



October 18, 2022

VIA ELECTRONIC SUBMISSION

Ms. Dana Bowman
Procurement Analyst
DoD / GSA / NASA
1800 F Street, NW
Washington, DC 20405

RE: Public Comments on FAR Case 2022-003 / RIN 9000-AO40 – FAR: Use of Project Labor Agreements for Federal Construction Projects

Dear Ms. Bowman:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) is an international trade association representing 3,500 signatory contracting firms with more than 100 chapters throughout the United States, Canada, Australia, and Brazil. SMACNA provides its sheet metal and air-conditioning contractor members with assistance in areas including business management, labor relations, marketing, governmental affairs, and technical research and development – on both a national and local level.

SMACNA provides these comments in support of Executive Order (EO) 14063, titled “*Executive Order on Use of Project Labor Agreements for Federal Construction Projects*,” and the proposed rule, “*Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects*,” 87 Fed. Reg. 51044 (Aug. 19, 2022), from the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

I. BACKGROUND

A project labor agreement (PLA) is a special type of “pre-hire” collective bargaining agreement governing labor relations and working conditions for all workers, union or non-union, on a single construction project. Pre-hire agreements are agreements reached between construction unions and employers in the construction industry before any employees are hired and they are expressly authorized by Section 8(f) of the National Labor Relations Act (NLRA).¹

The legislative history of Section 8(f) makes clear that Congress’ intent in enacting it was to accommodate the longstanding business practices and employment patterns in the construction

¹ 29 U.S.C. § 158(f); see also John Deklewa & Sons, 282 NLRB 1375 (1987), enforced sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988).



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industry, practices which resulted from the specific needs of building contractors “to know (their) labor costs before making the estimate upon which (their) bid will be based [and] to have available a supply of skilled craftsmen ready for quick referral.”² As the Supreme Court explained in 1993, PLAs are “the very sort of labor agreement that Congress explicitly authorized and expected frequently to find” in the construction industry.³

For large construction projects, PLAs are more advantageous than regular “pre-hire” agreements because they systematize labor relations across multiple trades, contractors, and subcontractors. Remember, large construction projects involve numerous contractors and subcontractors, each with their own workforce performing discrete parts of a larger construction project. As a result, there is interdependence among the different contractors since, depending on the particular task and the phase of the project, the contractor’s work may require them to work side by side, to keep out of one another’s way, and to work in a specific timed sequence. PLAs provide an overall structure on a project, which applies to all contractors working in every aspect of the project, throughout its entire duration, and facilitate coordination of these multiple parties.

II. HISTORY OF PLAs

PLAs have been used in the U.S. since at least the 1930s. Use of PLAs on federal and other publicly funded projects dates to the construction of the Grand Coulee Dam in Washington state in 1938 and the Shasta Dam in California in 1940.⁴ During and after World War II, atomic energy and defense construction projects used PLAs. NASA used PLAs in construction at Cape Canaveral in the 1960s and California’s Bay Area Rapid Transit (BART) used PLAs on rail projects during the same time.

Private sector use and enthusiastic support of PLAs also dates back for over half a century. PLAs have been used for compelling economic and efficiency reasons on various private construction projects. These include the Trans-Alaska Pipeline and the Prudhoe Bay Oil Pool Module Construction in the 1970s, Disney World in the 1960s, and the Sutter and Sunrise power plants in the 2000s.⁵

Despite this long history, questions were raised in the 1980s over whether the use of PLAs by public agencies was consistent with the NLRA. Any doubt was removed by the

² S. Rep. No. 187, 86th Cong., 1st Sess. 28, 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 424 (GPO 1959).

³ Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 233 (1993) (“Boston Harbor”).

⁴ U.S. Government Accountability Office, Project Labor Agreements: The Extent of Their Use and Related Information, GGD-98-82, at 4-5 (May 1998).

⁵ U.S. Government Accountability Office, Project Labor Agreements: The Extent of Their Use and Related Information, GGD-98-82, at 4-5 (May 1998).

Supreme Court's **unanimous decision** in Boston Harbor, which held that a public agency undertaking a public works project has at least as much discretion in arranging its industrial relations policy as an entity in the private sector.

III. THE BENEFITS OF PLAS ARE WELL-ESTABLISHED

A. PLAS PROVIDE READY ACCESS TO A HIGHLY SKILLED AND HIGHLY SOUGHT-AFTER WORKFORCE.

The construction industry is currently facing a nationwide skill shortage. A recent report from McKinsey & Company found that, in October 2021, 402,000 construction positions remain unfilled, which is the second-highest level recorded since data collection began in December 2000.⁶ Another study found that the construction industry will need to attract nearly 650,000 additional workers on top of the normal pace of hiring in 2022 to meet the demand for labor.⁷ The increase in vacancies of highly skilled craftworkers is coupled with the fact that there is an aging pool of skilled workers in general. The median age of a construction worker is 41 with an even older median age within the skilled labor sector of the industry.

This problem threatens to undermine capital facilities planning and adversely impacts projects including critical national security related infrastructure, economic development, and other major public works programs. PLAs help combat our nation's skilled labor crisis and similar workforce problems by mandating long overdue investments in high skill training programs, both in the short-term and in the long-term.

PLAs provide an answer to labor supply problems. PLAs utilize union hiring halls and apprenticeship programs, which are uniformly recognized as the gold standard for sourcing a supply of highly skilled craftsmen.

