

**COMMENTS OF THE
BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ON
FAR CASE 2009-005
USE OF PROJECT LABOR AGREEMENTS FOR FEDERAL CONSTRUCTION
PROJECTS**

The Building and Construction Trades Department, AFL-CIO (“the BCTD”), appreciates the opportunity to file these comments, on behalf of itself, its thirteen affiliated national and international unions, and the 2.5 million construction workers they represent, in response to the proposals by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“the Councils”) to amend the Federal Acquisition Regulations (“FAR”) to implement Executive Order (“E.O.”) 13502, “Use of Project Labor Agreements for Federal Construction.” 74 Fed. Reg. 33953 (July 14, 2009).

I. INTRODUCTION

President Obama issued E.O. 13502 on February 11, 2009, announcing the “policy of the Federal Government to encourage executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.” 74 Fed. Reg. 6985 (Feb. 11, 2009). The Executive Order is a significant departure from the approach taken by the previous administration, which had banned the use of project labor agreements on construction projects undertaken by the Federal Government or with Federal assistance. *See* E.O. 13202, 66 Fed. Reg. 11,225 (Feb. 22, 2001); E.O. 13205, 66 Fed. Reg. 18717 (Apr. 11, 2001). In issuing E.O. 13502, President Obama revoked the prior directive and ordered the heads of executive agencies to revoke all implementing rules. E.O. 13502 § 8, 74 Fed. Reg. at 6986. And the President directed the Councils to amend the FAR to implement his newly-announced policy, *id.* § 6, a

policy that accords with the approach to construction industry contracting that is widespread in both the private and public sectors.

A. History of PLAs in the Construction Industry

Employment in the construction industry is highly fragmented. Any sizable construction project involves a constantly changing stream of contractors and subcontractors responsible for discrete aspects of the job. Each of those contractors and subcontractors supplies its own complement of employees who are, for the most part, hired for the particular project. In the unionized sector, each trade has its own local collective bargaining agreement, with different expiration dates, work rules, schedules and holidays. In the non-union sector, each contractor similarly comes to the project with its own labor relations structure and hiring needs.

This fragmentation presents particular challenges on large, long-duration projects. Project labor agreements – “PLAs” – were developed as a governing mechanism for such projects. These pre-hire, pre-bid contracts are generally negotiated at the behest of the project owner or its representative, with the unions representing all of the trades that will be engaged on the project. The Agreements provide a mechanism for quickly and consistently staffing the job with the most highly-trained, qualified employees from all of the trades, to ensure on-time and on-budget construction. They create the labor-relations framework for the entire project, and make it possible to establish and maintain a coherent set of wage relationships and work rules, while protecting the project from disruptions like lawful economic strikes and other industrial action. Public entities are also increasingly using PLAs to make sure that the money taxpayers invest in public works projects is used to promote job training and career opportunities for the economically-disadvantaged.

PLAs were first used in the 1930s on government-funded flood-control projects and

hydroelectric dams, including the Grand Coulee Dam in Washington, the Shasta Dam in California, and the Denison Dam in Texas. In the 1940s, these agreements became a regular feature on construction projects at defense and atomic energy facilities. By the 1960s, the agreements were being used on important private and public works projects, such as Walt Disney World, Cape Canaveral and the Trans-Alaska Pipeline. Today, PLAs are commonly used on public and private sector projects ranging in size from shopping centers and schools, to major industrial facilities, airports and waste water remediation projects. To give just a few examples, reconstruction of Highway I-15 in Utah, a complex plan fast-tracked for completion before the 2002 winter Olympics, was conducted under a PLA; the Los Angeles Unified School District has been conducting a \$19.3 billion school construction and renovation project, slated to run through 2012, under a PLA first negotiated in 1998; in 2008, the Los Angeles Board of Airport Commissioners agreed to manage \$1.8 billion of new projects at the Los Angeles International Airport under its PLAs; and PLAs have recently been negotiated for the new World Trade Center Towers in New York City and a microprocessing plant being built by GlobalFoundries US in Upstate New York, each valued at \$4.2 billion, and for Constellation Energy's Calvert Cliffs, Maryland \$7 billion Unit 3 nuclear power plant. Indeed, since the beginning of this year, the BCTD and/or its affiliated local building and construction trades councils have signed PLAs covering over 80 projects in the private and public sector, on construction valued at more than \$30 billion.

