bidding process. Federal projects are firm-fixed price leaving no ability to clarify or revise pricing after award. For this reason, we rely on the participation and competition or our subcontract trade partners when preparing our bids. Our experience shows that the majority of subcontractors submitting proposals in the areas that we perform work are non-union. Although we do not discriminate between union and non-union

subcontractors, we depend on the non-union participation simply because they are in the majority. If we chose to submit on a federal project with a PLA, then our price would be significantly increased to account for administrative burdens, lack of subcontractor competition and to account for inefficiencies in working with trade partners with which we do not regularly contract.

8. Further, my firm does not have a relationship with any unions, particularly not in the Southeast region of the country where unions perform a small minority of the work, and five of these projects are located. Our employees have never voted to be represented by a union. Forcing our company to recognize and enter into a PLA with a union that does not represent our employees would infringe on our Constitutional right of freedom of association.

9. My firm has contacted unions for the purpose of entering into a PLA, but to date, none have been able to provide a proposed PLA Agreement for execution on these projects. Without this union participation, ECC will be unable to submit a bid for these imminent projects.

10. Further, on the Key West project, the union has indicated that it does not have membership in the area of the project, and ECC will be required to pay additional per diem costs for all union participation brought onto that project.

11. Most of our regular subcontractors have already made clear that they will not perform work under a PLA, and without them our firm cannot successfully bid or perform projects. The lack of subcontractors willing to bid under the PLA mandate would be an insurmountable challenge for our firm, or at a minimum will drastically decrease the number of subcontractors my firm could consider, given that most subcontractors who my firm typically works have refused to participate in a project with a PLA. The result will be unnecessarily increased costs and higher bid prices to the Government due to lack of competition between subcontractors.

12. If my firm elects to pursue Federal projects with PLAs my firm may need to

employ and train additional staff, and incur additional legal expense, to comply with the new administrative burdens and compliance risks imposed by the new Rule at the bid stage. The additional staff will increase our project estimates resulting in higher prices to the Government.

13. Imposing a PLA on projects such as those mentioned herein will do nothing to increase government efficiency or economy, and will instead have the opposite effect, by reducing competition and increasing prices. My firm is ready, willing and able to submit proposals for work on any of the projects mentioned above, and other federal projects that are being solicited; but the PLA mandate will irreparably harm our ability to bid or perform work on these projects or any other project covered by the new FAR PLA rule.

14. I declare under penalty of perjury that the foregoing is true and correct.

James Laurie

James P. Laurie III 4/22/2024

EXHIBIT “14”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. 24-cv-318-WWB**
Plaintiffs,	§	
vs.	§	
WILLIAM F. CLARK, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Ben Brubeck, being duly sworn, hereby state the following based on personal knowledge:

1. I am the Vice President of Regulatory, Labor, and State Affairs of the Associated Builders and Contractors, Inc. ("ABC"). ABC is a trade association representing more than 23,000 member contractors and related firms in Florida and throughout the country. ABC represents all specialties within the U.S. construction industry, including many member contractors and subcontractors who regularly perform work on federal projects valued at more than $35 million. I submit this Affidavit in support of Plaintiffs' Motion for Preliminary Injunction, which is incorporated by reference, for purposes of establishing ABC's standing to sue, as well as the standing of the separately incorporated chapter known as the ABC Florida First Coast Chapter ("ABCFFC").

2. ABC is affiliated with 68 separately incorporated chapters throughout the country who share ABC's mission of advocating on behalf of fair and open competition in the construction industry, including federal construction contracting. One of those chapters is the ABCFFC, headquartered in Jacksonville, Florida and representing 180 member companies, many of whom regularly perform work on federal construction projects valued at more than $35 million. ABCFFC and ABC and their members advocate in favor of "merit shop" construction, specifically calling for construction work to be performed on the basis of merit, regardless of labor affiliation, based on principles of free enterprise and open competition.

