

AGC Memo: What Federal Contractors Should Know About the New PLA E.O.

Background

On February 4, 2022, President Biden signed a new [Executive Order on Use of Project Labor Agreements For Federal Construction Projects \(PLA\)](#). When in effect, this Executive Order (E.O.) will require every prime contractor and subcontractor to engage in negotiation or agree to PLAs on federal construction projects valued at \$35 million or more. Rest assured, AGC of America will rigorously explore every possibly avenue—including legal options—to push back against this E.O., as underscored in the association’s recent [statement](#).

AGC of America neither supports nor opposes contractors’ *voluntary* use of PLAs on government projects or elsewhere but strongly opposes any government mandate for 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.

This E.O. will repeal and replace the Obama-Biden Administration’s 2009 PLA E.O. ([E.O. 13502](#)) once the Federal Acquisition Regulation (FAR) Council issues a final regulation—thereby implementing this E.O. and adding a federal contracts clause to applicable federal construction contracts—which is expected to take many months. The E.O. requires the FAR Council to issue a *proposed* regulation within 120 days (**Sec. 8**), which will require public notice and comment. Federal construction contractors will likely see none of the changes under this E.O. until a *final* regulation is issued by the FAR Council.

The E.O. does not impact federally assisted projects (e.g., state departments of transportation contracts for federal-aid transportation projects 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 the President Biden’s PLA E.O.

Key Points from the E.O.

- **Only Federal Contractors** – Applies to Direct Federal Construction Contractors, Not Federal-Aid (e.g. federal-aid transportation) Contractors. (**Sec. 2**)
- **Threshold** – Increases the threshold from \$25 to \$35 million, and requests regulators to peg this number to inflation. (**Sec. 2**)
- **Effective Date** – Does not take effect until a *final* regulation is issued by the FAR Council. The E.O. requires the FAR Council to issue a *proposed* regulation within 120 days, which will require public notice and comment. (**Sec. 8**)

- Requirement – The E.O. departs from the Obama E.O. by changing “May” to “Shall [... subject to the exceptions listed in the E.O.]” for federal agencies to use a PLA. **(Sec. 3)**
 - ***Subject to sections 5 and 6 of this order, in awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, agencies shall require every contractor or subcontractor engaged in construction on the project to agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations. (Sec. 3)***
- Exceptions – The factors for granting an Exception (*i.e.* Waiver) are broad, 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. **(Sec. 5)**
 - Senior Official – An exception will require a “senior official” to provide a submitted explanation. By not defining “senior official” this will likely provide agencies greater flexibility granting authority.
 - Website – These exceptions will be posted on a public website. **(Sec. 6)**
 - Separate from this E.O. but similar, 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.
- List of Exceptions – The E.O. provides a list of factors in determining an exception to requiring a PLA on a project if:
 1. **Would not advance the Federal Government’s interests in achieving economy and efficiency** in Federal procurement. Such a finding shall be **based on the following factors**:
 - i. The project is of short duration and lacks operational complexity;
 - ii. The project will involve only one craft or trade;
 - iii. The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors;
 - iv. The agency’s need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable; or
 - v. The project implicates other similar factors deemed appropriate in regulations or guidance issued pursuant to section 8 of this order.
 2. Based on an inclusive market analysis, requiring a project labor agreement on the project would **substantially reduce the number of potential bidders** so as to frustrate full and open competition.
 3. Requiring a project labor agreement on the project would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda. **(Sec. 5)**
- Key Definitions (Sec. 2):
 - (b) **“Construction”** means construction, reconstruction, rehabilitation, modernization, alteration, conversion, extension, repair, or improvement of buildings, structures, highways, or other real property.

February 7, 2022

- (c) **“Large-scale construction project”** means a Federal construction project within the United States for which the total estimated cost of the construction contract to the Federal Government is \$35 million or more. The Federal Acquisition Regulatory Council (FAR Council), in consultation with the Council of Economic Advisers, may adjust this.

Conclusion

There are important questions that remain unanswered, but this E.O. is clearly intended to pressure contracting officers, and other federal agency personnel, to mandate PLAs on federal construction projects. AGC will comment on the proposed regulation when it is issued and is assessing all options to oppose this E.O. from being implemented.

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](#)

For more information, contact Jordan Howard at jordan.howard@agc.org or (703) 837-5368