Despite this long history, questions were raised in the 1980s over whether use of PLAs by public agencies was consistent with the National Labor Relations Act. This doubt was resolved in 1993 when a unanimous Supreme Court held, in *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993) – the “Boston Harbor” case – that a

public agency undertaking a public works project has at least as much discretion in arranging its industrial relations policy as an entity in the private sector. Preemption cases decided in *Boston Harbor's* aftermath have made clear that the government may, as a matter of contracting policy, require PLAs on all of the construction projects it finances, as long as the agreements' terms apply only on those projects. *See, e.g., BCTD v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir. 2002) (Executive Order banning PLAs on any federal or federally-financed construction is not regulatory conduct subject to preemption under federal labor law because it addresses only the use of agreements on projects related to those in which the government has a proprietary interest); *Northern Illinois Chapter, ABC v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) (upholding requirement that entities receiving grants to build ethanol plants use PLAs); *see also HERE Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 216 (3d Cir. 2004).

Moreover, the highest court of each state that has considered a challenge to a PLA under the state's procurement laws has found that PLAs can be utilized in ways that are consistent with competitive bidding requirements. Many states, including Illinois, New Jersey, New York, Nevada and Washington, have issued executive orders or passed legislation authorizing PLAs on state-funded construction projects.

It is against this backdrop that President Obama issued E.O. 13502, encouraging Federal executive agencies to consider requiring PLAs on "large-scale construction projects." The President noted in the Executive Order that PLAs can help to predict labor costs, ensure a steady supply of labor, facilitate coordination among multiple contractors on a single project site, and resolve uncertainty about the terms and conditions of employment of various groups of workers, which tend to be more pronounced on "large-scale construction projects," which are generally more complex and of a longer duration.

B. Characteristics of Projects that Benefit from the Use of PLAs

A PLA is a departure from the usual type of collective bargaining agreement, through which a single employer or multi-employer industry group negotiates an agreement with a union representing a single construction trade. With a PLA, the entity with control over the entire operation – and the most vested interest in its success – directs the negotiation of an umbrella-type agreement that applies across a project, to all contractors and subcontractors that will be working on the project throughout its entire duration. It is therefore typically used as a workforce management tool on large, complex, long-term projects that will involve multiple contractors and employees from a variety of trades.¹

Owners in the private and public sectors cite the same reasons for using PLAs on particular projects.² Among the principle determinants are the scope of the project and the importance of keeping it on schedule.³ The larger the project and the longer its duration, the more fragmented the job is likely to be, and the greater the number of contractors and subcontractors whose work has to be coordinated. Project agreements directly address these issues by providing the construction manager or general contractor with a mechanism for coordinating scheduling and work rules, and establishing clear lines of communication on the job.

The agreements also provide assurances that work will progress without labor-related

¹ Johnston-Dodds, Kimberly, *Constructing California: A Review of Project Labor Agreements* 61, Cal. Research Bureau (2001), available on-line at <http://www.library.ca.gov/crb/01/10/01-010.pdf> (hereinafter “Johnston-Dodds”).

² Johnston-Dodds at 25.

³ Belman, Dale, et al., *Project Labor Agreements* 33, ELECTRI International (2007).

disruptions. First, the typical PLA includes procedures for resolving any grievances or jurisdictional disputes that may arise on the job, procedures that not only provide a mechanism for settling disputes but that also yield indirect benefits by fostering positive labor-management communication and cooperation, which can resolve issues before they develop into full-scale disputes.⁴

The agreements also routinely include no-strike/no-lockout clauses that bind all of the parties to continue working, whether disputes arise on-site or in the area, and have proven to be particularly valuable on long-term agreements. The typical collective bargaining agreement has a three-year term, and during a lengthy project, any number of the local agreements may be up for renegotiation. Even if a particular local union's contract expires without being successfully renegotiated, and the union engages in a lawful economic strike on other jobsites, the PLA's no-strike clause will preclude the union from participating in what would otherwise be a lawful work stoppage on that project.⁵

PLAs also assure construction owners uninterrupted work and on-time delivery by ensuring a steady stream of experienced, skilled tradespeople. The agreements typically incorporate the "positive, well-proven" centralized hiring hall referral systems found in the local

⁴ Johnston-Dodds at 59.

