AGC
THE CONSTRUCTION ASSOCIATION

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Sent *via electronic* mail to *Regulation.gov*

RE: AGC of America Comments on FAR Case 2022-003 – Use of Project Labor Agreements for Federal Construction Projects

Dear Ms. Bowman,

Thank you for the opportunity to comment on FAR Case 2022-003 – *Use of Project Labor Agreements for Federal Construction Projects Proposed Rule* ("Proposed PLA Rule"). For years, the Associated General Contractors of America ("AGC") has worked with the Federal Acquisition Regulatory Council ("FAR Council") and other federal entities to ensure that our nation has the high-quality infrastructure it needs now and in the future. Federal investment in infrastructure plays an essential role in building our economy and creating well-paying jobs for the American people.

AGC is the leading association in the construction industry representing more than 27,000 firms, including union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of 89 chapters in every state, the District of Columbia and Puerto Rico. AGC contractors are engaged in the construction of the nation's defense facilities, federal facilities, commercial buildings, factories, warehouses, highways, bridges, tunnels, airports, water infrastructure facilities, locks, dams, multi-family housing projects, and more.

AGC believes that the FAR Council should not mandate use of a PLA on any project. AGC neither supports nor opposes contractors' *voluntary* use of PLAs on public works projects but strongly opposes any *government mandate or prohibition* of contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. Similarly, neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. Government mandates for PLAs can restrain competition, increase costs, cause delays, and lead to jobsite disputes. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement.

Accordingly, AGC urges the FAR Council to refrain from imposing any PLA mandates on any federal project and to defer to the contractor's judgment as to whether a PLA is appropriate for a given project. **For the reasons henceforth, the FAR Council should rescind the Proposed PLA Rule and refrain from mandating or prohibiting PLAs on any federal construction project.**

An outline of AGC's comments on the Proposed PLA Rule are as follows:

I. Background on Government-Mandated PLAs in Federal Construction Contracting

II. Government Mandates for PLAs Do Not Advance Economy and Efficiency in Federal Procurement
- **A.** AGC Analysis of Department of Defense Data on Government Mandates for PLAs Shows that under the Obama-Biden Administration Defense Agencies Chose Not to Mandate PLAs
- **B.** AGC Survey of the Impact of E.O. 14063 on the Construction Industry
- **C.** How Government Mandates for PLAs Harm Union Contractors
- **D.** How Government Mandates for PLAs Harm Open-Shop Contractors
- **E.** Proposed PLA Rule Violates the Biden Administration's Goal to Promote Equity in Federal Contracting and Will Result in Less Small Business Participation

III. Rescind the Proposed PLA Rule Because it Goes Beyond the Statutory Authority and Contains Fundamentally Flawed Analysis
- **A.** The FAR Council Should Rescind the Proposed PLA Rule because it Violates Presidential Authority, Federal Procurement and Labor Laws, and will Lead to Costly Litigation
- **B.** More Research is Needed on the Analysis of the Public Burden
- **C.** More Research is Needed to Understand the Potential Impact on Business Participation, Including Small Businesses and Small Disadvantaged Businesses
- **D.** Flawed Compliance Cost Analysis Ignores the Strain this Unfunded Mandate will have on Public and Private Resources

IV. If the FAR Council Rejects AGC's Recommendation to Rescind the Proposed PLA Rule, it Should Implement Steps to Minimize the Disruption to Procurement of Federal Construction
- **A.** PLAs Should Be Evaluated on a Project-By-Project Basis
- **B.** The Proposed Rule Should Keep the Current Level of Authority to Issue an Exemption and Not Require the Senior Procurement Executive to Approve
- **C.** Standardize PLA Surveys for Interested Parties to Comment

V. Conclusion

AGC provides the following comments to ensure that the Proposed PLA Rule does not upend the expeditious and efficient distribution of taxpayer dollars, while allowing for free and open competition to our nation's businesses and workers.

I. Background on Government-Mandated PLAs in Federal Construction Contracting

Investment in our nation's infrastructure is critical to building our economy and creating well-paying jobs. PLAs are not new but have a long history of use in the construction industry. In the past several decades there has been various attempts for presidential administrations to weigh in on its use in the procurement of federal construction. AGC provides the following recommendations for the FAR Council to clarify the consequences of the Proposed PLA Rule to capital infrastructure investment and advocate for the expeditious and efficient use of taxpayer dollars on federal construction projects.

For roughly thirty years, successive Democratic and Republican presidents have issued various executive orders ("E.O.") that gave a preference for or against PLAs on federal construction projects.[1] Early on and throughout these different administrations, AGC publicly and consistently advocated for government neutrality—no *mandate or prohibition*—of contractors' use of PLAs on any construction project.[2] It is important to emphasize that none of these orders made a permanent amendment to the Federal Acquisition Regulation ("FAR"), as the Proposed PLA Rule attempts to do. Issued in 2009 and still in effect today, President Obama's E.O. 13502[3] ("E.O. 13502") has been in effect the longest of all the PLA E.O.s. This E.O. encourages federal agencies "to consider" the use of PLA's in large-scale federal construction projects where the total cost to the federal government is $25 million or greater. The E.O. 13502 standard of *encouraging* but *not mandating* PLAs on large-scale federal construction stood as a consistent federal procurement policy for more than a decade under both Democratic and Republican presidential administrations.

On February 4, 2022, President Biden signed E.O. 14063: *Use of Project Labor Agreements For Federal Construction Projects*[4] resulting in the Proposed PLA Rule. On the same day E.O. 14063 was signed, AGC issued a statement[5] opposing this discriminatory PLA mandate and published its recent analysis[6] of federal construction procurement decisions by the Department of Defense (DoD) agencies during the Obama Administration. The information—obtained via a Freedom of Information Act request by AGC—disproves the reasoning set forth by the Biden Administration that government-mandated PLAs promote economy and efficiency for federal construction projects.