By securing access to the best-trained, most highly skilled workforce available, PLAs promote safe, timely, cost-effective execution of the most complex and national security-conscious construction projects yet designed. These benefits have been documented in several major studies aimed at evaluating the efficacy and economic benefits of PLA-construction:

- "PLAs [in Illinois] from 2011 to 2013 were found to: [(1)] support female and nonwhite business owners in the effort to diversify the construction industry; [(2)] ***experience cost overruns at a lower rate than a survey of 'mega-projects' in the private sector***; [(3)] ***have zero or minimal actual cost overruns for the typical project***; [(4)] be completed on time or within one month of the estimated completion date 70.5 percent of the time; and

⁶ Available at <https://www.mckinsey.com/capabilities/operations/our-insights/bridging-the-labor-mismatch-in-us-construction>.

⁷ Available at <https://www.abc.org/News-Media/News-Releases/entryid/19255/abc-construction-industry-faces-workforce-shortage-of-650-000-in-2022>.

[(5)] increase Illinois' economic output by at least \$1.0 billion and support over 3 million hours of uninterrupted work for nearly 1,700 blue-collar construction workers.”⁸

- “[PLAs] provide value for government and corporate purchasers of construction services – getting the *best work for the money* with far greater likelihood of on-time, on-budget performance.”⁹
- “If designed properly, *PLAs can help projects meet deadlines by guaranteeing a steady supply of highly skilled labor and by reconciling the various work routines of the many trades*. PLAs also help to assure timely completion by keeping projects free from disruptions resulting from local labor disputes, grievances, or jurisdictional issues.”¹⁰
- “*PLAs’ cost savings are both direct and indirect and can be substantial*. These labor cost savings are typically achieved by the following: . . . [c]ontractors having immediate access to a pool of skilled labor during the hiring phase and throughout the life of the project”¹¹
- “[A] central purpose of a PLA is to obtain *ready access to a skilled union labor force*.”¹²
- “*PLAs provide a trained, skilled and productive labor force*.”¹³

These studies and countless private corporate decisions to prefer and require PLAs more than attest to why PLAs are seen by major corporations to maximize efficiency, minimize risks, reduce costs, and ensure timely project delivery while meeting the highest quality design and construction industry standards.

⁸ Manzo & Bruno, Efficiencies of Project Labor Agreements, Illinois Capital Development Board Projects, 2011-2013, ILEPI-LEP ECONOMIC COMMENTARY #19 (May 18, 2015).

⁹ Fred B. Kotler, Project Labor Agreements in New York State II: In the Public Interest and of Proven Value, at 1, CORNELL UNIVERSITY ILR SCHOOL (2011).

¹⁰ Dale Belman & Matthew Bodah, Building Better: A Look at Best Practices for the Design of Project Labor Agreements, ECONOMIC POLICY INSTITUTE (2010).

¹¹ Fred B. Kotler, Project Labor Agreements in NYS: In the Public Interest, at 31-32, Cornell ILR School (2009).

¹² Belman, Bodah & Philips, Project Labor Agreements, ELECTRI INTERNATIONAL (2007).

¹³ Scharnau & Sheehan, Project Labor Agreements in Iowa: An Important Tool for Managing Complex Public Construction Projects, THE IOWA POLICY PROJECT (2004).

B. PLAS FACILITATE THE TRAINING OF A HIGHLY-SKILLED WORKFORCE TO MEET FUTURE CONSTRUCTION NEEDS.

As noted above, in the short-term, PLAs guarantee project owners an adequate supply of highly skilled craft workers through hiring halls or referral systems. While local referral systems are usually adequate, these systems can also call upon workers from surrounding regions and across the county if needed to meet local demands.

In addition, PLAs expand the long-term supply of highly skilled craft workers needed for the future.¹⁴ When PLAs are used, local union referral systems are forced to expand their capacity and recruit and train more workers to meet manpower demand. This, in turn, facilitates long-term workforce planning and development, which is critically needed by the industry.

For example, SMACNA and SMART's partnership has been providing skilled, trained, and certified workers to respond in a timely manner to meet industry demands for more than a century. SMART, with more than 203,000 members, provides classroom, hands-on, on-the-job, and rapid response training to its members through federal and state registered apprenticeships in more than 150 privately funded and administered state of the art training centers located throughout the United States and Canada.

Academic research has found that:

Apprenticeships with union participation were found to have much higher enrollments and a greater share of women and ethnic / racial minorities. These programs also have a markedly better performance rating for all groups on levels of attrition and completion.

Joint apprenticeship programs in the building trades remain vital and continue to improve, as demonstrated by recent accomplishments, such as the establishment of national training funds and national instructor preparation, arrangements for college credit for learning in apprenticeship, and expansion of journey-level update training.¹⁵

Indeed, research has consistently shown that: (1) "union programs enroll the majority of building trade registered apprentices," (2) "the apprentice completion rates from union programs is higher than from non-union programs," (3) "union programs enroll non-traditional populations in higher numbers and at higher rates than do non-union programs," and (4) "the apprentice completion

¹⁴ [Redacted], Project Labor Agreements, CONGRESSIONAL RESEARCH SERVICE (June 28, 2012) ("[A] PLA will promote the agency's long-term program interests, such as training workers to meet the agency's future construction needs.").

¹⁵ Glover & Bilginsoy, Registered Apprenticeship Training in the US Construction Industry, EDUCATION AND TRAINING (May 2005).

rates of non-traditional populations from union programs is higher than from non-union programs.”¹⁶

In contrast, non-union contractors have been unable to develop or maintain an effective system of craft training that ensures open shop workers uniformly meet requisite, minimum skill standards.¹⁷ For these and other reasons, it fails to adequately invest in skill training or produce sufficient numbers of properly trained workers. This, in fact, is one of the primary causes of the industry’s current skill shortages.¹⁸

Union construction apprenticeship programs consistently invest over \$600 million in state-of-the-art training programs year after year, provide a quality of training that is far superior and maintain programs that cover the wide range of all essential crafts needed for large capital facility projects. Thus, the use of PLA-construction, which provides challenges and opportunities for the highly skilled union craftworker referral systems that have by far the greatest capacity to recruit, train and deploy the next generation of skilled construction craft personnel. This also serves the long-term workforce and project quality development interests of developers and building owners.