⁵ The construction managers for the Southern California Metropolitan Water District cited the importance of the no-strike clause in the PLA governing its \$2 billion Eastside Reservoir Project in keeping that project on schedule, noting that during the course of the project, the local collective bargaining agreements of two of the craft unions had expired, triggering strike activity elsewhere in the area, but not on work covered by the PLA. Rounds, Daniel, *Project Labor Agreements: An Exploratory Study* 11, Institute for Labor and Employment, University of California, Los Angeles (2001)

collective bargaining agreements.⁶ Construction unions operate hiring halls under the express approval and specific requirements of §§ 7 and 8(f) of the NLRA. The typical hiring hall provision requires employers to use the hiring hall as its primary source of referrals, but leaves the employers with final say on hiring decisions and permits them to look elsewhere for applicants if the union is unable to fulfill its hiring needs within 48 hours.⁷ The law requires unions to refer employees in a non-discriminatory manner, without regard to union membership, while also permitting unions to establish certain referral priorities, generally based on experience. When the numbers of qualified tradespeople available for work in the area decline, the contractors do not have to resort to want ads or employment services and do not have to independently assess their applicants' qualifications. Instead, the unions can send word through their network of affiliated locals around the country that work is available, calling on people who have gone through their apprenticeship programs and encouraging workers with requisite qualifications to travel to register for work.

Another common feature of PLAs is a standardized system for utilizing apprentices across the trades. Most agreements permit contractors to employ a certain ratio of apprentices to trained journeymen on the project. This yields a double benefit: reducing labor costs for the contractors, by permitting them to employ apprentices at a lower wage rate, and creating training opportunities, which can lead to long-term careers.

It is in this latter respect that public entities are increasingly using PLAs to leverage their

⁶ Johnston-Dodds at 59, quoting Ken Hedman, Principal Vice President for Labor Relations, Bechtel Construction Co.

⁷ Johnston-Dodds at 61. Public sector PLAs often modify these provisions to enable contractors with a regular complement of employees to retain a number of those employees, without going through the hiring hall.

public works projects into investments that yield broader community benefits. Like the pioneering agreement at the Port of Oakland, public entities are using PLAs to provide training opportunities for historically disadvantaged workers and businesses.⁸ Working together, agencies, unions, contractors and community groups have created innovative programs that create pre-apprenticeship programs to help community members develop the skills they need to enter apprenticeship programs; reserve certain numbers of apprenticeship positions for minority or disadvantaged youth; and guarantee certain numbers of jobs for small or minority-owned businesses. As a result of the requirements of the PLA applied to construction of the Washington National's Stadium in Washington, D.C., for example, unprecedented numbers of D.C. residents were employed on the project as apprentices and journeypersons.

Similarly, as detailed in a recent study by UCLA, three public agencies in Los Angeles County used PLAs to significantly increase the number of local and disadvantaged workers successfully prepared for and brought into the local unions' apprenticeship programs and hired on the projects.⁹ In Chicago, where the public school system has long conducted its construction program under a PLA, the City recently extended the agreement for another 10 years. The parties have set a goal of recruiting 25% of apprentices on covered construction from the public school system, a goal they are working to accomplish by developing an "education-to-career"

⁸ The social justice program in the Port of Oakland's Maritime and Aviation PLA is detailed in the comments filed by the Law Firm of Weinberg, Roger & Rosenfeld. *See also* 2009 Progress Report to the Board of Port Commissioners, available at http://www.portofoakland.com/pdf/busi_maplaReport_julyDec08.pdf.

⁹ UCLA Labor Center, *Construction Careers for Our Communities* (2009), available online at <http://www.labor.ucla.edu/programs/pdfs/ConstructionCareersForOurCommunitiesFullReport.pdf>.

program to provide students with an introduction to and experience in the trades. Thus, where consistent with the requirements of the applicable contracting laws, public entities have been able to use the taxpayers' money they are investing in public works and infrastructure projects to promote workforce training and development opportunities for economically disadvantaged local residents.