3. ABC prepared and filed thorough regulatory comments on the proposed rule that preceded the challenged PLA Rule, running to 43 single-spaced pages. I played a principal role in drafting the ABC comments and hereby vouch for their truthfulness, including extensive legal, economic, and practical input from ABC staff and ABC member firms, regarding the adverse impact of the PLA Rule on ABC, ABCFFC, and their members.

4. Since the enactment of EO 14063, ABC has been compelled to spend thousands of dollars and staff resources responding to the EO and the implementing PLA Rule and OMB Memorandum. ABC has invested hundreds of staff hours studying the rule and informing its members about the rule's contents. We have also fielded many calls from members and their government and private industry customers concerned about the rule's effects and legal basis, and specifically regarding the injuries to competition resulting from imposition of PLA mandates on work that ABC members have in the past successfully performed, without need for any government-mandated PLAs.

5. Because ABC has expended resources to assist members relating to the PLA Rule, it has been required to divert resources away from other efforts, such as workplace safety, apprenticeship and workforce development, and government advocacy on other issues.

6. As trade associations representing federal contractors in this District and nationwide, ABCFFC and ABC National also have standing to bring this action on behalf of their members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) Plaintiffs' members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to Plaintiffs' organizational purposes; and (3) neither the claims nor relief require the participation of Plaintiffs' individual members.

7. Plaintiffs have attached to our motion for preliminary injunction affidavits from numerous identified members of ABCFFC and ABC—contractors and subcontractors, large and small businesses, and both union and non-union firms — all of whom attest to the irreparable harms resulting from the PLA Rule. These are examples only; many more members of ABCFFC and ABC have complained that they are being irreparably harmed by the across-the-board PLA mandate and that the exemption process has proved to be a dead letter even in areas of the country where few if any union contractors are able to perform the work. As detailed in the member affidavits themselves, the restrictive PLA mandate policy and resulting PLA mandates irreparably harms them in the bidding process by erecting barriers making it more difficult for ABCFFC's and ABC's members to compete and win government contracts for construction services via competitive bidding.

8. In addition, the interests at stake are clearly germane to ABC and ABCFFC's organizational purposes, as discussed above. Specifically, the PLAs mandated by the new EO and Rule are antithetical to ABC's and ABCFFC's mission of promoting fair and open competition, regardless of labor affiliation.

9. Finally, neither the claims nor relief sought in this litigation require the participation of Plaintiffs' individual members. Plaintiffs solely request injunctive relief to stop the PLA Rule from mandating PLAs on federal construction projects.

10. Under the guise of increasing "economy and efficiency" and "full and open competition" in federal contracting, as required by the Procurement Act, the Competition in Contracting Act, and other federal laws, the PLA Rule plainly has the opposite effect. It stifles competition from the majority of construction contractors whose employees have chosen not to be represented by labor unions (89% of the construction industry workforce nationally; 97% of the construction industry workforce in Florida, according to www.bls.gov and www.unionstats.gov), as well as ABC members who have signed bargaining agreements with unions that are disfavored by the PLA Rule. The PLA mandate plainly reduces economy and efficiency on federal construction projects by deterring and restricting competition from ABC members who are fully qualified to perform such work and who are irreparably injured in their ability to fairly compete for and be awarded work on such projects.

11. ABC conducted a survey of its contractor members about government-mandated PLAs and the proposed version of the PLA Rule, which was essentially unchanged in its final form: 99% of respondents said they would be less likely to begin or continue bidding on federal contracts if the proposed rule was finalized and 97% said that

government-mandated PLAs decrease economy and efficiency in government contracting. 97% of respondents who self-identified as small businesses said they would be less likely to bid on contracts if the rule is finalized, and 73% of small businesses stated PLAs decrease hiring of minority, women, veteran and disadvantaged business enterprises.