On August 18, 2022, the FAR Council released this Proposed PLA Rule, which will repeal and replace E.O. 13502 once the FAR Council issues a final regulation. When in effect, the Proposed PLA Rule will require every prime contractor and subcontractor to agree to PLAs on federal construction projects valued at $35 million or more, unless an exception applies.[7] To emphasize the mandatory requirement of PLAs, the Proposed PLA Rule estimates granting exceptions to as few as ten percent of covered contracts.[8] The Proposed PLA Rule also gives directions for agency use on projects below the $35 million threshold. The

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[1] "In [1992], President George H.W. Bush signed Executive Order 12818, which forbade agencies from requiring construction contractors to use project labor agreements, which governed the relationships with their workers for a contract's duration. President Clinton in 1993 issued Executive Order 12818 overturning Bush's order, and released a memo in 1997 recommending that agencies require contractors to use project labor agreements on construction contracts worth more than $5 million. In 2001, President George W. Bush reversed Clinton's order, and added a clause stipulating that agencies could not discourage the use of labor agreements either, but had to stay neutral toward such agreements altogether… President Obama issued his own executive order in February [2009 reversing President George W. Bush's Executive Order 13202]."
Rosenberg, Alyssa. Government Executive (July 10, 2009). *Obama reverses Bush-era order on labor agreements: Move clears way for agencies to encourage agreements between construction contractors and workers*. Retrieved on October 09, 2022 from: www.govexec.com/oversight/2009/07/lawmakers-watchdog-question-effects-of-stimulus/29519/

[2] AGC's policy against preferential procurement based on labor policy has always been pursued in an even-handed manner. In 1992, when President George H.W. Bush issued E.O. 12818–which would have barred union sector firms with union subcontracting restrictions from direct federal and federally assisted projects–AGC opposed this exclusion in public documents and in correspondence with stakeholders.

[3] 75 FR 19168

[4] 87 FR 7363

[5] Associated General Contractors of America (February 9, 2022). *Biden Order Imposing Project Labor Agreements On Federal Projects Will Inflate Construction Costs, Discriminate Against Most Workers*. Retrieved from: https://www.agc.org/news/2022/02/04/biden-order-imposing-project-labor-agreements-federal-projects-will-inflate-construction-costs

[6] Career civil servants also do not see the benefits of imposing these kinds of agreements. As explained later, a recent AGC analysis of federal construction procurement decisions by the Department of Defense during the Obama Administration that we obtained via a Freedom of Information Act request–during a time when federal officials were being pressured by a similar executive order–found that in 99.4 percent of construction projects where a PLA could have been imposed, nonpartisan federal officials found no benefit to taxpayers from imposing one.

[7] 87 FR 51050

[8] 87 FR 51047

Proposed PLA Rule specifically states that "[w]hile the reasons for using PLAs remain largely unchanged from the previous policy, use of a PLA is no longer discretionary for large-scale Federal construction projects."[9] It further emphasizes that "[t]he objective of the [Proposed PLA Rule] change in policy from discretionary use to requiring the use of PLAs for federal construction projects valued at $35 million or more."[10]

The Proposed PLA Rule departs significantly from E.O. 13502 in at least two ways. It will *mandate* PLAs on large-scale federal construction projects and force a *flow-down clause* to require every subcontractor to be a signatory. As the Proposed PLA Rule states, "[r]equiring a PLA means that every contractor and subcontractor engaged in construction on the project agree, for that project, to become a party to a project labor agreement with one or more labor organizations."[11] The Proposed PLA Rule requires a dramatic shift despite any unbiased empirical data, including from the government, that favors one side over the other in this debate. There are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. While case studies have had varying results, research regarding the impact of PLA use on the economy or efficiency of projects in general is inconclusive.[12] Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers.

The FAR Council and federal agencies do, however, have a new body of data that AGC has published to consider as discussed in greater detail below. AGC data provides powerful and convincing evidence that mandating PLAs will not improve economy or efficiency in the procurement of public construction projects or otherwise facilitate their delivery. **This data shows that the Proposed PLA Rule is a dramatic and radical change from long established procurement practices and will decrease competition and hurt the federal construction market.**

II. Government Mandates for PLAs Do Not Advance Economy and Efficiency in Federal Procurement

The Proposed PLA Rule impact on the construction industry and federal construction contracting will be far-reaching and dramatic. If implemented, the negative consequences to both federal civilian and military construction projects will threaten to dramatically diminish business participation in the federal construction market, decrease competition, and hurt small businesses. **As described in detail below, AGC's analysis of government data and its survey of federal construction contractors reflect that government-mandated PLAs are not in the best interest of federal procurement and prove that the Proposed PLA Rule will harm federal construction.**

A. AGC Analysis of Department of Defense Data on Government Mandates for PLAs Shows that under the Obama-Biden Administration Defense Agencies Chose not to Mandate PLAs

The Proposed PLA Rule incorrectly asserts that "[t]here 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

[9] 87 FR 51045
[10] *Id.* at 51047
[11] 87 FR 51046
[12] In a 1998 study by the agency then called the Government Accounting Office, the agency reported that it could not document the alleged benefits of past mandates for PLAs on federal projects and that it doubted such benefits could ever be documented due to the difficulty of finding projects similar enough to compare and the difficulty of conclusively demonstrating that performance differences were due to the PLA versus other factors. (U.S. Government Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information*, GAO/GGD-98-82.) The Congressional Research Service reached the same conclusion in a report issued in July 2010. (U.S. Congressional Research Service Report R41310, *Project Labor Agreements*, by Gerald Mayer.)

be a higher usage of exceptions in the initial year as industry and the Government work to implement the requirement."[13] On the contrary, practically all of the exceptions listed in the Proposed PLA Rule are the same as E.O. 13502.[14] Therefore, we can accurately assess the number of exceptions that federal agencies have used in the past and are likely to use in the future.

According to an AGC analysis[15] of data—obtained via a Construction Advocacy Fund-financed lawsuit under the Freedom of Information Act—the DoD federal construction agencies declined to impose a PLA mandate 99.4%[16] of the time even when encouraged to do so under the Obama-Biden Administration. According to the Proposed PLA Rule that uses data collected by the Office of Management and Budget (OMB), between the years of 2009 to 2021, there were a total of approximately 2,000 eligible contracts and the requirement for a PLA was used 12 times. Based on the information, on average there are approximately 167 eligible awards annually and approximately one award that includes the PLA requirement."[17] AGC's analysis of DoD decisions is consistent with the Proposed PLA Rule's analysis of government data, showing government-mandated PLAs do not advance economy and efficiency in the procurement of federal construction.

AGC's new data relates to E.O. 13502 and it is the direct product of OMB Memorandum M-09-22[18] (which OMB issued in July of 2010). The OMB memorandum required the relevant federal agencies to file quarterly reports on their implementation of the E.O. from June 2010 (when OMB issued it) until June 2017 (when OMB rescinded it). Each report had to "indicate whether a PLA was required in the solicitation" and "provide a brief explanation of the considerations in deciding whether a PLA was appropriate for the project." Pursuant to the Freedom of Information Act, AGC sought and received copies of all available reports. They included 27 reports that DoD submitted to OMB between the fourth quarter of 2009 and the fourth quarter of 2016. For that period, the only missing report is the DoD's report for the fourth quarter of 2017.