In sum, construction owners have found PLAs to be beneficial when used on large, complex projects, for which delivering quality construction on-time and on-budget are important, and which will involve numerous contractors and subcontractors utilizing numerous skilled construction workers from a variety of trades, over an extended period of time, while providing expanded employment opportunities for disadvantaged local residents.¹⁰

C. The BCTD's Role in Facilitating Use of PLAs

PLAs are generally negotiated to meet the unique needs of a particular project. However, the BCTD has developed two mechanisms to make it easy for willing owners, construction contractors and unions to adopt and implement these agreements.

First, the BCTD and the North American Contractors Association ("NACA") have negotiated the National Construction Agreement ("NCA"), a standard framework agreement that member companies may either use as is, or modify to meet the objectives of the particular project. NACA's members are some of the largest construction companies in the U.S., including

¹⁰ Opponents are likely to argue that PLAs increase costs. However, a broad-ranging and detailed study of PLAs, which examined "a number of large projects using . . . archival research, interviews, case studies and the statistical analysis of original data," and which analyzed studies opponents often cite as evidence that these agreements increase costs, concluded that there is no substantial evidence that PLAs either decrease the number of bidders or increase the costs of construction projects. Belman at 1. Instead, their analysis revealed that by failing to take into account other important influences on construction costs, other researchers "falsely attributed [effects] to PLAs that actually belonged to unobserved variables." *Id.*

Bechtel, Fluor, Parsons, Kiewit, Jacobs, Day & Zimmerman, Black & Veatch, and URS. The NCA has been used for construction of large industrial facilities, nuclear and coal-fired power plants, ethanol plants, micro chip processing plants, and other public and private industrial facilities, including two Department of Energy projects – the Umatilla Munitions and Chemical Disposal Plant, in Umatilla, Oregon, and the Bluegrass Chemical Demineralization Project, in Richmond, Kentucky.

Second, the BCTD has developed a model agreement for its affiliated local building and construction trades councils to use in negotiating their own PLAs. Among the features of the BCTD’s model PLA is an agreement to utilize the services of the Center for Military Recruitment, Assessment and Veteran’s Employment and its “Helmets to Hardhats Program,” to recruit veterans to work on the covered project.

II. RESPONSE TO REQUEST FOR COMMENTS

A. Process for Determining Whether to Use a PLA

1. Exercise of Discretion

The Executive Order establishes a Federal Government policy of “encourag[ing] executive agencies to consider requiring the use of project labor agreements.” While not requiring agencies undertaking construction projects to use PLAs in every instance, it encourages them to consider doing so, implicitly favoring their use when an agency determines it will “[a]dvance the government’s interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance” with various workplace laws and regulations, and are otherwise consistent with law – the standards spelled out in the Executive Order and the proposed regulations. (*See* E.O. 13502 § 3(A), 74 Fed. Reg. 6985; Proposed FAR § 22.504(a)(1), 74 Fed. Reg. 33955).

As drafted, the proposed regulations would not effectuate this policy. Instead, the procedure set forth in subparagraph (a)(2) would undermine the President's policy by providing that even if an agency undertakes an analysis and determines that use of a PLA will, in fact, advance its enumerated interests, the agency nonetheless retains the "complete discretion" to ignore those findings and decline to use one. § 22.504(a)(2). Thus, the regulations' proposed terms would permit an agency simply and arbitrarily to disregard its own findings that a PLA would advance its purposes, without having to engage in any meaningful decisionmaking.

To properly implement the Executive Order, the Councils should therefore replace the "complete discretion" that proposed § 22.502 would confer on the agencies with a procedure that requires an agency contemplating use of a PLA to evaluate specific factors and, if it finds that use of a PLA will promote its interests, either to utilize one or provide a statement of reasons for declining to do so.

2. Decisionmaking Criteria

As explained above, PLAs have proven to be beneficial on complex construction projects, for which staying on time and on budget are important, and which involve numerous contractors and subcontractors utilizing numerous skilled construction workers from a variety of trades, over an extended period of time. More often than not, these are precisely the characteristics of public works projects undertaken by the Federal Government and covered within the scope of the Executive Order.

Accordingly, we propose there should be a presumption in favor of using a PLA on a construction project coming within the Executive Order's scope, when doing so will serve the agency's interests in economy and efficiency, labor-management stability and ensuring compliance with various labor and employment standards, and is otherwise consistent with law.