C. PLAS HARMONIZE WORK RULES ACROSS MULTIPLE CONTRACTORS AND TRADES.

PLAs promote efficiency by providing a uniform set of rules for all unions, contractors, and subcontractors on the jobsite. PLAs are described as a “job site constitution” and supersede, and thereby reconcile, conflicting provisions of the local area collective bargaining agreements between various unions and contractors.¹⁹

On a typical construction project, project owners or general contractors are required to juggle multiple local area agreements for each construction trade and those firms without a signatory workforce. PLAs preempt the local area complications between unskilled workforces affiliated with nonunion firms and skilled labor building trade agreements. This is done to promote efficiency by providing uniform working hours, shift times, scheduling, holidays, overtime and premium pay, and other terms and conditions of employment. In addition, a PLA

¹⁶ Argyres & Moir, Building Trades Apprentice Training in Massachusetts: An Analysis of Union and Non-Union Programs, 1997-2007, LABOR RESOURCE CENTER (Oct. 2008).

¹⁷ Glover & Bilginsoy, Registered Apprenticeship Training in the US Construction Industry, EDUCATION AND TRAINING (May 2005) (“To date, the non-union sector has not established effective mechanisms to address the reluctance of employers to invest in training in the face of transient construction labor markets.”).

¹⁸ Cihan Bilginsoy, Apprenticeship Training in the U.S. Construction Industry, at 9, UNIVERSITY OF UTAH (1998).

¹⁹ Fred B. Kotler, Project Labor Agreements in New York State II: In the Public Interest and of Proven Value, at 1, CORNELL UNIVERSITY ILR SCHOOL (2011).

minimizes the potential for friction among employees who would otherwise be subjected to different terms and conditions of employment. Because all contractors, unions, and employees working on the project are subject to the same set of expectations and rules, the PLA serves to solve many of the coordination problems posed by large multi-contractor and multi-craft construction projects of great complexity.

D. PLAs ELIMINATE DELAYS FROM STRIKES.

Strikes – both primary and sympathy – can pose a serious impediment to the timely performance of planned construction, especially during the current crisis shortage of skilled labor. Strikes are also more common at the expiration of a collective bargaining agreement. On a large construction project, there may be multiple local area agreements across several trades that may be expiring at various times during the multi-year project. Thus, there may be multiple instances where a strike by a particular contractor could shut down the entire project.

For example, on a large construction project, a small contractor could become embroiled in contentious negotiations with a local union. If the union goes on strike, it could set up a picket line in front of the construction project and other unions could potentially recognize the picket line (called a sympathy strike) even if they are not in a dispute with their employer.

PLAs eliminate the risk of strikes by prohibiting strikes and lockouts during the entire term of the project and providing a uniform dispute resolution mechanism:

[A]ll PLAs have no-strike clauses in effect through the entire duration of the project. For long-lasting projects, these no-strike clauses are meaningful because inevitably in a two- or three-year period, one or more traditional union contracts will expire, leading to the possibility of a negotiation stalemate and a strike.²⁰

Expiring local area agreements therefore have no impact on the timely completion of the project.²¹

Non-union contractors also benefit from the strike protections of a PLA. This is because, while rare, non-union employees have the right to engage in a primary or sympathy strike under Section 7 of the NLRA.²² Without a PLA, a non-union contractor has no power to waive its employees' right to strike and thus cannot guarantee a strike-free project. Thus, both union and

²⁰ Belman, Bodah & Philips, Project Labor Agreements, ELECTRI INTERNATIONAL (2007).

²¹ [Redacted], Project Labor Agreements, CONGRESSIONAL RESEARCH SERVICE (June 28, 2012) (“A PLA usually includes procedures for resolving labor disputes. . . . PLAs usually include a provision that unions agree not to strike, and contractors agree not to lock out workers.”).

²² See, e.g., NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) (finding that non-union employees who protested their working conditions by walking off the job were engaged in concerted activity protected by Section 7); NLRB v. Leslie Metal Arts Co., 509 F.2d 811 (6th Cir. 1975) (finding an employee walkout was protected by Section 7).

non-union contractors benefit from an enforceable agreement protecting the job from lockouts, strikes, and pickets.

E. PLAs REDUCE WORKER MISCLASSIFICATION.

Worker misclassification in the construction industry is a very serious tax avoidance, legal and project execution efficiency problem undermining the construction industry quality and training certification structure. According to a recent DOL study, while independent contractors represent only 7 percent of the total national workforce, roughly 20 percent of all independent contractors work in construction (U.S. BLS 2018). The construction industry is not a statistical anomaly and industry abuses are widely acknowledged as a serious issue in need of enforcement actions and regulatory action in recent decades or even longer.

