



October 18, 2022

Mr. 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]

The American Road & Transportation Builders Association (ARTBA) respectfully offers the following comments opposing the proposed rule of the Department of Defense, General Services Administration and National Aeronautics and Space Administration mandating project labor agreements (PLAs) on federal construction projects valued at \$35 million or more.

Introduction

The agencies' proposed rule seeks to amend the Federal Acquisition Regulation (FAR) to implement executive order (EO) 14063, "Use of Project Labor Agreements for Federal Construction Projects." The EO requires a PLA for all direct federal construction projects valued at \$35 million or more.¹ The EO does not extend to federally-assisted projects, such as work done for state departments of transportation, which represents the bulk of the market for ARTBA's contractor-members. However, the order does impact a variety of other projects ARTBA members work on, such as those on federal lands highways or done directly for certain federal agencies, such as the U.S. Army Corps of Engineers.

ARTBA opposes the use of PLAs on transportation improvement projects. The association believes these mandates conflict with the open competitive bidding system that has facilitated efficiencies in federal contracting for decades. It should be noted that ARTBA's membership ranks include both union and open shop construction firms, as well as many affiliated chapters whose members fall predominantly into one category or the other. ARTBA's policy on PLAs represents the consensus view of both types of firms and state associations.

Mandating PLAs Will Unnecessarily Increase Project Costs

The Infrastructure Investment and Jobs Act (IIJA) represents a generational opportunity to invest in our nation's transportation assets. However, the many economic benefits of this

¹ Prior federal policy, dating to the Obama administration, promoted and encouraged PLAs on many federal projects, but did not require them. (Executive Order 13502, February 9, 2009)

landmark legislation – including job-creation – are subject to the regulatory and policy environment confronting the firms and people building them.

Mandatory PLAs are an obstacle to maximizing the value of federal funding, in that they will likely increase the costs of affected projects. First, they will limit competition in the procurement process. Non-union contractors will almost certainly not bid on a project covered by a PLA, and even many union contractors will forego participating if the PLA mandates business practices and/or project management principles contrary to those of their company. Second, many contractors that do bid on the project will “price” the additional risk of PLA-required deviations from their normal operating procedures, resulting in higher bids. Both these factors will cause the overall costs for many of these projects to increase.

Many contractors will face another form of risk, relating to the inexperience of several federal agencies in administering PLAs. This is not to question these agencies’ competence, but instead emphasizes that the lack of a project owner’s track record represents uncertainty for a contractor. One example is the Office of Federal Lands within the Federal Highway Administration. It is our understanding that not one federal lands project has ever been subject to a PLA before. Again, under this PLA mandate, any contractors who do choose to bid on such projects will price the risk of this uncertainty into their bids.

These dynamics will take effect at the same time construction materials costs have risen and their availability decreased or delayed in the wake of the pandemic. According to ARTBA’s analysis of the Bureau of Labor Statistics’ Producer Price Index², the cost of highway and street construction inputs rose 13 percent in the year before September 2022, and 36 percent over the two years before that month. To put this in perspective, the average annual increase over the preceding five pre-pandemic Septembers was only two percent. Moreover, this measurement only captures the cost of goods, energy, and services, and excludes that of capital investment, labor, and imports. The aforementioned PLA-driven cost increases will only exacerbate these unprecedented market conditions, further limiting the IJJA’s economic benefits and the employment opportunities PLA proponents claim to be promoting.

PLAs Interfere with Existing Collective Bargaining Agreements

In a union work environment, contractors negotiate collective bargaining agreements with relevant construction trade unions, often on a project-by-project basis. PLAs preempt these agreements, while relegating contractors and many of these unions to the sidelines. The parties to those agreements are the most familiar with the complexities and labor needs of specific projects, but PLAs usually result from negotiations between public agencies and unions which may or may not be familiar with the construction disciplines in question. Thus, PLAs can create union jurisdiction issues while picking winners and losers within organized labor. ARTBA’s union contractors also note that key terms in PLAs – like dispute resolution – may differ greatly from those in negotiated collective bargaining agreements.

² <https://www.artba.org/economics/materials-dashboard/>

The Proposed Rule's Exemptions for Mandating PLAs Are Not Sufficient

Prior to the publication of the proposed rule, a group of leading ARTBA contractors met virtually with staff of the Office of Management and Budget to share their experiences with PLAs, as well as detailed explanations as to why they often disrupt efficient project delivery. ARTBA appreciated this opportunity and sees some of this dialogue reflected in the proposed rule's exemptions. Specifically, federal agencies would not be required to apply a PLA when it:

- 1) would not achieve economy and efficiency in federal procurement;
- 2) 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); and/or
- 3) would be inconsistent with statutes, regulations, other EOs or Presidential Memoranda.

While all worthy exemptions, they are largely subjective and also place the burden on the contracting community to argue that a project meets one or more of them. The current policy, through which federal agencies have more latitude to apply or forego a PLA, is still preferred.

Mandating PLAs can also deny opportunities to small and disadvantaged businesses, many of which are non-union and therefore barred from participating in a union-only project. This represents a clear conflict among the current administration's policy objectives, for which growing opportunities for those types of businesses is supposed to be a priority.

Conclusion

As federal agencies work with all parties to deliver on the IJA's promise, the proposed PLA mandate is ill-timed and ill-advised. This is not the time to risk further increases in project costs or disruptions to project delivery. The administration and its agencies should reconsider this mandate, either withdrawing it or, at the very least, further clarifying the proposed exemptions. This would better ensure that projects funded by direct federal investment will maximize competition in procurement, efficiencies in construction and effectiveness in infrastructure-related job creation.

Thank you for considering these views.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Juliano", is positioned above the printed name.

Richard A. Juliano, CAE
General Counsel