In determining whether using a PLA on a particular project will serve these interests, the agency should be directed to consider whether the project satisfies one or more of the following criteria:

1. The project will require the services of two or more construction contractors and/or subcontractors that together employ workers in two or more crafts or trades (*e.g.* plumber, laborer, and electrician);
2. Completion of the project will require an extended period of time;
3. The potential for conflict between unionized and non-union workers presents a need for peaceful, orderly, and mutually binding procedures for resolving labor disputes and conflicts on the project;
4. The project will require a substantial number of experienced, skilled building trades and craft workers;
5. The agency has a significant interest in assuring that the project will be completed on schedule and within budget; and
6. There is a labor organization or group of labor organizations whose geographic jurisdiction includes the area where the project will be constructed that operate systems for referring experienced skilled building trades and craft workers to successfully complete the project and that can negotiate a PLA applicable to the project.

If, despite finding that a PLA would advance the agency's interests, under the terms defined above, the agency nonetheless determines not to require one, the agency should be required to document the reasons for its decision and submit that documentation to the Office of Management and Budget ("OMB"). This is consistent with the approach OMB Director Orszag announced in his July 10, 2009 Memorandum (M-09-22 - Implementation of the President's Executive Order on Project Labor Agreements), directing all agencies to report quarterly on any construction they undertake, whether they decided a PLA was appropriate on the project, and the factors they considered in making that determination. Requiring reporting would ensure that agencies do, in fact, follow a deliberative process in determining whether a PLA is appropriate on a particular project. It would also provide the Administration with a basis for ensuring the

consistent application of its policy. And it would provide a record for tracking and evaluating the use of PLAs on construction projects using Federal funds.¹¹

B. Bid Specifications

1. Problems with the Council's Proposed Alternatives

The Councils have invited comment on the bid solicitation procedure agencies should use to implement their decision to use a PLA on a particular project. In the preamble to the proposed regulatory text, the Councils suggest two alternatives: (1) requiring each offeror to submit a PLA as part of its bid package, or (2) requiring only the “apparent successful offeror” to submit a PLA. 74 Fed. Reg. 33954. Notwithstanding the two alternatives described in the preamble, the proposed text presents a different set of options: either (1) requiring the apparent successful offeror to submit a PLA to the contracting officer before the final contract award, or (2) simply requiring the successful bidder “to bargain in good faith . . . with one or more appropriate labor organizations” for a PLA. *Id.* at 33956 (proposed § 52.22-XX(b) and (e); *id.* Alternate I ¶ (b)). None of these alternatives mirrors the manner in which public and private construction owners actually use PLAs – which is to have the agreement negotiated as part of the planning process, so they are assured that the PLA accomplishes their objectives and bidders are aware of the contracting requirements in preparing their bids, and then to require all prospective bidders to agree to its terms as a condition of contract award. More importantly, the alternatives proposed in the Federal Register notice are simply not workable, and would hinder, rather than facilitate,

¹¹ The Government Accounting Office (now the Government Accountability Office) attempted to assess the extent to which the Federal Government was using PLAs in a report to Congress in 1998. GAO, *Project Labor Agreements: The Extent of their Use and Related Information* (GAO/GGD-98-82)(May 1998). At that time, the GAO reported that there was no Federal database that collected information about PLA use. We are not aware of any database that has been developed since that time.

the agency's contracting objectives.

As a preliminary matter, each of the proposed alternatives is at odds with the basic purpose of a PLA: to establish a single agreement governing the labor relations of all contractors and subcontractors that operate on a project throughout its duration. Instead, each of the proposals requires the bidders responding to each solicitation associated with a project to present its own PLA, an approach that could result in a series of different agreements on a project.

Each of the proposed alternatives also presents its own problems. Requiring each prospective bidder to submit its own agreement with its bid creates an unwieldy process, since it potentially pits bidders against one another in negotiating labor agreements with the same set of unions before they are able to submit their bids. It creates the potential that bidders will not be operating on a level playing field, since they will not be basing their bids on the same set of conditions.