The data they provided is illuminating because experienced and unbiased professional staff of the DoD, including the staff of the U.S. Army Corps of Engineers (USACE), and the Naval Facilities Engineering Command (NAVFAC), were the ones deciding whether to require PLAs. In addition, they made these decisions during an administration that was, if anything, exerting pressure to increase the number of PLAs required for federal construction projects. These nonpartisan professionals had no reason to disfavor PLAs and were not under any pressure to do so. Their only mission was to deliver high-quality construction projects on time and within budget.

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[13] 87 FR 51046

[14] FAR Policy: (a) PLA is a tool that agencies may use to promote economy and efficiency in Federal procurements. Pursuant to Executive Order 13502, agencies are encouraged to consider requiring the use of project labor agreements in connection with large scale construction projects. (b) 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 party to a project labor agreement with one or more labor organizations if the agency decides that the use of project labor agreements will (1) 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 (2) Be consistent with law. Reference: Provision: 52.222-33 "Notice of Requirement for Project Labor Agreement Clause 52.222-34 "Project Labor Agreement."

[15] Associated General Contractors of America (February 9, 2022). *New Data Weighs on Debate Over Project Labor Agreements*. Retrieved from:
www.agc.org/sites/default/files/Files/communications/New_Data_Weighs_on_Debate_Over_Project_Labor_Agreements.pdf

[16] *Id.* at 3.

[17] 87 FR 51046

[18] Peter R. Orzag, Implementation of the President's Executive Order on Project Labor Agreements (M-09-22), Office of Management and Budget (July 10, 2009) available at:
https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-22.pdf

In the specific and unique context of each project, these professionals consistently found that PLAs had no merit. The details include the following:

- The 27 reports cover a total of 610 decisions.

- In 52 cases, the professionals decided to not require a PLA because the contract was a Multiple Award Task Order Contracts (MATOC) or other Indefinite-Delivery Indefinite-Quantity (IDIQ) contracts,[19] or DoD had inadvertently omitted the project from consideration for a PLA. In seven other cases, involving projects in Guam, they included the project in their report but neglected to indicate whether they had required a PLA. Subtracting those 52 decisions from the raw total brings the number of decisions that the reports cover down to 558.

- In another 241 cases, the professionals decided to not require a PLA because, at the time, the FAR Counsel had yet to finalize the implementing regulation and/or DoD had yet to issue guidance. Also subtracting those decisions from the raw total brings the number of decisions that the professionals made on the merits down to 317.

- In 315 (or 99.4%) of those cases, the professionals decided not to require a PLA. In only 2 (or 0.6%) of those cases did they decide, to the contrary, to require a PLA.

The individual explanations for their decisions to not require PLAs for those 315 projects are far from uniform. In many cases, the professionals expressly stated their reasons for not requiring a PLA, but in others, they simply stated the factors they had considered in the process of deciding to not require a PLA. In addition, the professionals gave or identified more than 12 different reasons for, or factors in, their decisions. They also combined and recombined those reasons and factors in several different ways. One does find that some of the explanations are identical. In one report, the professionals provided the same explanation for 22 decisions. In another, they provided they provided the same explanation for ten decisions. A large majority of the explanations are, however, unique to the individual projects on which they were made.

Other details that the reports reveal include the following:

- In the process of explaining 156 of their 317 decisions on the merits (or 49.2% of the time), the professionals made an express reference to economy or efficiency, and in each and every one of those 156 cases (or 100% of the time), they decided not to require a PLA.

- In 152 of those 317 cases (or 48% of the time), they found that requiring a PLA would not promote economy or efficiency.[20] In another four of those cases (or 1.2% of the time), they did not go as far, but did indicate that economy and efficiency were among the factors they considered (and perhaps the only factors) before deciding not to require a PLA.

[19] IDIQs and MATOCS are acquisition vehicles that are frequently used in federal construction contracting. In general, IDIQs and MATOCS require a pool of contractors that will bid on multiple future contracts. Acquisition vehicles like IDIQs and MATOCs provide federal agencies a pre-qualified, competitive pool of contractors, while reducing administrative time and costs.

[20] This includes findings a PLA would not achieve, add, advance, enhance, establish, furnish, improve, increase, provide, or support economy or efficiency, or contribute to economy or efficiency, or meet or advance the goals of economy and efficiency. In addition, it includes finding that a PLA was not necessary to accomplish one or more of the preceding.

- In the process of explaining 41 of their 317 decisions on the merits (or 13% of the time), the professionals determined that requiring a PLA would not be suitable or appropriate.[21]

- Together, the preceding account for 197 of the 317 decisions on the merits (or 62% of the total). In that large majority of the cases, the professionals found that requiring a PLA would not promote economy, that those factors did not tip the balance in favor of requiring a PLA, or that a PLA would simply not suit the project.

In addition, the reports provided insight into several of the specific issues that run though the debate over government policy on PLAs. For example, the reports also revealed the following:

- In the process of explaining 218 of their 317 decisions on the merits (or 68.8% of the time), the professionals made an express reference to the risk of labor shortages or the need for an adequate labor supply. In 217 of those 218 cases (or 99.5% of the time), they decided not to require a PLA.

- In 134 of those 218 cases (or 61.5% of the time), the professionals found that the risk of a labor shortage was low, or in the alternative, that they did not need a PLA to ensure an adequate supply of skilled labor. In another 83 of those cases (or 38.1% of the time), they indicated that the risk of a labor shortage, or in the alternative, the need for an adequate supply of skilled labor, was among the factors they considered before deciding not to require a PLA.

- In the process of explaining 95 of their 317 decisions on the merits (or 29.9% of the time), the professionals made an express reference to the risk of labor unrest,[22] and in 94 of those 95 cases (or 99% of the time), they decided not to require a PLA.

- In 69 of those 95 cases (or 72.6% of the time), the professionals found little or no risk of labor unrest, and in another 25 of those cases (or 8% of the time), they indicated that the risk of labor unrest was a factor they considered before deciding not to require a PLA.

- In the process of explaining 95 of their decisions on the merits (or 29.9% of the time), the professionals made an express reference to the prior use of PLAs in the relevant area, and in each and every one of those cases (or 100% of the time), they decided not to require a PLA.

- In 33 of those 95 cases (or 34.7% of the time), they stated that they could not identify any prior use of PLAs in the same area, or at least, that they could not identify any prior use for similar projects. In 62 of those cases (or 65.3% of the time), they indicated that the prior use of PLAs for such projects was among the factors they considered before deciding not to require a PLA.

[21] This includes finding that a PLA was not practical, feasible, beneficial or warranted for the project, or would not benefit the project, or would not be in the best interest of the government. In one case, the professionals decided to make a PLA a voluntary option, as a way to determine whether a PLA would be "suitable," and later made the award "without a PLA."