12. Contracting officers have further refused to either produce, share and/or acknowledge the market research they are instructed by the FAR Rule and OMB Memorandum to examine to determine if a PLA is appropriate and/or if an exemption to the FAR Rule's PLA requirement policy is warranted. The EO and FAR Rule announced creation of a website where exemptions would be posted. No exemptions have been posted there as of this filing. *See* Project Labor Agreements (PLA) | Acquisition Gateway.

13. Indeed, despite ABC's close monitoring of the status of federal projects above $35 million since the PLA Rule went into effect, I have not been made aware of any federal agency granting an exception to the FAR Rule's PLA mandate policy, to date. As set forth in greater detail in the attached member affidavits, no exemptions from the FAR Rule's PLA mandates have been granted on any identified projects even in the South Region of the country, including the Jacksonville area, where members of ABC and ABCFFC have successfully performed billions of dollars worth of federal projects with little union activity. The federal agencies have turned a deaf ear to market research, and merit shop contractors who do not (or cannot) sign PLAs are being blatantly discriminated against for no other reason than political favoritism.

14. Federal agency contracting officers and senior officials at multiple federal agencies have told me specifically that no PLA exceptions are being granted at this time.

In addition, federal agency contracting officers have told me that it is not possible to get a PLA exception request up the military chain of command to the Army's senior procurement officer for an evaluation without incurring significant project procurement delays. As a result, no PLA exceptions are being sought by many federal contracting officers at the USACE, even though they are appropriate. In addition, federal contracting officers have said that publicly listing federal agency PLA exceptions is a deterrent to contracting officers and federal agency procurement officers granting PLA exceptions. In short, the PLA exception process outlined in the OMB Memorandum and FAR Rule is fatally flawed, is not being utilized and is designed to deter PLA exception requests from being filed and granted.

15. That there is no factual basis supporting the PLA Rule is conclusively shown by reviewing the results of the federal government's pro-PLA policy from fiscal year 2009 to fiscal year 2023, encouraging—but not requiring—federal agencies to mandate PLAs. Between fiscal years 2009 and 2023, just 12 federal contracts (valued at $1.26 billion) contained a PLA mandated by a federal agency out of 3,222 contracts of $25 million or more valued at a total of $238 billion: this means procurement officials saw no need to impose PLAs to increase economy or efficiency on more than 99% of federal construction contracts of $25 million or more. During this period ABC members won and successfully performed 54% of the $205.56 billion in total value of direct prime construction contracts exceeding $35 million awarded by federal agencies during fiscal years 2009-2023.[1]

[1] *See ABC Members Won the Majority of Large-Scale Federal Contracts > $35M, FY2009-FY2023*, Associated Builders & Contractors, https://thetruthaboutplas.com/wp-content/uploads/2023/12/ABC-Members-Won-A-Significant-Number-of-Large-Scale-Federal-Contracts-of-35M-FY09FY23-030524.png (last visited, Mar. 8, 2024).

I declare under penalty of perjury that the foregoing is true and correct.

Ben Brubeck

4/25/24

Date

EXHIBIT “15”

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

ASSOCIATED BUILDERS AND CONTRACTORS FLORIDA FIRST COAST CHAPTER, AND ASSOCIATED BUILDERS AND CONTRACTORS,	§	**NO. 24-cv-318-WWB**
Plaintiffs,	§	
vs.	§	
WILLIAM F. CLARK, et al.	§	
Defendants.	§	

AFFIDAVIT

I, Karin Tucker Hoffman, being duly sworn, hereby state the following based on personal knowledge:

1. I am submitting this Affidavit in support of Plaintiffs' Motion for Preliminary Injunction, for purposes of establishing standing to sue on the part of Associated Builders and Contractors Florida First Coast Chapter ("ABCFFC").