It has been estimated that more than one-third of construction workers have been wrongly and most often knowingly misclassified as independent contractors. Annual tax and revenue losses due directly to worker misclassification amount to about \$400 million in Florida, \$467 million in North Carolina, and \$1.2 billion in Texas.²³ A Massachusetts study estimated that from 2001-2003, construction worker misclassification resulted in an underpayment of \$7 million in workers' compensation premiums.²⁴

Misclassified workers earn significantly less than workers paid as employees and lose generally provided employee benefits of great importance, such as healthcare, retirement, and tax withholding. One government expert calculated that a construction worker earning \$31,200 a year before taxes would be left with an annual net compensation of \$10,660.80 if paid as an independent contractor, compared to \$21,885.20 if paid properly as an employee.²⁵

A PLA eliminates the risk of misclassification by requiring all contractors and subcontractors to operate within the law and pay uniform, contractually agreed upon wages and benefits. The PLA business model is epitomized by jobsite regulatory enforcement, efficiencies and responsible, scrupulous contractors who play by the rules, follow the employment and tax laws, and comply with existing ordinances to ensure that taxpayers and their clients get what they pay for – which is quality work and value on jobs completed on-time and within budget; and with a healthy respect for the workforce and the communities in which they operate. These contractors are legally bound in the PLA to follow all local ordinances and licensing requirements, and provide family-sustaining wages, health care and retirement benefits. Further, they are active participants in the skilled workforce development initiatives

²³ Ordonez, Franco, and Mandy Locke. 2014b. "IRS' 'Safe Harbor' Loophole Frustrates Those Fighting Labor Tax Cheats." McClatchy Washington Bureau, December 14.

²⁴ Carré & Wilson, The Social and Economic Costs of Employee Misclassification in Construction, CENTER FOR SOCIAL POLICY PUBLICATIONS (2004).

²⁵ Tim Crowley, UI Tax Chief, U.S. Department of Labor, Worker Misclassification – An Update from Constitution Ave. (Oct. 24, 2012).

that provide career training opportunities within local communities. In total, they provide a stable, highly trained, and productive workforce that earns a healthy income, thereby lessening the impact on the social safety net and financial resources of governments or local charitable support groups.

F. PLAs “LEVEL THE PLAYING FIELD” AND PREVENT A “RACE TO THE BOTTOM.”

PLAs “level the playing field” by providing uniform pay and benefits to all in the workforce for contractors and subcontractors – union or non-union. This prevents contractors, who pay prevailing wages and benefits, from being undercut by low-wage and unscrupulous competitors often operating contrary to wage and hour laws and standards.

Unfortunately, the U.S. construction industry is becoming increasingly defined by contractors who do not play by the wage and hour standards, laws, and rules. These unprincipled contractors attempt to win bids and fatten their profit margins by intentionally operating in ways that avoid fair competition and subvert the law. They will routinely submit artificially low bids knowing they have no intention of following published employment rules, such as prevailing wage laws, even when mandated by law. These contractors are increasingly engaged in “misclassifying” their employees as “independent contractors” to avoid paying federal and state taxes, workers’ compensation, and unemployment insurance benefits. This allows them to submit an even lower bid while simultaneously defrauding the taxpayers by not paying requisite taxes paid by legitimate contractors. Unfortunately, it has also become a de facto part of the “race to the bottom” business model to utilize and exploit illegal and undocumented workers and pay them sub-standard wages (or not pay them at all, in some cases). And finally, these contractors are not averse to using inferior materials, and taking unsafe shortcuts on construction plans that put workers, as well as the project itself, in danger.

Not surprisingly, these contractors, and the organizations that represent them are the most vocal opponents of PLAs, independent contractor rules, OSHA enforcement, wage and hour standards, and prevailing wage laws. Unscrupulous contractors may appear to offer a low-cost “bargain” to federal, state, and local agencies who contract for construction services. Unfortunately, the contract pricing and evaluation systems currently used by agencies at all levels of government typically do not consider these indirect cost shifts from employers to taxpayers while also undermining the skilled workforce development efforts by many contractors and federal policy makers.

A growing body of research demonstrates that in many industries, contractors that provide good wages and benefits and respect workplace laws deliver higher quality services for government agencies and the taxpayers. Further, construction research has indicated that “high road” contractors that comply with workplace laws and provide quality training, along with family-sustaining wages and benefits, typically have better skilled and more productive workforces that increase both the productivity and quality associated with public construction

work.²⁶ And that results in higher construction quality, efficiency, and greater project savings for the taxpayers. It is a matter of common sense and economics. Simply put, a highly paid, highly trained workforce is more productive, which can have the effect of producing lower labor costs than a low-wage, low-skill workforce. That is the essence of the PLA business model.

As early as the 1980's, an audit by the U.S. Department of Housing and Urban Development (HUD) of seventeen HUD sites found a "direct correlation between labor law violations and poor-quality construction" on HUD projects and found that the quality defects on these sites contributed to excessive maintenance costs. The HUD Inspector General concluded that "[T]his systematic cheating costs the public treasury hundreds of millions of dollars, reducing workers' earnings, and driving the honest contractor out of business or underground."

More recently, a survey of New York City construction contractors by New York's Fiscal Policy Institute found that contractors with workplace law violations were **more than five times** as likely to have a low performance rating than contractors with no workplace law violations. Other studies have found that construction workers who receive higher wages and quality training are at least 20 percent more productive than less skilled and lower paid workers.

On the flip side, a study examining the impact of repealing prevailing wage laws in nine states found that the resulting drop in construction worker wages correlated with increases in cost overruns and delays on construction projects and led to a workforce that was less skilled and less productive.²⁷ Yet despite the recognized quality advantages and offsetting savings generated by better paid workforces, many federal, state, and local contracting systems do not currently provide any systematic way to factor them in during the contract pricing and evaluation process. As a result, they remain largely ignored, skewing the selection process towards the "race to the bottom" contractors.

In the short and long run, it costs state and federal governments more money to have workers making poverty level wages, and not having health and retirement benefits. It is a huge drain on the economy and on the tax base as well as project efficiency and quality. Therefore, it is essential that contracting officials factor those costs into the contracting and contractor selection process. Where an employer is providing health and retirement benefits and saving the health system money, those savings should be seriously weighed when federal, state, and local governments seek to invest in construction and procure construction services.