[22] This includes references to any history of strikes or other labor disruptions in the relevant area and findings that the risk of labor unrest or instability was low, or in a few cases, that a PLA would not be an effective tool for managing that risk.

- In the process of explaining 42 (or 13.2%) of their 317 decisions on the merits, the professionals made an express reference to the risk of a conflict among the multiple contractors and trades they would need to construct the project, or at least to the possibility that they would need multiple contractors and trades and contractors. In 41 of those 42 cases (or 99.8% of the time), they decided not to require a PLA.

- In five of those 42 cases (or 11.9% of the time), they indicated either that the project would not require multiple contractors and trades, that engaging multiple contractors and trades had not created problems for past projects or that engaging multiple contractors and trades was not a concern. In 36 (or 85.7%) of those cases, they indicated that their need for multiple contractors and trades was among the factors they considered before deciding not to require a PLA. In the real-world context of individual projects, and with regard to those projects, the professionals also made the following observations:

    - There would be "added expenses associated with the PLA, without offsetting benefits to justify the cost."

    - "[N]o interest in the use of PLA . . . was expressed by any interested parties (e.g. contractors, building trades council, etc.)."

    - "[T]he applicable Davis-Bacon Wage Determination is . . . sufficient to predict labor costs and ensure efficient and timely completion of this project."

    - "PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining."

    - "Market research revealed negative effects on competition when a PLA was used."

    - "Even though a PLA can establish uniform standards and dispute-resolution mechanisms that may help avoid or solve some workforce problems, market research also revealed that it can exacerbate such problems, causing friction that would not otherwise exist, by forcing a new labor framework onto previously non-union employees. Additionally, the labor market survey shows PLAs cannot prevent strikes, lockouts, and similar job disruptions, as trade organizations are aware of several work stoppages that hindered the progress of PLA projects, notwithstanding the no-strikes provisions included in PLAs."

    - "Market research conducted in the project area indicated the potential for additional administrative burden, direct costs and decreased competition could outweigh any benefits for incorporating a PLA."

    - "Market research reflects that the use of a PLA typically increases project costs by restricting competition, creating delays, discriminating against nonunion employees and places [nonunion] contractors at a significant competitive disadvantage."

    - "A PLA may hinder small and disadvantaged businesses efforts to work on the project."

    - "Requiring a PLA would result in less competition and higher prices ..."

- "A PLA could adversely affect a prime contractor's ability to meet [its] small business goals due to some nonunion small businesses are not willing [sic] to bid on a PLA covered project."

- "The PLA could reduce competition among contractors and subcontractors."

The significant body of new data compiled by AGC should persuade the FAR Council against requiring contractual provisions mandating the prime contractor and all of the subcontractors involved in the construction of a public project to sign and work under a PLA. **AGC's survey of the construction industry on the impact of the E.O. 14063 reflects the similar determinations by many federal contractor personnel, which concludes that government-mandated PLAs are not in the best interest of a federal construction project and weighs heavily against the Proposed PLA Rule.**

B. AGC Survey of the Impact of E.O. 14063 on the Construction Industry

On June 2, 2022, AGC released the results of its survey[23] on the impacts E.O. 14063 will have on AGC member companies, asking them how government-mandated PLAs affect federal construction projects. The purpose of the survey is to inform the federal government and others about the impact this regulation will have on contractors. Some key highlights[24] of the survey found:

- 73% of federal contractors responded that they are *not interested* in bidding if there is a government-mandated PLA on a federal construction project, compared to 27% that responded they are still interested in bidding projects with PLA mandates.

- 67% of firms that have previously worked under a government-mandated PLA responded that it made it *harder to find workers* needed to keep their projects on schedule and within budget, whereas 10% responding that it would be easier to find workers.

- 83% of firms that operate under a collective bargaining agreement responded that if E.O. 14063 required a PLA, the firm will *not have enough union workers* to guarantee on time and on budget delivery because the labor unions are facing shortages among their own ranks.

- 88% responded E.O. 14063 would *raise costs*, whereas 0% responded it would lower costs.

- 82% responded E.O. 14063 would be *harder to subcontract with small disadvantaged businesses* (e.g., Veteran-Owned Small Business, Service-Disabled Veteran-Owned Small Business, Small Disadvantaged Business, Women-Owned Small Business, HUBZone business), whereas 5% responded it would be easier.

- 78% responded E.O. 14063 would be *harder to find workers and/or subcontractors*, whereas 3% responded it would be easier.

[23] Associated General Contractors of America (June 2, 2022). *2022 Project Labor Agreement Survey Results*. Retrieved from: www.agc.org/sites/default/files/users/user21902/2022_PLA_Survey_FactSheet_F.pdf.
[24] Associated General Contractors of America (June 2, 2022). *AGC's PLA Survey - Summary Statistics*. Retrieved from: www.agc.org/sites/default/files/users/user21902/PLA%20summary%20statistics_2022.pdf

- 73% responded E.O. 14063 would *lengthen* the time to complete projects, whereas 1% responded it would shorten.

- 41% responded that their company is a *small business* under the Small Business Administration's small business size standards.

The industry data of AGC's survey clearly demonstrates that all segments of the construction industry and federal contracting will be harmed by the heavy-handed approach of E.O. 14063, and by extension the Proposed PLA Rule. **The results prove that the Proposed PLA Rule will decrease economy and efficiency in federal construction, decrease competition as many federal contractors will no longer bid on work, and will make it harder to subcontract with Small Disadvantaged Businesses.**

C. How Government Mandates for PLAs Harm Union Contractors

While government mandates for PLAs can create a competitive environment that favors union contractors over open-shop contractors, they can also cause significant problems for union contractors. This is true not only for those contractors working on the PLA project but also those working elsewhere in the area. Below are some of the ways that PLA mandates harm union contractors.

Contractors are typically given no opportunity to negotiate the terms of the government-mandated PLA. Most often, government representatives—who lack experience in construction-industry collective bargaining and who will not be directly governed by the terms of the PLA—simply adopt terms presented to them by the building trade unions or negotiate the terms themselves. Consequently, PLA provisions usually weigh heavily in favor of union interests over employer interests. They frequently deviate from the provisions of local, area-wide collective bargaining agreements, injecting unfamiliar or regressive terms and conditions into the labor-management relationship, often causing inefficiencies and added costs. For example:

- While many union contractors are signatory to agreements with only two or three unions in the area, PLAs may require contractors to deal with as many as 15 different unions – unions with which a contractor may be unfamiliar or with which it has a negative history – and to comply with the wage, benefits, and labor practices of such unions.