The second proposal, to make an award to the apparent successful offeror contingent on the offeror negotiating a PLA that satisfies the agency's criteria, would needlessly complicate and prolong the contracting process. If the parties did not successfully reach an agreement, the agency would have to reopen the bidding process, make a second conditional award, and await the outcome of that bidder's negotiations. Moreover, permitting post-bidding negotiations would undercut a major advantage of entering into a pre-hire collective bargaining agreement like a PLA: giving contractors a basis for accurately estimating their costs, and therefore preparing accurate bids, before construction begins.

The Councils' other alternative – simply requiring the winning bidder to engage in good faith bargaining – would even further complicate and potentially undermine the process.

Assuming that the National Labor Relations Act is the touchstone for evaluating the parties'

conduct, the Act's requirement that parties engage in good faith bargaining does not include the requirement that they actually reach an agreement. Thus, a contractor could fully satisfy its obligations under this bid specification – *i.e.*, bargaining in good faith – without fulfilling the agency's objective – reaching agreement on a PLA tailored to satisfy the agency's interests. Moreover, the question of what constitutes “good faith” is a complicated legal question, requiring detailed consideration of the surrounding facts – a judgment that contracting officers neither are, nor should be, in the business of making.

Instead of the alternatives offered in the Federal Register notice, we propose that the Councils adopt a procedure that mirrors the way owners in both the public and private sector develop and implement PLAs: develop the agreement before the solicitation of bids, and then include it in the bid specifications for all contract solicitations.

2. Including the PLA in the Bid Specifications

As described earlier, a PLA is a tool that the entity with control over a construction project can use to establish the labor relations system for an entire project. It is therefore generally negotiated by the project owner or a construction manager or general contractor acting as the owner's agent, with a group of local unions that represent the full range of trades that will be engaged on the project. The agreement enables the parties to establish the management structure, lines of communication and direction, work rules, and methods of resolving disputes that will obtain on the project, throughout its duration. The project owner can also use the agreement as a mechanism for implementing programs tailored to achieve objectives for a particular project (whether on-the-job *e.g.*, through labor-management safety and health committees; or for the community, *e.g.*, through outreach and training programs for the economically-disadvantaged). By developing these agreements prior to the bidding process, the

owner or project manager can tailor the agreement to meet its objectives for the project and ensure that its interests are fully realized, while at the same time clearly announcing the characteristics of the project that prospective contractors must factor into their bids.

In the public sector, the agency that decides to use a PLA will generally follow one of two procedures: It will either negotiate and execute an agreement in its own name, or retain a project manager to negotiate the agreements on their behalf. As an example of a Federal agency employing the first option, the Tennessee Valley Authority negotiates its own PLAs with the BCTD. Similarly, school boards in Los Angeles, California, and Circleville, Akron and Portsmouth, Ohio are all signatories to PLAs with their area Building and Construction Trades Councils that cover school construction projects. On the other hand, in contracting for construction of the Salt Waste Processing Facility at its Savannah River Site, the U.S. Department of Energy directed its construction manager, Parsons Constructors, Inc., to negotiate the PLA on DOE's behalf. DOE has followed the same procedure, using construction managers to negotiate PLAs, at its facilities at the Oak Ridge (Tennessee) Reservation, *see Phoenix Engineering v. MK-Ferguson*, 966 F.2d 1513 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1577 (1993) (rejecting challenges to a PLA based on NLRA preemption and the Competition and Fair Contracting Act), the Fernald (Ohio) Environmental Management Project, the Idaho National Engineering Environmental Laboratory, the Nevada Test Site, the Lawrence Livermore National Laboratory, the Hanford (Washington) Site, the Rocky Flats (Colorado) Environmental Technology Site, and the Savannah River (South Carolina) Site.

Once a public agency is satisfied that it has developed a PLA that will effectuate its objectives on the project, it implements its determination to use the agreement by issuing a bid specification requiring each bidder to agree to abide by the PLA if awarded the contract. This

gives the bidders clear notice of their obligations, and a definitive basis for estimating their costs.

The Supreme Court described this process of including the PLA in the bid specifications in its *Boston Harbor* decision, explaining that after its project manager, Kaiser Engineering, negotiated a PLA with the local building trades council, the Massachusetts Water Authority's board of directors approved the agreement and directed that it be incorporated into a bid specification providing that

[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed . . . by and between Kaiser . . . on behalf of [MWRA] and [BCTC] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract.