PLAs are a valuable tool to ensure that public dollars are leveraged to ensure not just a quality return on the construction investments, but also to ensure that taxpayer dollars are used to support a construction industry business model that also works to prevent social and economic damage—that governmental entities will have to clean up with additional taxpayer funds. As

²⁶ Available at <https://faircontracting.org/wp-content/uploads/2022/03/The-33-Cost-of-repeal-of-Prevailing-Wage-to-Wisconsin.pdf>.

²⁷ Available at <https://www.wmca.info/files/ProjectLaborAgreements.pdf>.

noted above, PLAs ensure that all contractors “play by the rules.” All contractors and subcontractors must sign the PLA and agree to family-sustaining pay and benefits. This raises the standard of living (and increases taxes paid) in areas where the work is being performed. Under strictly enforced PLAs, unscrupulous contractors, who often do not employ local workers, are unable to undercut law-abiding contractors and ensures that workers and local governments benefit.

G. PLAs IMPROVE SAFETY.

Safer projects are far more likely to be on time, on budget and far less expensive projects. Construction is inherently a more dangerous industry than most other industry categories. A construction worksite can become even more dangerous because, at any given time, there may be hundreds of contractors and subcontractors on site, each with (or without) its own safety program. These formal or informal programs vary greatly in effectiveness and each firm’s safety program impacts not just that firm’s workers but many other workers on site as well. Thus, there is potential for confusion, trouble, serious accidents, and far worse when safety is shortchanged as a priority factor in bidding and contractor selection.

PLAs improve worker safety by requiring contractors and workers to comply with comprehensive uniform project safety rules. PLAs contain sophisticated health and safety provisions, including those that dictate overall safety practices, create safety committees, mandate safety training and safety meetings, and address such matters as drug screening. PLAs also typically include joint labor-management committees to address evolving safety and training issues that may need to be addressed on the project.

H. PLAs INCREASE DIVERSITY, EQUITY, AND INCLUSION.

In addition to non-discrimination provisions, PLAs often also include provisions requiring contractors to participate in local and regional recruitment, apprenticeship, and training programs for women, minorities, veterans, and other under-represented groups.

Certain PLAs – called Community Workforce Agreements (CWAs) – are PLAs that “contain social investment or targeted hiring provisions to create employment and career path opportunities for individuals from disadvantaged or low-income communities.”²⁸

For example, PLAs can be drafted to include a system to recruit, train and employ local workers from poor and economically disadvantaged and at-risk populations such as the homeless, ex-offenders, and others.²⁹ PLAs can also include provisions that commit unions and contractors to recruit individuals from these demographic groups.

²⁸ Figueroa, Grabelsky & Lamare, Community Workforce Provisions in Project Labor Agreements: A Tool for Building Middle-Class Career (Oct. 2010).

²⁹ As an example, a PLA in California included the following condition:

PLAs promote diversity, equity, and inclusion by providing a structured pathway for residents to gain access to highly valued career training in the skilled trades. Most skilled trade apprenticeships offer “earn while you learn” programs that mandate five years of training consisting of over 800 hours of classroom education and 8,000 hours of on-the-job training under the supervision of an experienced and highly skilled tradesperson. In some cases, the completion of a skilled craft apprenticeship program includes the awarding of a two-year Associate’s Degree from a local community college.

For individuals with little or no construction experience, PLAs can create a pathway to acquire the basic skills needed to enter a registered apprenticeship program. This is done through pre-apprenticeship programs. As opposed to the specialized or registered apprenticeship programs, which train in a particular skilled trade (e.g., electrician, carpenter, etc.), pre-apprenticeship programs provide training in areas such as construction math, workplace safety, and academic skills needed to obtain a GED or high school diploma.

I. PLAS BENEFIT THE LOCAL COMMUNITY.

In addition to providing value to project owners and general contractors, PLAs offer many important benefits to local communities affected by capital projects.

1. *Local Hiring*

PLAs require contractors to hire labor through local union hiring halls or referral systems. Hiring local workers results in lower unemployment and more money in the local economy. This has a multiplier effect on taxpayer investments.

2. *Prevailing Wages*

The wage rates set forth in PLAs are based on local area agreements, so they pay higher, livable wages. The higher income for local workers supports the local tax base and the general economy. By establishing livable wages for all workers, PLAs attract the best qualified workers to the project and protect local residents from the unscrupulous practices of companies that hire transient workers at substandard wages.

3. *Skills Training*

The training and apprenticeship programs operated by local unions provide the best training in the construction industry without question. As noted above, several recent studies

1.16 ‘Disadvantaged Worker’ means an individual whose primary place of residence is within the Counties of Los Angeles and Orange and who, prior to commencing work on the Project, either (a) has a household income of less than 50% of the AMI” [area median income] “or (b) faces at least one of the following barriers to employment: being homeless; being a custodial single parent; receiving public assistance; lacking a GED or high school diploma; or suffering from chronic unemployment.

demonstrate that union apprenticeship programs attract and graduate far more apprentices, including more minority and female apprentices.³⁰ Bipartisan policy makers uniformly refer to it as the Gold Standard and the envy of the world and US construction industry.

4. Healthcare and Pension

Because PLAs incorporate local area collective bargaining agreements, they also ensure that workers on the project receive adequate health care and pension coverage. These benefits promote a better quality of life for local workers and protect local jurisdictions from having to subsidize such benefits and healthcare costs for workers injured on the construction worksite who do not receive them from their employers.

IV. PLAs ARE MOST COMMONPLACE IN THE PRIVATE SECTOR

As outlined above, PLAs promote quality, safety, timely delivery, and cost-efficiency. These benefits have not been unnoticed by project owners and general contractors in the private sector. In fact, evidence suggests that use of PLAs in the private sector has long and far outpaced the federal public sector more than a hundred-fold.