- The PLA may establish different work rules from those in area-wide agreements. These rules may be outdated, having inefficient terms that the local contractors negotiated out of the agreements long ago but that the unions have been able to insert into PLAs.

- The PLA may require a contractor to assign work differently from how it normally assigns work, possibly resulting in jurisdictional disputes. Further, the PLA might require assignment of work to unions that are not entitled to such work under local agreements and that have not been awarded such work in recent years for good cause.

- The PLA may designate different procedures for resolving jurisdictional disputes than are normally used in the local area. Including such a contractual procedure prevents the contractor from seeking resolution by the National Labor Relations Board in a 10(k)

proceeding.[25] The procedures set forth in the PLA may rely on different criteria for settling jurisdictional disputes than criteria relied on by the Board or local procedures, raising the risk of a decision that is unfavorable to the contractor and that revives previously settled historical disputes.

- The PLA may impose different grievance or arbitration procedures than the area-wide agreements.

- PLA mandates normally require all contractors working on the project to adopt the PLA terms, restricting or eliminating a contractor's freedom to select subcontractors. Instead of awarding subcontracts based on cost-effective bids and performance history, the contractor must make awards based a company's willingness to agree to the PLA.

- Even when contractors are included in negotiations over the PLA terms, they have little bargaining leverage. Once a government agency has decided to make PLA use a condition of bidding or working on a project, the unions know that a deal must be struck. They are in a position to demand and hold out for the terms that they want.

- A PLA covering a large project effectively guarantees that union members in the area will have ample work regardless of a strike against local contractors. This has a destructive and destabilizing impact on local bargaining, significantly diminishing contractor leverage. It may result in unreasonably high wage settlements, regressive work rules and other terms, and work disruptions. The negative effects on local labor-management relations can last for years to come.

As the reasons delineated above, government-mandated PLAs harm union contractors in ways that the Proposed PLA Rule fails to consider.

D. How Government Mandates for PLAs Harm Open-Shop Contractors

Government mandates for PLAs–even when competition, on its face, is open to all contractors–put open-shop contractors at a competitive disadvantage and discourage them from bidding on covered projects. This is because PLAs typically require such contractors to make fundamental and often costly changes in the way that they do business. For example:

- Most PLAs severely limit open-shop contractors' rights to use their current employees to perform work covered by the agreement. They usually permit contractors to use only a small "core" of their current craft workers, while the remaining workers on the job must be

[25] 29 U.S. Code. 160, Sec.8(b)(4)(D) and Sec.10(K). *See also,* National Labor Relations Board. *About NLRB: Jurisdiction*. Retrieved October 16, 2022 from https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-disputes-section-8b4d-10k "Section 8(b)(4)(D) of the Act prohibits certain union conduct an object of which is to force or require "any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization" (unless the union is trying to force the employer to assign the work in conformity with a Board order or certification). Section 10(k) of the Act provides that "[w]henever it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(D)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

referred from union hiring halls. Hiring halls typically maintain referral procedures and priority standards that favor union members with seniority.

- PLAs normally contain union security clauses that require all craft workers to pay either union dues or an equivalent amount of union agency fees, whether or not the workers have any interest in union representation. This may deter workers from applying for, or accepting an assignment on, a PLA project, exacerbating already-challenging labor supply conditions.

- PLAs frequently require contractors to change the way they assign work to employees, requiring sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers who are competent in more than one skill and perform tasks that cross such boundaries.

- PLAs usually require contractors to pay union-scale wages, which may be higher than the wage rates required under the governing prevailing wage law. PLAs often also require extra pay for overtime work, travel, subsistence, shift work, holidays, "show-up," and various other premiums beyond what is required by law.

- PLAs normally require contractors to make contributions to union-sponsored fringe benefit funds. But an open-shop contractor's regular employees probably won't receive any benefits from those funds because of the plans' time-based vesting and qualification requirements. To continue providing benefits for such employees, the contractor must contribute to both the union benefit funds and the contractor's regular benefit funds. The cost of such double payments can make the contractor's bids uncompetitive.

- In rare but occasional situations, the obligation to contribute to union-sponsored pension funds under a PLA can lead to expensive withdrawal liability for the open-shop contractor once the contribution obligation ends.

- PLA mandates normally require all contractors working on the project to adopt the PLA terms, restricting or eliminating a contractor's freedom to select subcontractors. Instead of awarding subcontracts based on cost-effective bids and performance history, the contractor must make awards based a company's willingness to operate under the PLA.

- PLA mandates can also act as a barrier for the hiring of small businesses, including minority- and woman-owned businesses, and the fulfillment of small-business utilization goals. Such businesses are largely open-shop and are among those least able to make the above-described changes that a PLA requires.

As the reasons stated above show, government mandates for PLAs put open-shop contractors at a competitive disadvantage and discourage them from bidding on covered projects, even when competition on its face is open to all contractors.

E. <u>The Proposed PLA Rule Violates the Biden Administration's Goal to Promote Equity in Federal Contracting and Will Result in Less Small Business Participation</u>

The Proposed PLA Rule is in direct opposition to the Biden Administration's goal to increase participation of Small Businesses and Small Disadvantaged Businesses (SDBs) in federal

contracting. Among other initiatives, President Biden issued an initiative to increase the share of contracts going to SDBs by 50% by 2026, which the Administration calculates as an additional $100 billion to SDBs over this five-year period.[26] Most recently, on October 4, 2022, OMB directed agencies to award at least 12% of all federal contracting dollars to SBDs.[27] Despite these initiatives, the Proposed PLA Rule will have the opposite effect, driving small businesses and SDBs out of the federal construction market.

As detailed above, AGC's survey data clearly demonstrate that the Proposed PLA Rule will harm federal contracting, especially Small Businesses and SDBs. AGC's survey of the federal construction industry—of which 41% of respondents identified their company as a small business under the SBAs Small Business Size Standard—demonstrates that there will likely be an exodus of not only federal construction contractors, many of which are small businesses, but it will be more difficult for them to find subcontractors. The relevant AGC survey results are again listed for emphasis:

- 82% responded E.O. 14063 would be harder to subcontract with small, disadvantaged businesses (e.g., Veteran-Owned Small Business, Service-Disabled Veteran-Owned Small Business, Small Disadvantaged Business, Women-Owned Small Business, HUBZone business), compared to 5% responded it would be easier.

- 78% responded E.O. 14063 would be harder to find workers and/or subcontractors, compared to 3% responded it would be easier.

- Interest in bidding – 73% responded that they are not interested in bidding if there is a government-mandated PLA on a federal construction project, compared to 27% that responded they are still interested in bidding.

- Small Businesses – 41% responded that their company is a small business under the Small Business Administration's Small Business Size Standard.

