

AGC Memo: What Federal Contractors Should Know About the New PLA Mandate

Background

On December 22, 2023, the Federal Acquisition Regulation (FAR) Council released a [Final Rule](#) (FAR Case 2022-003)—in line with President Biden’s [Executive Order on Use of Project Labor Agreements For Federal Construction Projects](#)—requiring every prime contractor and subcontractor to engage in negotiation or agree to project labor agreements (PLAs) on direct federal construction projects valued at \$35 million or more. This Final Rule (PLA mandate) repeals and replaces the Obama-Biden Administration’s 2009 PLA E.O. ([E.O. 13502](#))—thereby adding a contract clause to applicable federal construction contracts—which takes effect on January 22, 2024.

AGC of America neither supports nor opposes contractors’ *voluntary* use of PLAs on government projects or elsewhere but strongly opposes any government mandate for or prohibition of contractors’ use of PLAs. AGC is committed to free and open competition for publicly funded work. AGC has long [maintained](#) that the federal government should not mandate PLAs. The use of government mandated PLAs hurt [Union Contractors](#), [Open-Shop Contractors](#), and fails to promote economy and efficiency in federal procurement.

To that later point, according to an AGC of America [analysis](#) of data obtained via a [Construction Advocacy Fund](#)-financed lawsuit under the Freedom of Information Act, [the Department of Defense federal construction agencies—which perform the lion’s share of federal construction—rejected PLA mandates 99.4 percent of the time even when encouraged to do so under the Obama-Biden Administration](#). The data AGC obtained clearly disprove and undermine the reasoning set forth by the Biden Administration that government-mandated PLAs promote economy and efficiency for federal construction projects. The Final Rule supports AGC’s findings stating that “[a]ccording to the data collected by [Office of Management and Budget], 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.”¹

The Rule does not impact federally assisted projects (e.g., state departments of transportation contracts for federal-aid transportation projects² or municipal water projects funded in any part by the U.S. Environmental Protection Agency’s state revolving loan funds for drinking water or clean water).

This memo is broad summary of President Biden’s PLA mandate.

Key Points from the Final Rule

- **Only Direct Federal Contractors** – Applies to direct federal construction contractors—not federal-aid (e.g. federal-aid transportation) contractors—including to all subcontracts with subcontractors. Direct federal construction contractors are contractors with prime or subcontracts with a federal agency owner.

¹ 88 FR 88724

² Please note, however, that the Final Rule applies to transportation construction contracts of more than \$35 million for the National Parks Service of the U.S. Department of Transportation’s Office of Federal Lands Highway, as these are federal agencies.

- **Threshold** – Increases the applicable project threshold from \$25 to \$35 million. However, the Final Rule allows for agencies to require PLAs to projects below the \$35 million threshold.
- **Mandate** – The Final Rule departs from the Obama E.O. by changing “May” to “Shall [... unless an exception applies.]” for federal agencies to use a PLA.
- **Flow Down Requirements** - The Final Rule text requires all subcontractors to become a party to the PLA negotiated by the prime contractor. “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.”³
- **Timing** – The Final Rule applies to new solicitations that are issued on or after January 22, 2024. Under [FAR 1.108](#), contracting officers may, at their discretion, include the FAR changes in solicitations issued before January 22, provided award of the resulting contract(s) occurs on or after January 22.⁴
- **Exceptions** – The factors for granting an Exception (*i.e.*, Waiver) are somewhat similar to the exceptions currently in place under the Obama PLA E.O. For example, a significant reduction in the number of bidders is a factor. However, the Final Rule establishes new procedures for the contracting officer to request an exception to the requirement to use PLAs. An exception may be granted by a written explanation from a "Senior Official." The Final Rule interprets the senior official as the "Senior Procurement Executive."
 - **Senior Procurement Executive** – FAR 2.101 identifies a Senior Procurement Executive⁵ as the responsible official for management direction of the acquisition system in an executive agency ([41 U.S.C. 1702\(c\)](#)). For example, regarding an U.S. Army Corps of Engineers (USACE) contract, this official would be above the three-star commanding general of USACE. As such, the considerations for obtaining a waiver from such a high-level official could be difficult.
 - **Website** – The Final Rule 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.
 - Separate from this Final Rule, the Administration has required Buy American waivers to be posted on a public website. It is probable that any website for PLA waivers would look similar to the Buy American website, such as the Made in America Office’s [website](#).
- **List of Exceptions** – The Final Rule provides a list of factors in determining an exception to requiring a PLA on a project if such a requirement:
 1. **Would not advance the Federal Government’s interests in achieving economy and efficiency** in Federal procurement. Such a finding shall be **based on ONE OR MORE the following factors**:
 - i. The project is of short duration and lacks operational complexity.
 - ii. The project will involve only one craft or trade.

³ 88 FR 8872

⁴ 88 FR 88718

- 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.
2. 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.
 3. Requiring a project labor agreement on the project would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.
- Indefinite-delivery indefinite quantity (IDIQ) – A PLA may be required on an order-by-order basis, rather than for the entire contract. For an order at or above \$35 million a PLA will be required unless an exception applies, and a waiver is granted. Consequently, while an IDIQ contract may have been solicited and awarded before January 22, a solicitation on or after January 22 for a resulting order under that IDIQ of \$35 million or more will require a PLA unless an exception applies, and a waiver is granted.
 - Small Businesses – Small businesses are not exempt from the Final Rule's PLA Mandate. Office of Management and Budget and Department of Labor will work with the Small Business Administration to determine the best way to help small businesses in "understanding how to negotiate or participate in a construction project with a PLA."⁶ Therefore, more guidance is expected from the Administration.
 - Required PLA Clauses:
 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.

⁶ 88 FR 88716

January 9, 2024

- Key Definitions

- **“Construction”** means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.
- **“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.
- **“Labor organization”** means a labor organization as defined in [29 U.S.C. 152\(5\)](#) of which building and construction employees are members.

Conclusion

AGC believes the PLA Mandate is beyond the President’s authority and violates long established law, including federal procurement statutes. AGC **strongly believes** that the choice of whether to adopt a collective bargaining agreement should be left to the contractor-employers and their employees, and that such a choice should not be imposed as a condition to competing for, or performing on, a publicly funded project.

Government mandates and preferences for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. In cases where use of a PLA would benefit a particular project, the construction contractors otherwise qualified to perform the work would be the first to recognize that fact and to adopt a PLA voluntarily. They would also be the most qualified to negotiate the terms of such an agreement. Contractors should communicate with their contracting officer to determine which contracts will be affected.

Additional Information

- [AGC of America’s Website on its Opposition to Government-Mandated Project Labor Agreements](#)
- [AGC Guidebook: Government Mandated Labor Agreements in Public Construction: Their History and Factors to Consider](#)
- [How Government Mandates for Project Labor Agreements Hurt Union Contractors](#)
- [How Government Mandates for Project Labor Agreements Hurt Open-Shop Contractors](#)

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