2. I am the President of the ABCFFC. We are an incorporated trade association, headquartered in Jacksonville, Florida, representing 180 member contractors, subcontractors and related firms. We are a chartered affiliated chapter of Associated Builders and Contractors ("ABC" or "ABC National") which represents more than 23,000 member contractors, subcontractors and related firms in Florida and throughout the country. ABCFFC represents all specialties within the U.S. construction

industry, including many member contractors and subcontractors who regularly perform work on federal projects valued at more than $35 million.

3. ABCFFC shares ABC's mission of advocating on behalf of fair and open competition in the construction industry, including federal construction contracting. ABCFFC and its members advocate in favor of "merit shop" construction, specifically calling for construction work to be performed on the basis of merit, regardless of labor affiliation, based on principles of free enterprise and open competition.[1]

4. As a trade association representing federal contractors in this District and regionally, ABCFFC has standing to bring this action on behalf of our injured members under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977), because (1) ABCFFC's members would otherwise have standing to sue in their own right; (2) the interests at stake are germane to our organizational purposes; and (3) neither the claims nor relief require the participation of ABCFFC's individual members.

5. Plaintiffs have attached to our motion for preliminary injunction affidavits from numerous identified members of ABCFFC and ABC – contractors and subcontractors, large and small businesses, and both union and non-union firms – all of whom attest to the irreparable harms resulting from the PLA Rule. These are examples only; many more members of ABCFFC and ABC have complained that they are being irreparably harmed by the across-the-board PLA mandate; and that the exemption process has proved to be a dead letter even in areas of the country like Jacksonville, where few if any union contractors are able to perform the work. As detailed in the member affidavits themselves, the restrictive PLA mandate policy and resulting PLA

[1] *See also* ABC First Coast > About > The ABC Story **(last visited March 26, 2024)**

mandates irreparably harm them in the bidding process by erecting barriers making it more difficult for ABCFFC's and ABC's members to compete and win government contracts for construction services via competitive bidding.

6. The interests at stake are clearly germane to ABCFFC's organizational purposes, as discussed above. Specifically, the PLAs mandated by the new EO and Rule are antithetical to ABCFFC's mission of promoting fair and open competition, regardless of labor affiliation.

7. Finally, neither the claims nor relief require the participation of Plaintiffs' individual members. Plaintiffs solely request injunctive relief to stop the PLA Rule from mandating PLAs on federal construction projects.

8. The PLA Rule plainly does not increase "economy and efficiency" and "full and open competition" in federal contracting, as required by the Procurement Act, the Competition in Contracting Act, and other federal laws. Instead, the Rule stifles competition from the majority of construction contractors whose employees have chosen not to be represented by labor unions (97% of the industry in Florida).[2]

9. Since the enactment of Executive Order 14063 mandating PLAs on federal construction projects above $35 million, ABCFFC has been compelled to spend money and staff resources responding to the EO and the implementing PLA Rule and OMB Memorandum, studying the rule and informing our members about the Rule's contents. We have also fielded many calls from members and their government and private industry customers concerned about the rule's effects and legal basis. Our members have expressed great concern regarding the injuries to competition resulting from imposition of

[2] www.unionstats.com

PLA mandates on work that ABC members have in the past successfully performed, but now are facing discriminatory barriers in the bidding process.

10. Because ABC has expended resources to assist members relating to the PLA Rule, it has been required to divert resources away from other efforts, such as workplace safety, apprenticeship and workforce development, and government advocacy on other issues.

11. As set forth in greater detail in the attached member affidavits, no exemptions from PLA mandates have been granted I our region, as the agencies have turned a deaf ear to market research and numerous complaints from our members about the PLA mandate is stifling competition and discriminating in favor of union contractors who until now have performed very little federal construction work in the Jacksonville area. ABCFFC members have complained that government contracting officers have refused to either produce, share or even acknowledge the market research they are supposed to examine. Merit shop contractors belonging to ABCFFC are being blatantly discriminated against for no other reason than political favoritism.

I declare under penalty of perjury that the foregoing is true and correct.

Karin Tucker Hoffman

4-24-2024

Date