Despite the assertion that the Proposed PLA Rule is fully consistent with the promotion of small business interests, the facts clearly show this not to be true. **AGC's data demonstrate that the Proposed PLA Rule violates the Biden Administration's goal to promote equity in federal contracting and will result in fewer small businesses and SDBs participating in federal construction.**

III. Rescind the Proposed PLA Rule Because it Goes Beyond the Statutory Authority and Contains Fundamentally Flawed Analysis

As described in detail below, the Proposed PLA Rule violates federal procurement and labor laws. In addition, the Proposed PLA Rule's analysis of its economic and contractual impacts contain fundamental flaws and omit key factors. **Either the violation of law or the FAR Council's flawed analysis is sufficient reason to rescind the Proposed PLA Rule.**

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[26] The White House. *Fact Sheet: Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*. June 1, 2021. Available at: www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap/

[27] Shalanda D. Young. *Increasing the Share of Contract Dollars Awarded to Small Disadvantaged Businesses*. Office of Management and Budget (October 4, 2022) available at: www.whitehouse.gov/wp-content/uploads/2022/10/M-23-01.pdf

A. The FAR Council Should Rescind the Proposed PLA Rule because it Violates Presidential Authority, Federal Procurement and Labor Laws, and will Lead to Costly Litigation

The president asserts that E.O. 14063 is authorized by the Constitution and the Federal Property and Administrative Services Act (the "Procurement Act").[28] However, E.O. 14063 in fact exceeds the president's authority under the Constitution and the Procurement Act. Any action taken by the president under a claim of Procurement Act authority must have a close nexus to, and advance, the purposes embodied in the Procurement Act in order for that action to be lawful under that act – namely, economy and efficiency in procurement. As discussed above, E.O. 14063 and the Proposed PLA Rule do not advance economy and efficiency in procurement. Because the government has failed to demonstrate the requisite nexus, E.O. 14063 exceeds the statutory and related Constitutional authorities of the president, and its implementation via the Proposed PLA Rule is subject to challenge as *ultra vires* action under the major questions and nondelegation doctrines.

The Proposed PLA Rule is also subject to challenge under labor law conflict preemption principals because they conflict with policies set forth in the National Labor Relations Act ("NLRA"). The NLRA protects the rights of employees to refrain from union representation. It also protects the rights of employers to refrain from recognizing a union without a proper showing of employee support. Furthermore, by mandating compliance with a collective bargaining agreement that the contractor has either no power to negotiate or curtailed power to negotiate, the Proposed PLA Rule interferes with the fundamental principle that collective bargaining is a process that requires agreement from both sides on a level field. Because E.O. 14063 and the Proposed PLA Rule are regulatory in nature, they are preempted by the NLRA and may not "alter the delicate balance of bargaining and economic power that the NLRA establishes."[29]

For these reasons and more, the Proposed PLA Rule is ripe for litigation if finalized in a way that mandates the use of PLAs. This conclusion is based on analysis of the merits of potential litigation, general observations of AGC's own ongoing or recently concluded litigation, and the high number of regulations being challenged in court. Given recent litigation challenging the federal COVID-19 vaccine mandates for federal contractors, the FAR Council is well aware of the strain on public and private resources such litigation can cause. **Accordingly, the FAR Council should rescind the Proposed PLA Rule.**

B. More Research is Needed on the Analysis of the Public Burden

The Proposed PLA Rule's perplexing assertion that it will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act is inaccurate.[30] AGC asserts that the public burden is significantly more than is concluded in the initial regulatory flexibility analysis. For example, the number of impacted subcontractors is dramatically more than the average of two subcontractors stated in the analysis. In addition, the costs associated with compliance and the time required for the review of PLAs are significantly higher. The analysis states:

> 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 estimates from experts, it is

[28] 40 U.S.C. § 101 et seq.
[29] *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996).
[30] 87 FR 51047

> estimated that for each contract there is an average of 2 subcontractors. Therefore, the requirement for PLAs is estimated to apply to 240—430 subcontractors (120-215 * 2).[31]

The above analysis of the number of estimated subcontractors alone is so fundamentally inaccurate that it should be enough for the FAR Council to rescind the Proposed PLA Rule and do more research. It is common on large-scale construction projects to have several dozen subcontractors involved. In preparation for these comments AGC asked several federal prime construction contractors the typical number of subcontractors for federal projects of about $35 million. The answers ranged between *thirty and fifty* subcontractors, not *two* as the Proposed Rule claims. For example, a prime contractor working on a construction project will often subcontract out the work for electrical, mechanical, plumbing, concrete, drywall, etc. Indeed, it is long established federal procurement policy for the government to encourage the use of as many subcontractors as possible.[32] This is why it is especially perplexing that the FAR Council chose to use two subcontractors in its analysis. The accompanying analysis from these numbers should likewise be removed, including the number of prime contractors and subcontractors.

It is unclear who are the "estimates from experts" the Proposed PLA Rule states as having consulted, or whether these experts are from the public or private sectors. However, AGC—as the largest and oldest association representing the construction industry—was not consulted and AGC is unaware of any outreach from the FAR Council to AGC members that would support this analysis. It is difficult to imagine that any federal contractor working on a large-scale federal construction project would ever suggest that the average number of subcontractors is two. The FAR Council analysis is so far from reality that it serves as an example for why many contractors are cautious to enter the federal construction market.

Further, the FAR Council's analysis of time and cost to review the Proposed PLA Rule and to comply with its many requirements are grossly inaccurate.

> Subcontractors that may be required to participate in a PLA will generally review and sign on to the PLA negotiated by the prime contractor. The subcontractor does not negotiate the PLA. However, the subcontractor must read, understand, and implement the terms and conditions included in the PLA. These actions are estimated to take 1 to 10 hours. Representatives on behalf of a subcontractor may include the owner, project manager, or an attorney. 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 establishing and submitting PLAs in response to a Government contract is estimated to be $58,272 to $1.04 million (240-430 subcontractors * (2 participants * 1-10 hours * $121.40)). Taking midpoints of each range implies a primary estimate of $549,136.[33]

The presumption that subcontractors will only require 1 to 10 hours to review a PLA—including understanding and implementing the terms and conditions—at the de minimis cost of $121.40 demonstrates a fundamental disconnect between the Proposed PLA Rule and the business of

