

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

Background

On Aug. 18, the Federal Acquisition Regulation (FAR) Council released a [proposed 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 proposed rule will repeal and replace the Obama-Biden Administration’s 2009 PLA E.O. ([E.O. 13502](#)) once the FAR Council issues a *final* rule—thereby implementing this *proposed* rule and adding a federal contract clause to applicable federal construction contracts—which will take place after the 60-day public comment period. Rest assured, AGC of America has spent months preparing for legal action to block this proposal from going into effect.

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.

The Proposed Rule 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 Proposed Rule.

Key Points from the Proposed Rule

- [Only Federal Contractors](#) – Applies to Direct Federal Construction Contractors, Not Federal-Aid (e.g. federal-aid transportation) Contractors, including to all subcontracts with subcontractors.
- [Threshold](#) – Increases the threshold from \$25 to \$35 million, periodically adjusts to inflation. However, the proposed rule allows flexibility for agencies to apply this requirement to projects below the \$35 million threshold.
- [Effective Date](#) – Does not take effect until a *final* regulation is issued by the FAR Council. The proposed rule requires 60-day public notice and comment period, which is on or about Oct. 18, 2022. After the public comment period closes, the FAR Council will review comments and issue the final regulation. This review period could range from weeks to months.

- Requirement – The Proposed Rule departs from the Obama E.O. by changing “May” to “Shall [... unless an exception applies.]” for federal agencies to use a PLA.
- 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. However, the proposed 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 "senior official." The proposed rule interprets the senior official as the "senior procurement executive."
 - Senior Procurement Executive – An exception will require a “Senior Procurement Executive” to provide a written explanation for the exception. The proposed rule provides several references that “Senior Procurement Executive” those that are GS-15 or higher level.
 - Website – The proposed rule is silent on the E.O.’s requirement that these exceptions will be posted on a public website. However, this does not mean this initiative is no longer under consideration.
 - Separate from this proposed 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.
- List of Exceptions – The Proposed 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 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.
 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) – The proposed rule applies to an order at or above \$35 million, but the exception may only apply to the entire IDIQ if the basis would all to all orders. The decision whether to grant an exception for an order should be made prior to issuing the notice of intent to place an order.

August 18, 2022

- 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 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

There are important questions that remain unanswered, but this proposed rule 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. AGC will offer its members resources to weigh in on the proposed rule and to contact Congress.

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