



**Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) in Support of the Use of Project Labor Agreements for Federal Construction Projects**

**FAR Case 2022-003**

The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) submit these comments in response to proposed amendments to the Federal Acquisition Regulation (FAR) to implement Executive Order 14063, *Use of Project Labor Agreements for Federal Construction Projects*, issued on February 4, 2022, by the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) (referred to as the “FAR agencies”).<sup>1</sup> SMART has approximately 203,000 members in diverse occupations, with more than 136,000 members employed in the sheet metal trade. SMACNA is a national employer association representing 3,500 contributing unionized sheet metal contractors.

SMART and SMACNA strongly support President Biden’s historic Executive Order mandating the use of PLAs on “large-scale” federal construction projects. Mandatory use of PLAs on large-scale construction projects is a key element in the Biden administration’s multi-pronged approach to ensuring Federal construction is conducted economically and efficiently, while also increasing the supply of highly-skilled workers who are qualified to improve the nation’s infrastructure, creating good-paying jobs that support a middle class standard of living, and achieving net-zero emissions by 2050. The administration has instituted an unprecedented coordination of federal resources to upgrade the Nation’s crumbling infrastructure, “ensure a steady supply of labor on contracts” on federal construction projects,<sup>2</sup> and “create and sustain jobs, including well-paying union jobs; support a just transition to a more sustainable economy for

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<sup>1</sup> NPRM, *Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects*, 87 Fed.Reg. 51044 (Aug.19, 2022). The “FAR agencies” is a reference to Federal Acquisition Regulatory Council.

<sup>2</sup> PLA Executive Order, section 1(a).

American workers; strengthen America’s communities; protect public health; and advance environmental justice.”<sup>3</sup> In so doing, the President has called upon the entire Executive branch to fulfill an assigned role in this mission. In issuing these proposed rules to implement President Biden’s Executive Order, the FAR agencies are acting in furtherance of the federal government’s proprietary role in procuring federal construction.<sup>4</sup> The FAR agencies’ interpretation of the Executive Order in this rulemaking must be consistent with the Biden administration’s clear mandate that it is the “policy of the Federal Government for agencies to use project labor agreements.”<sup>5</sup>

Large-scale projects pose “special challenges to efficient and timely procurement” by the federal government, and PLAs provide the “structure and stability needed to reduce uncertainties for all parties connected” to them.<sup>6</sup> PLAs provide a steady supply of highly-qualified journeymen and apprentices working under their guidance; an important source of on-the-job learning opportunities for apprentices to further increase the supply of workers; labor-management stability; improved efficiency and certainty in federal procurement of construction; and greater national security on nuclear sites and other locations that are critical to national defense. These comments incorporate by reference the comments of the North America’s Building Trades Unions (NABTU), including, but not limited to NABTU’s comments on: the role and value of PLAs in the construction industry; the misuse of “market surveys” to thwart the use of PLAs during the

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<sup>3</sup> Executive Order 14057 (Dec. 8, 2021), “Catalyzing Clean Energy Industries and Jobs through Federal Sustainability.”

<sup>4</sup> See *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island*, 507 U.S. 218 (1993), and *BCTD v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2002), which states that the “Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity.”

<sup>5</sup> PLA Executive Order, section 1(c).

<sup>6</sup> 87 *Fed.Reg.* at 51045.

Obama administration; support for use of terms, such “modernization,” in the proposed definition of construction, that clarify the scope of work subsumed within “construction”;<sup>7</sup> the reliance by opponents of PLAs on research with “methodological shortcomings”; the value of registered apprenticeship programs in the construction industry; the need for elimination of the option that PLAs may be submitted “after contract award, by the successful offeror”;<sup>8</sup> and the importance of establishing minimum standards for the senior procurement officer’s “written explanation” for an exception from the PLA requirements.

### **I. PLAs PROVIDE A RELIABLE STREAM OF HIGHLY SKILLED WORKERS WHO ARE TRAINED TO RECOGNIZE AND AVERT SAFETY RISKS AND HAZARDS**

PLAs provide a mechanism for quickly and consistently staffing the job with the most highly-trained, qualified employees from all the trades, to ensure on-time and on-budget construction. All employers working on projects with PLAs benefit from having access to the unions’ “hiring hall[s] that match[] employers with needs and jobseekers with specific skills.”<sup>9</sup> This includes access to apprentices trained through a network of registered apprenticeship programs. A common feature of PLAs is a standardized system for utilizing apprentices across the trades. Most PLAs allow contractors to employ a specified ratio of apprentices to trained