[31] *Id.*
[32] Apart from increasing small businesses goals discussed in this document, federal agencies require bidders on federal construction solicitations to show how the bidder intends to use various subcontractors and how the bid will meet or exceed the small business goals required.
[33] *Id.*

federal construction. For federal contractors with no experience operating under a PLA—a significant share of market—it will take significant expense and workhours to "read, understand, and implement the terms and conditions" included in a PLA. The more risks that contractors bare, the higher bids will be submitted during a time where federal agencies are increasingly receiving bids that exceed the authorized amounts for the project, resulting in bid busts. The FAR Council is well aware of the significant time and cost to federal agencies to request additional money from Congress, a process that can take years and cost the agency millions of dollars in manhours. It is much more likely that the $121.40 figure cited will be the cost of printing the documents for the various individuals involved in reading, understanding, and implementing the PLA. Therefore, the rather low estimated impact of $58,272 to $1.04 million and any other figures derived from this calculation are correspondingly inaccurate. These are just a few of the many errors in the analysis section. **The government analysis fails to perform the required analysis, and the figures used are so grossly inaccurate that the FAR Counsel should rescind the Proposed PLA Rule.**

C. More Research is Needed to Understand the Potential Impact on Business Participation, Including Small Businesses and Small Disadvantaged Businesses

Transparency and clear requirements are important for providing free and open competition to our nation's businesses and accountability to the American people. However, PLA mandates and the predictably burdensome reporting requirements will undermine the significant infrastructure investments recently enacted into law. It will preclude many businesses from participating in the federal market, lowering competition in the federal market. It is important to note that the federal construction industry has long been a well-regulated industry, ensuring that workers are safe, taxpayer dollars are properly spent, and the environment is protected. Businesses of all types—especially small businesses—are confronted with an unparalleled crisis that threatens them both financially as well as the health, safety, and welfare of themselves and their employees. These businesses should not be burdened or distracted with vague regulations and reporting requirements, especially during the crisis brought about by the COVID-19 pandemic and accompanying supply chain disruptions that continue to contribute to higher construction material costs and longer lead times for their delivery, if they are even available.[34]

Federal construction contracting, in general, is a challenging market to participate. Businesses in the federal area must comply with numerous regulations, reporting requirements, security clearances, small business participation plans, cybersecurity requirements, and so on. It is important to ensure that federal regulations do not create unnecessary barriers for businesses, especially for small businesses with limited resources. As such, it is disconcerting that the Proposed PLA Rule fails to provide adequate analysis on the impact to small prime contractors and small subcontractors.

Federal agencies have small business participation goals which generally requires a certain percentage of the total value of all small business eligible prime contracts be awarded to small businesses. According to a recent report by the Congressional Research Service, federal agencies and prime contractors consistently have difficulty meeting the goals of 5% to Women-Owned Small Business (WOSBs) and 3% to Historically Under-utilized Business Zones Small Business (HUBZone).[35] As explained above, the Biden Administration has ordered dramatic increases to these goals of at least 12% of all federal contract spending to SDBs in fiscal year 2023. Therefore, it is important that any new regulations and reporting requirements do not discourage participation by small businesses, especially participation by WOSBs and HUBZones. However, there is little to no

[34] Associated General Contractors (July 2022). *AGC Construction Inflation Alert*. Retrieved from: www.agc.org/sites/default/files/users/user21902/Construction%20Inflation%20Alert%20Cover_Jul2022_V4.pdf

[35] For additional information, see CRS Report R45576, *An Overview of Small Business Contracting*, by Robert Jay Dilger.

accurate analysis on the impact to small business contractors at all tiers—including any potential decline in participation—due to the cost and time of complying the Proposed PLA Rule.

Another way small entities will be caught up in the mandate that the Proposed PLA Rule's analysis assumes is through IDIQ contracts. The Proposed PLA Rule distinguishes between the entire value of an IDIQ contract and orders that are $35 million or above. The Proposed PLA states that for an *order* at or above $35 million, an agency shall require the use of a PLA, unless an exception applies.[36] Since the Proposed PLA Rule mandates the flow down of the PLA to every subcontractor, many small businesses will be required to comply. Moreover, the Proposed PLA Rule contains language throughout that emphasizes the fact that it does not preclude an agency from requiring the use of a PLA for projects below the $35 million threshold and does not undertake any significant research on this option.

Finally, there is no indication that the U.S. Small Business Administration was consulted in the drafting of the Proposed PLA Rule, despite the substantial number of small businesses that will be impacted. AGC encourages the FAR Council to collaborate with the U.S. Small Business Administration to better analyze any potential impact to our nation's small businesses. **Therefore, the Proposed PLA Rule should be rescinded until more research and analysis is preformed to understand its impact on businesses—especially Small Businesses and SDBs—participation.**

D. Flawed Compliance Cost Analysis Ignores the Strain this Unfunded Mandate Will Have on Public and Private Resources

AGC is concerned that the Proposed PLA Rule represents an unfunded mandate that will diminish the economy and efficiency of many federal construction projects and needlessly require federal employees to spend significant time to comply with the Proposed PLA Rule. As explained above, the Proposed Rule will significantly increase the number of written communications between interested parties responding to PLA surveys for large construction projects—taking significant time to review—with little tangible benefit for the federal agency procuring construction services. There will be a significant increase in public comments that will require an increase in time to review whether one of the exceptions the Proposed PLA Rule applies in determining whether or not to mandate a PLA. The total estimated cost for establishing and submitting PLAs in response to a government contract of $2.92-$10.45 million[37] is inaccurate. AGC members currently experience difficulty with federal agencies awarding contracts and issuing *Notice To Proceed* orders in a timely and reasonable manner. Unless the relevant federal agencies substantially increase the number of personnel, the Proposed PLA Rule will further strain the federal workforce and contribute to further delays in federal construction.

An axiom of contracting holds that the more risk is shifted to a contractor the higher their bid. The statistical data AGC has provided shows that there will be a significant increase in the costs of bids for federal solicitations. This will inevitably cause an increase in bid busts on federal solicitations. The FAR Council is well aware of the costs associated with bid busts. The Proposed PLA Rule will lead to project delays and significant costs to individual agencies as it goes back to request more appropriations from Congress. **AGC is concerned that the Proposed PLA Rule represents an unfunded federal mandate that will further strain federal resources and, in turn, increase**

[36] 87 FR 51050
[37] *Id.*

delays in awarding contracts, construction starts, and undertaking other requirements necessary to deliver infrastructure projects.