Boston Harbor, 507 U.S. at 222.

We urge the Councils to adopt the following procedure, reflecting this well-established industry practice: The agency, its construction manager or general contractor should

- develop the PLA during the project planning stage;
- include the PLA in the bid documents; and
- incorporate into the bid specifications the requirement that each bidder must agree, if

awarded the contract, to be bound by the agreement.

There are a number of ways to facilitate this process. It is common, for example, for agencies to contract with a construction manager in the early stages of project development to manage the planning and administration of the project, which can negotiate such an agreement on the agency's behalf.¹² Moreover, as discussed earlier, the BCTD has negotiated the National

¹² The agency would include negotiation of a PLA as one of the construction manager's contractual obligations.

Construction Agreement for construction of large industrial facilities, and has developed a model PLA, which it and its local Councils commonly use as the basis for negotiations. The agencies, their construction managers or general contractors may use these agreements as a starting point, which they may modify and augment to meet the needs of the particular project. The BCTD is also available to work with the agencies in developing model agreements that generally address their procurement interests, and that contracting officers can then adopt and, if necessary, modify, for particular projects.

C. The Scope of the Executive Order and the Implementing Regulations

The Executive Order expressly states a policy of encouraging agencies to consider requiring PLAs on “large-scale construction” projects. It also makes clear that the President did not intend to preclude their use in other circumstances. And, we submit, there are likely to be circumstances in which federal agencies determine that a PLA will serve their procurement purposes on projects valued at less than \$25 million.

As detailed above, the total cost of the project is far less significant than the enumerated factors in determining whether a PLA would serve the Government’s procurement interests on a particular project. That is, a project that requires the coordination of multiple contractors and involves hiring substantial numbers of skilled craftspersons on a tight time schedule could benefit from the use of a PLA, regardless of the overall cost of the project. While a project’s monetary value may sometimes serve as a proxy for complexity, that will not always be the case. In fact, in a survey, project owners reported that PLAs tend to become useful on projects worth \$5 million or more.¹³

¹³ Belman at 27, 33. This is consistent with President Clinton’s Memorandum, which encouraged the use of PLAs on all Federal construction valued at \$5 million. *See* Memorandum

As a result of the President's directive and the Councils' action, there are no longer any provisions in the FAR that prohibit agencies from using PLAs on federal and federally-assisted construction. 74 Fed. Reg. 34206 (July 14, 2009). It is our understanding, however, that to enable agencies to exercise their discretion to the full extent permitted under President Obama's Executive Order, it is not enough simply to remove the express prohibitions that implemented E.O. 13202. Instead, the current regulations must be framed in a way that will enable agencies to use PLAs regardless of their dollar value. We therefore recommend that the statement of policy in Section 22.503 be modified to read as follows:

Section 22.503 – Policy

Project labor agreements are a tool that agencies may use to promote economy and efficiency in Federal procurement. Pursuant to Executive Order 13502, agencies are encouraged to consider requiring the use of project labor agreements in connection with large-scale construction projects, and may also consider requiring the use of project labor agreements on other construction projects.

In addition, any reference to “large-scale” should be removed from the solicitation provision and contract clause in Section 22.505, so the provisions may be used whenever an agency determines a PLA is appropriate.

on the Use of Project Labor Agreements for Federal Construction Projects (June 5, 1997).

Although we realize that the conduct of federal agencies in providing financial assistance is beyond the purview of the Councils and these rules, we additionally note that the Federal Government has the same procurement interests, whether it is expending its funds through direct federal contracts or through various forms of federal assistance to other entities undertaking their own construction projects. And the same factors influence the appropriateness of using a PLA, whether the project is undertaken by a federal agency or a recipient of federal assistance.

III. BCTD Proposed Regulatory Text

To implement the proposals outlined in our comments, we propose the following as a substitute for the Council's proposed rules:

Subpart 22.5 Use of Project Labor Agreements for Federal Construction Projects.

Sec.

22.501 Scope of subpart.

22.502 Definitions.

22.503 Policy.

22.504 General requirements for project labor agreements.

22.505 Solicitation provision and contract clause.

22.501 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 13502, February 6, 2009.

22.502 Definitions.

As used in this subpart--

Construction means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

Large-scale construction project means a construction project, including all contracts associated with the project, where the total cost to the Federal Government is \$25 million or more.