Indeed, leading Fortune 100 and 500 companies, including Toyota, General Motors, Wal-Mart, Bank of America, CVS, Target, Sunoco, and Disney, have relied on PLAs to ensure the successful performance of large capital construction projects for decades. Consider the following recent examples:

- Amtrak³¹
 - In 2021, Amtrak and the North America’s Building Trades Unions (NABTU) signed a PLA to employ U.S. workers as part of Amtrak’s 15-year expansion strategy to create half a million jobs delivering over \$150 billion in economic benefit to 160 local communities.

- California
 - In one study of 82 PLAs from 1984 to 2001, **72 percent** involved private projects.³²

³⁰ Argyres & Moir, Building Trades Apprentice Training in Massachusetts: An Analysis of Union and Non-Union Programs, 1997-2007, LABOR RESOURCE CENTER (Oct. 2008); see also Bradley & Herzenberg, Construction and Apprenticeship Training In Pennsylvania, KEYSTONE RESEARCH CENTER (2002) (“Union apprenticeship programs have outperformed non-union ones on all critical measures of program success that we have examined: enrollment levels, graduation rates, enrollment and graduation rates for minorities and females, increases in enrollment levels to meet expanding industry needs.”).

³¹ Available at: <https://media.amtrak.com/2021/10/north-americas-building-trades-unions-and-amtrak-sign-workforce-mou/?print=print>.

³² Daniel Rounds, Project Labor Agreements: An Exploratory Study, UCLA INSTITUTE FOR LABOR AND EMPLOYMENT (October 2001).

- LAX Modernization Program (\$1.62 billion)
- Sky River Casino (\$500 million)
- Capitol Annex (\$95 million)
- Oroville Hospital (\$100 million)
- Museum Place (\$450 million)
- 1150 Walsh Ave. Data Center (Ragingwire) (\$125 million)

- Keystone XL Pipeline
 - In 2020, Keystone XL reached a PLA with four labor unions that would create 10,000 high-paying construction jobs.³³

- Massachusetts
 - Renovations to 13 public housing properties serving residents of 4,300 units, Boston, MA; \$66.7 million (2014)

- Minnesota
 - US Bank Stadium (\$1.1 billion)
 - Essentia Vision Northland (\$800 million)

- New York
 - Frontier Field (\$26 million)
 - MCC Building (\$14.1 million)
 - MCC Downtown Campus (\$78 million)
 - MC Crime Lab (\$30 million)
 - MC ESWTP (\$150 million)
 - RSMP Phase 1 (School Mod) (\$325 million)
 - Amtrak Train Station (\$29.8 million)
 - RGRTA Bus Garage (\$50 million)
 - FLCC Geneva Campus (\$15.3 million)
 - Lago Casino, Tyre NY (\$440 million)
 - CoR Midtown Phases 1,2,3 (\$38 million)
 - CoR Inner loop (\$22.5 million)
 - Marina at the Port of Rochester (\$22 million)
 - O'Rourke Bridge (\$74 million)
 - Kendrick Road, Phase II (\$14.8 million)
 - 1390@ Rt 15A (\$30.7 million)
 - F Douglass-\$ B Anthony Bridge (\$41 million)
 - STAMP Infrastructure (\$46 million)

³³ Available at: <https://www.globenewswire.com/news-release/2020/08/05/2073386/0/en/Keystone-XL-Announces-Project-Labor-Agreement-with-Four-U-S-Unions.html>.

- Ohio³⁴
 - Akron Goodyear IRG Project (\$200 million)
 - Cleveland East Flats Development (\$500 million)
 - CoGen 500 mw Oregon Clean Energy Project (\$860 million)
 - Honda of America Marysville Auto Plant upgrade projects (\$210 million)
 - Lordstown Energy Center Project (\$850 million)
 - Promedica Toledo Hospital Replacement Tower Project (\$400 million)
 - PTTGCA-Daelim Ethane Cracker Plant, Belmont Co. (\$9 billion)
 - MetroHealth Transformation Project, Cleveland (\$18 million)
 - Hilton Hotel and Convention Center 2.0, Columbus (\$15 million)
 - Lordstown Ultium EV Cell Plant, Lordstown (\$10 million)
 - Sherwin Williams R&D Facility, Brecksville (\$20 million)
 - Sherwin Williams Headquarters, Cleveland (\$20+ million)
 - Ashtabula Medical Center, Ashtabula (\$18 million)

- Oregon
 - Knight Campus for Accelerated Scientific Impact (\$1 billion).³⁵

- Ørsted³⁶
 - In May 2022, Ørsted and NABTU signed a PLA to employ U.S. workers at offshore wind projects from Maine to Florida.

- Tennessee
 - In 2021, Ford announced the construction of a \$5.6 billion EV plant in Memphis.³⁷

- Virginia
 - Dulles Corridor Metrorail Project, VA, \$5.684 billion (2009-2022)
 - Dominion Energy and the Virginia State Building and Construction Trades Council announced plans to negotiate a PLA to perform the onshore electrical interconnection work for the first stage of the company's Coastal Virginia

³⁴ Available at: <https://www.actohio.org/wp-content/uploads/2021/09/PROJECT-LABOR-AGREEMENTS-IN-OHIO.pdf>.

³⁵ Available at: <https://nwlaborpress.org/2018/02/uos-new-1-billion-knight-science-campus-will-be-built-under-a-pla/>.

³⁶ Available at: <https://www.americanprogress.org/press/statement-caps-mike-williams-praises-project-labor-agreement-for-offshore-wind-energy/>.