IV. If the FAR Council Rejects AGC's Recommendation to Rescind the Proposed PLA Rule, it Should Implement Steps to Minimize the Disruption to Procurement of Federal Construction

As stated above, AGC strongly recommends that the FAR Council rescind the Proposed PLA Rule and allow contractors to decide whether a PLA is appropriate for a particular project and to execute one voluntarily should they deem it appropriate. **If, however, the FAR Council chooses to reject our primary recommendation, then AGC urges the FAR Council to 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.**

A. PLAs Should Be Evaluated on a Project-By-Project Basis

AGC urges the FAR Council and any relevant federal entity to study relevant factual conditions and circumstances to determine whether a PLA mandate would advance each of the government interests set forth in the Proposed PLA Rule more than the interests would be advanced without a PLA mandate, before imposing a PLA mandate on any project. The Proposed PLA Rule requires research to see if an exception applies. Such an analysis should include thorough research and analysis of such issues as:

- Which firms normally perform the types of construction services involved in the project and are likely to submit a well-qualified proposal? What proportion of them are union contractors and what proportion are open-shop contractors? What experience do they have in working under a PLA? Are they willing to work under a PLA, or would a PLA mandate deter them from bidding on the project?

- Is there a sufficient number of qualified contractors (including subcontractors) in the local area of the project that are willing and able to work on the project if it has a PLA mandate? If not, will FAR Council or the prime contractor have to rely on out-of-town contractors? If so, what impact might this have?

- Is there a set-aside goal for small, minority, or woman-owned businesses? If so, what proportion of the contractors in the area that would qualify to satisfy the goal are union contractors and what proportion are open-shop contractors? Are these contractors willing and able to work under a PLA?

- What specific crafts are needed for the project and what is the specific level of labor surplus or shortage for each of those crafts in the local area? What percentage of each of those craft workforces is represented by a union? What evidence is there that the local union hiring halls for each craft will be able to supply the particular labor needed? What other sources of labor or recruitment are available?

- What is the recent history of construction-industry strikes, jurisdictional disputes, or other delay causing labor strife in the local area? If the area is largely open-shop, is a PLA actually needed to prevent such problems? If the area is largely unionized, would local-area CBAs offer sufficient protection against such problems? Will all of the unions representing the trades needed for the project be willing to execute the PLA? If not, could the PLA create

problems for contractors signatory to CBAs with the trades that are not party to the PLA and lead to jurisdictional disputes?

- What is the recent history of PLA use on comparable projects in the local area? If PLAs have recently been used there, what quantifiable impact (positive or negative) have they had on project cost, timeliness, quality, and other factors? Have comparable projects in the area been successfully completed without the use of a PLA?

- Will the project be subject to a prevailing wage law? If so, which one(s)? How would the requirements of the law differ from the contractual requirements of the PLA with respect to wages, fringe benefits, and labor practices? How will this affect the cost of the project?

- Would a PLA mandate violate the Competition in Contracting Act, Federal Acquisition Regulation, National Labor Relations Act, Employee Retirement Income Security Act, Small Business Act, or any other applicable procurement or funding legislation?

- Are there any local or state laws requiring, prohibiting, or otherwise governing the use of PLAs in the area of the project? If so, do those laws apply to the present project? Would they have an impact on the lawfulness or propriety of a decision to mandate a PLA or to not mandate a PLA?

- Is a PLA mandate likely to provoke a bid protest or other challenge under federal, state or local laws? Could such a challenge increase the cost of the project or delay its initiation and completion? Would a public hearing be required or appropriate under the relevant procurement laws and regulations?

B. <u>The Proposed Rule Should Keep the Current Level of Authority to Issue an Exemption and Not Require the Senior Procurement Executive to Approve</u>

A recent and positive trend among the major federal construction agencies—benefiting both federal agencies and the construction industry—is the recognition that federal employees closest to the field-level are in the best position to make decisions that are in the best interest of the federal project. It makes sense that those on the ground and who are responsible for the project are more knowledgeable about the challenges and opportunities of the project than a senior bureaucrat sitting at the agency's headquarters in Washington, D.C. Worryingly, the Proposed PLA Rule attempts to reverse this positive trend by centralizing more authority by those farthest from those who are responsible for executing the project.

The Proposed PLA Rule interprets "senior official" mentioned in E.O. 14063 as the "senior procurement executive"[38] ("SPE") as having the authority to grant an exception to mandating a PLA on the project. The FAR Council mentions several times that SPEs will be the only ones with this authority but fails to define who qualifies as an SPE. AGC has significant concerns that the FAR Council is intending SPE's to be a small handful of agency officials, and even the heads of contracting at the agency's headquarters will not be considered SPEs. Needless delays and layers of review that require the highest levels of senior authority will have significant negative consequences. Therefore, it is perplexing that the Proposed PLA Rule uses the current GS-15 in its analysis for the cost to the government. Even using the GS-15 analysis, the analysis projects that associated costs will be increased.[39] If very senior officials are suddenly required to issue these exemptions, the costs to the federal government will significantly increase from its own analysis.

[38] 87 FR 51045
[39] 87 FR 51047

AGC sees no reason for the Proposed PLA Rule to upend the recognition that those in the field and closest to the project are in the best position. As one AGC member said in preparation for these comments, "if someone has contract authority over you, that's pretty senior to a business." **Therefore, the proposed rule should keep the current exemption authority to at least the current GS-15 and not require SPEs at agency headquarters to approve.**

C. Standardize PLA Surveys for Interested Parties to Comment

The Proposed PLA Rule should standardize and automate the responses in order to handle the dramatic increase in volume of responses that will come. Since E.O. 13502 was issued in 2009, AGC and its AGC Chapters have responded in writing to hundreds of federal agencies soliciting input from the construction community regarding the potential use of PLAs on a large-scale construction project exceeding $25 million.

If a group like AGC and its AGC Chapters has sent hundreds of letters in response to potential use of government-mandated PLAs on federal projects when it is merely *encouraged*, it is logical to assume that when the PLA is mandatory, unless there is an exception, there will be a manyfold increase in responses. There is a common theme in these hundreds of solicitations for input from federal agencies. These solicitations contain standard questions without standardized application. While these solicitations contain similar questions and language, the Contract Specialist—or similarly positioned federal employee solicitating information—will rearrange the standard questions, include some questions but not others, or change verbiage that does not fundamentally change the question. This is an incredibly inefficient system that will not hold up if the Proposed PLA Rule is implemented as written. **Therefore, the Proposed PLA Rule should require the agencies to use a standard form—or choose from no more than three standard forms—for soliciting input from the construction contract community. Likewise, there should be an automated system in place to process the significant influx of responses. A standardize survey will allow for more streamlined review.**

V. Conclusion

AGC neither supports nor opposes contractors' *voluntary* use of PLAs on public works projects but strongly opposes any *government mandate or prohibition* of contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. Government mandates for PLAs can restrain competition, increase costs, cause delays, and lead to jobsite disputes. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. **AGC respectfully requests the FAR Council rescind the Proposed PLA Rule for the many reasons stated above.** If you would like to discuss this matter with us further, please do not hesitate to contact AGC.

Sincerely,

Stephen E. Sandherr
Chief Executive Officer