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).

22.503 Policy.

Project labor agreements are a tool that agencies may use to promote economy and efficiency in Federal procurement. Pursuant to Executive Order 13502, agencies are encouraged to consider requiring the use of project labor agreements in connection with large-scale construction projects, and may also consider requiring the use of project labor agreements on other construction projects.

22.504 General requirements for project labor agreements.

(a) (1) Except as provided in paragraph (b) of this section, an agency shall require the use of a project labor agreement where it finds that the use of such an agreement 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) Among the factors the agency shall consider in determining whether use of a project agreement satisfies paragraph (a)(1)(i) is whether the project satisfies one or more of the following criteria --

(i) The project will require the services of two or more construction contractors and/or subcontractors that together employ workers in two or more crafts or trades (*e.g.* plumber, laborer, and electrician);

(ii) Completion of the project will require an extended period of time;

(iii) The potential for conflict between unionized and non-union workers presents a need for peaceful, orderly, and mutually binding procedures for resolving labor disputes and conflicts on the project;

(iv) The project will require a substantial number of experienced, skilled building trades and craft workers;

(v) The agency has a significant interest in assuring that the project will be completed on schedule and within budget; and/or

(vi) There is a labor organization or group of labor organizations whose geographic jurisdiction includes the area where the project will be constructed that operate a system for referring experienced skilled building trades and craft workers to successfully complete the project and that can negotiate a PLA applicable to the project.

(b) If, notwithstanding finding that use of a project labor agreement would satisfy the criteria of paragraph (a), the agency determines, for reasons specific to the construction project, that using a project labor agreement on the project will not advance its interests, the agency shall prepare a report, detailing its findings and its reasons for declining to use a project labor agreement, and shall transmit the report to the Director, Office of Management and Budget.

(c) An agency that decides to use a project labor agreement on a particular project shall negotiate, or shall cause its construction manager, general contractor or other entity retained to manage the construction project to negotiate, a project labor agreement with one or more

appropriate labor organizations. Any project labor agreement established under this subpart shall--

- (1) Bind all contractors and subcontractors 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, and Executive orders.

22.505 Solicitation provision and contract clause.

- (a) For acquisition of construction projects, if the agency makes a determination pursuant to this subpart that a project labor agreement will be required, the contracting officer shall insert the provision at 52.222-XX, Notice of Requirement for Project Labor Agreement, in all solicitations associated with the project.
- (b) For acquisition of construction projects, if the agency makes a determination pursuant to this subpart that a project labor agreement will be required, the contracting officer shall insert the clause at 52.222-YY, Project Labor Agreement in all construction contracts associated with the project.

PART 36--CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. In section 36.202 revise paragraph (d) to read as follows:

36.202 Specifications.

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(d) For requirements on the use of project labor agreements for Federal construction projects, see part 22, Subpart 22.5 of this chapter.

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PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Add section 52.222-XX to read as follows

52.222-XX Notice of Requirement for Project Labor Agreement.

As prescribed in 22.505(a), insert the following provision:

NOTICE OF REQUIREMENT FOR PROJECT LABOR AGREEMENT (DATE)

(a) *Definitions.* Labor organization and project labor agreement, as used in this provision, are defined in the clause of this solicitation entitled Project Labor Agreement.

(b) A project labor agreement covering the project in this solicitation has been negotiated and is attached to this bid solicitation.

(1) All successful offerors and their subcontractors will be required to execute and comply with the project labor agreement for the term of the resulting construction contract.

(2) All contractors and subcontractors are permitted to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(c) The successful offeror shall submit to the Contracting Officer evidence that it has agreed to be bound by the project labor agreement prior to contract award.

(End of Provision)

8. Add section 52.222-YY to read as follows:

52.222-YY Project Labor Agreement.

As prescribed in 22.505(b), insert the following clause:

PROJECT LABOR AGREEMENT (DATE)

(a) *Definitions.* As used in this clause--

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

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).

(b) The Contractor shall maintain in a current status throughout the life of the contract the project labor agreement entered into prior to the award of this contract in accordance with solicitation provision 52.222-XX, Notice of Requirement for Project Labor Agreement.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this

paragraph (c), in all subcontracts.

(End of Clause)