³⁷ Available at: <https://www.tn.gov/governor/news/2021/9/27/memphis-regional-megasite-lands--5-6-billion-investment-from-ford-motor-company-and-sk-innovation.html>.

Offshore Wind commercial project, the largest announced offshore wind project in the Western Hemisphere, located 27 miles off the Virginia Beach coast.³⁸

- Washington
 - Climate Pledge Arena was constructed pursuant to a PLA worth \$1.15 billion, including side projects worth \$80 million.³⁹
 - Sea-Tac Airport (\$500 million).⁴⁰
 - Lumen Field (\$300 Million).
 - T-Mobile Park (\$517 million).

- Wisconsin
 - In 2022, Michels Pipeline Inc. and Enbridge Inc. announced the signing of a PLA for the pipeline relocation that will cost \$46 million and create 700 high-paying construction jobs.⁴¹
 - In 2022, Blattner Energy announced a PLA with two unions to build a 200+ megawatt (MW) Paris Solar Farm.⁴²

V. THE CRITIQUES OF PLAS ARE MISPLACED

A. PLAS ARE NOT “UNION-ONLY” AGREEMENTS.

Opponents of PLAs knowingly and falsely persist in mischaracterizing them as “union-only” agreements. This is widely understood inside and outside of the contracting sector as simply untrue on every level of analysis. Section 4(b) of EO 14063 expressly provides that any PLA “allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts *without regard to whether they are otherwise parties to collective bargaining agreements.*” Thus, *both union and nonunion contractors are free to bid on PLA project work and every serious contractor knows it very well.*

It is true that contractors subject to the PLA typically utilize a local and legal workforce via a union hiring hall for a portion of their project workforce. Critically, though, the hiring hall process **cannot** discriminate against a nonunion worker. The hiring hall process also has the

³⁸ Available at: <https://news.dominionenergy.com/virginia-renewable-energy-partnership>.

³⁹ Available at: <https://www.seattle.gov/Documents/Departments/FAS/PurchasingAndContracting/Labor/FAS-PC-Climate-Pledge-Arena-Final-Report.pdf>.

⁴⁰ Available at: [Seattle-Tacoma International Airport Concourse C Expansion, USA \(airport-technology.com\)](https://www.seattle-tacoma.com/airport-concourse-c-expansion).

⁴¹ Available at: <https://www.enbridge.com/media-center/media-statements/union-project-labor-agreement-signed-for-enbridge-line-5-wisconsin>.

⁴² Available at: <https://www.wisbusiness.com/2022/liuna-local-113-and-ibew-local-127-announce-project-labor-agreement-with-blattner-energy-for-the-200-megawatt-mw-paris-solar-farm/>.

benefit of worker security background reviews, which is an important government project priority for all federal government projects, especially defense and homeland security facilities where every worker's background is essential to check and verify.

B. PLAS NEITHER EXCLUDE NONUNION WORKERS NOR REQUIRE UNION MEMBERSHIP.

Workers who are not union members **are not** excluded by PLAs. Indeed, they could not be excluded. Sections 8(a)(3) and 8(b)(2) of the NLRA prohibit employers and unions from discriminating against employees based on their membership or non-membership in the union.

Also, as noted above, a union operating an exclusive referral system under a PLA owes the same legal obligations to all employees seeking work through the hiring hall, regardless of their union membership.⁴³ In short, the fact that a construction project is being performed under a PLA has no bearing on the legal right of non-union workers to work on that project.

PLA opponents also claim that union-security clauses in project labor agreements require union membership. **That is wrong as a matter of law.** The law is clear union membership cannot be compelled and every employee covered by a union-security clause has the option of paying an agency fee to the union, which supports the collective bargaining services rendered by the union in lieu of actual membership.

A related claim is that these agreements allow unions to bypass the right of employees to select their union under the NLRA. That is also untrue, and that assertion simply flies in the face of Section 8(f) which, as noted above, expressly authorizes pre-hire agreements in the construction industry.

C. PLAS DO NOT RAISE COSTS OR DISCOURAGE BIDDING.

PLAs **do not** increase construction costs. To the contrary, PLAs are an instrument designed and implemented by corporate and public owners and developers to predict and **control** labor costs. Recent data confirms this fact. For example, a 2017 study by the UC Berkley Labor Center examined 263 California community college projects built between 2007 and 2016, 88 of which were PLA projects. The study concluded that "PLAs did not decrease the number of bidders, nor did PLAs raise prices relative to the engineer's estimates."⁴⁴

A 2015 analysis by economists at the University of Utah compared nine PLA affordable housing projects with 121 affordable housing projects built without PLAs. The authors

⁴³ Breininger v. Sheetmetal Workers Local 6, 493 U.S. 67 (1989).

⁴⁴ Peter Philips & Emma Waitzman, Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California, UC Berkley Labor Center (2017), available at <https://laborcenter.berkeley.edu/project-labor-agreements-and-bidding-outcomes/>.

concluded that “the nine PLA affordable housing projects **were not more expensive** to build than comparable projects not governed by project labor agreements.”⁴⁵

A 2011 study by Cornell University examined a \$5.3 billion project in New York City. The project included four PLAs and the city commissioned 15 independent studies to identify potential cost savings. According to the report: “*All of the studies reached the same conclusion: the PLAs would produce substantial direct and indirect cost savings for the City, provide job stability, and promote productivity and greater efficiency.*”⁴⁶ Contrary to the claims of PLA opponents, the study also found that public-sector PLA bidding is “open and fair and cannot discriminate against nonunion contractors” because only the public interest is protected when securing “the best work for the money.” Stated differently, the PLA process includes a competitive bidding process that eliminates the risk of increased costs while also allowing laborers to come from a pool of both union and nonunion workers.

In fact, the studies that are frequently cited by PLA critics have been found to be “*flawed*” or based on “*poor methodology or predetermined conclusions.*”⁴⁷

VI. THE PROPOSED RULE SHOULD BE CLARIFIED

A. CLARIFY SECTION 22.504(d)(1)(iii).

Section 22.504(d)(1)(iii) provides an exception to the PLA requirement if “[r]equiring a project labor agreement on the project would otherwise be inconsistent with statutes, regulations, Executive orders, or Presidential memoranda.”

Courts have uniformly held that PLAs are not inconsistent with state law, including state right-to-work laws and competitive bidding laws.⁴⁸ Nevertheless, because several states and municipalities have passed laws purporting to prohibit PLAs, Section 22.504(d)(1)(iii) should be updated to make clear that the exception is limited to conflicting *federal* laws: “[r]equiring a

⁴⁵ Peter Philips & Scott Littlehale, Did PLAs on LA Affordable Housing Projects Raise Construction Costs, University of Utah (2015), available at https://economics.utah.edu/research/publications/2015_03.pdf.

⁴⁶ Fred B. Kotler, Project Labor Agreements in New York State II: In the Public Interest and of Proven Value, Cornell University ILR School (2011), available at https://ecommons.cornell.edu/bitstream/handle/1813/74333/LaborAgreementsinNYS_II.pdf?sequence=1&isAllowed=y.

⁴⁷ Belman, Bodah & Philips, Project Labor Agreements, ELECTRI INTERNATIONAL (2007).

⁴⁸ Master Builders of Iowa, Inc. v. Polk County, 653 N.W.2d 382, 391-92 (Iowa 2002); San Francisco Airports Comm’n, 981 P.2d 499 (Cal. 1999); John T. Callahan & Sons, Inc. v. City of Malden, 713 N.E.2d 955, 961-62 (Mass. 1999); Assoc. Builders & Contractors of Rhode Island, Inc. v. Department of Admin., 787 A.2d 1179, 1189-90 (R.I. 2002); New York State Chapter, Inc. v. New York State Thruway Authority 666 N.E.2d 185, 192 (N.Y.,1996) (approving PLA for the Tappan Zee project as consistent with state competitive bidding laws).

project labor agreement on the project would otherwise be inconsistent with federal statutes, regulations, Executive orders, or Presidential memoranda.”

B. THE EXCEPTIONS IN PARAGRAPH (d)(1)(i) and (d)(1)(ii) SHOULD BE NARROWLY CONSTRUED.

Given the numerous advantages of PLAs, which are outlined in detail above, any exceptions to their use should be very narrowly construed.

Section 5 of EO 14063 lists several exceptions an agency may grant to using a PLA as intended and directed. Any announced exception must be accompanied by “a specific written explanation of why at least one of the following circumstances exists with respect to that contract[.]” One exception is that the use of a PLA would not advance the government’s interest in achieving economy and efficiency in federal procurement. A finding supporting such an exception 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 [by the FAR Council].”

The second exception is if the contracting agency determines that “[b]ased 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.” Section 22.504(d)(ii) provides that the market research exception (in paragraph (d)(1)(ii)) requires contracting officers to “consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the requirement for a project labor agreement (e.g., costs of labor or materials, supply chain costs). Agencies may rely on price analysis conducted on recent competitive proposals for construction projects of a similar size and scope.”

To ensure that “large scale construction projects” reap the benefits of PLAs, the FAR Council should include regulatory text specifying that the exemptions in paragraph (d)(1)(i) and (d)(1)(ii) should be “**narrowly construed**” and any “written explanation” documenting an exception should be based on “**substantial evidence**.” For example, consider the following amendment to Section 22.504(d)(1): “The senior procurement executive may grant an exception from the requirements at 22.503(b), only if the senior procurement executive finds substantial evidence that one of the following conditions exists with respect to the particular contract and the senior procurement executive provides a detailed written analysis in support of such a finding: . . .”

This amendment ensures that a procurement executive cannot simply “check a box” to avoid the PLA presumption set forth in Section 3 of EO 14063. Such an interpretation **would**

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October 18, 2022

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not be sufficient to meet the “specific written explanation” required by in Section 5. Instead, the language would ensure that procurement officers conduct a comprehensive review of the enumerated factors and provide a sufficiently detailed written explanation of their findings to ensure that the intent of EO 14063 is effectuated – that is, taking advantage of the numerous benefits of PLAs on public works projects.

VII. CONCLUSION

SMACNA enthusiastically supports EO 14063 and the proposed rule, “*Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects*,” 87 Fed. Reg. 51044 (Aug. 19, 2022).

PLAs have been used extensively for many decades, in the public and private sectors, to the benefit of owners, contractors and the public. PLAs provide management structure and stability to large-scale construction projects, they avoid labor-related disruptions on projects; they secure the commitment of a skilled labor force in short supply and serve all stakeholders on a construction site to guarantee that the project will proceed efficiently without unnecessary interruptions; and they advance the interests of project owners, contractors, and subcontractors, including small businesses and the taxpayer.

For these reasons, owners, and contractors in both the public and private sectors routinely prefer to use PLAs in large-scale construction projects. EO 14063, “*Executive Order on Use of Project Labor Agreements for Federal Construction Projects*,” and the proposed rule, “*Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects*,” 87 Fed. Reg. 51044 (Aug. 19, 2022) advance these same interests by requiring PLAs on large-scale construction projects with narrow exceptions. Accordingly, the proposed rule should be adopted with only the minor clarifications outlined above.

Sincerely,



Aaron Hilger
Chief Executive Officer

cc: Martin J. Walsh, Secretary
U.S. Department of Labor