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<sup>7</sup> The federal government’s repairs and alterations (R&A) work involves modernizing buildings that have exceeded their life expectancies. For instance, through its Public Service Buildings program, the GSA undertakes construction of “new buildings, repairs, renovations, modernizations, and alterations.” See GSA’s PBS-P100, *Facilities Standards for the Public Service Buildings* (July 2018). [https://www.gsa.gov/cdnstatic/2018%20P100%20Final%205-7-19\\_0.pdf](https://www.gsa.gov/cdnstatic/2018%20P100%20Final%205-7-19_0.pdf)

<sup>8</sup> See U.S. Department of Labor (2011). *Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation*. U.S. Department of Labor; Hill International, at 6, which recommends: “Negotiate the PLA prior to the bid process, and include PLA terms in the documents so that all potential bidders are aware of labor costs and availability.” This report is referred to herein as the “Hill Report” and is found at the U.S. DOL’s Project Labor Agreement Resource Guide, <https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide>. See footnote 13.

<sup>9</sup> Maria Figueroa & Jeff Grabelsky (2010). *The Socio-Economic Impacts of Construction Unionization in Massachusetts*, Cornell University School of Industrial and Labor Relations, at 17. <https://faircontracting.org/wp-content/uploads/2022/04/the-socio-economic-impacts-of-construction-unionization-the-socio-economic-impacts.pdf>

journeypersons on the project. This yields a triple benefit: reducing labor costs for the contractors, by permitting them to employ apprentices at a lower wage rate; improving safety, and thereby, reducing costly accidents; and creating training opportunities, which can lead to long-term careers. Over time, the use of PLAs increases the supply of journeypersons in the areas in which covered projects are located as apprentices graduate from registered apprenticeship programs.

Programs registered with the U.S. Department of Labor or state apprenticeship programs are the gold standard; as stated by the DOL, a “structured OJL [on-the-job learning] model is a hallmark of a high-quality apprenticeship program.”<sup>10</sup> These programs deliver quality skill and safety training, and thereby, increase the Nation’s supply of skilled construction workers available to work on private and public projects.<sup>11</sup> According to the DOL, registered programs “require several safety protections designed to both teach apprentices how to work safely within their occupation and create safe workplaces for apprentices” and “protect the safety of apprentices in each RAP by being tailored to the specific conditions in which those apprentices will be working and learning.”<sup>12</sup> Armed with this training, journeypersons have the ability to “recognize and avert risks,” which is essential to fostering workplace safety.<sup>13</sup> Apprentices benefit from the judgment

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<sup>10</sup> Final Rule, Apprenticeship Programs, Labor Standards for Registration, 87 *Fed.Reg.* 58269, 58275 (Sept. 26, 2022) (In rescinding the Industry-Recognized Apprenticeship Program (IRAP) rule, the DOL stated that the “IRAP model does not adequately ensure high-quality training or apprentice safety and welfare.”) *See also*, Notice of Proposed Rulemaking, Apprenticeship Programs, Labor Standards for Registration, 86 *Fed.Reg.* 62966 (Nov. 15, 2021).

<sup>11</sup> Sally Klingel & David B. Lipsky, “Joint Labor-Management Training Programs for Healthcare Worker Advancement and Retention.” Cornell University ILR School, *Research Studies and Reports*, 2010. (Construction JATCs are a joint “response to a seasonal and mobile labor market.”)

<sup>12</sup> Final Rule (IRAP rescission), at 58277.

<sup>13</sup> In a 2018 Final Rule, *Cranes and Derricks in Construction: Operator Qualification*, 83 *Fed.Reg.* 56198 (Nov. 9, 2018), OSHA emphasized the importance of the ability to “recognize and avert risk” in modifying its proposed rule to incorporate this language. The standard states, in pertinent part, that the employer provide sufficient training to ensure that the crane operator has the ability to “recognize and avert risk necessary to operate the equipment safely for assigned work.” 29 C.F.R. § 1926.1427(a). The standard further states that an employer must undertake an evaluation of the operator’s “skills and knowledge, as well as the ability to recognize and avert risk” (§1926.1427(f)) and that “[o]nce the evaluation is completed successfully, the employer may allow the operator to operate other equipment that the employer can demonstrate does not require substantially different skills, knowledge, or ability to recognize and avert risk to operate.” §1926.1427(f)(5).

and leadership of journeypersons in the crews to which they are assigned, which enables them to progressively develop proficiency.<sup>14</sup>

### **A. Sheet Metal JATCs are Examples of Registered Apprenticeship Programs that Train Apprentices to Work Safely and Productively**

The 148 Joint Apprenticeship and Training Committees (“JATCs”) jointly trusted by SMART and SMACNA are good examples of the kinds of registered apprenticeship programs to which contractors operating under PLAs have access. The vast majority of these JATCs were established in the early 1900s. Our JATCs have a proven track record sustained over more than 100 years of preparing sheet metal workers to meet the demands of a changing economy. These registered apprenticeship programs prepare workers to meet all challenges faced on job sites, regardless of the complexity of the jobs, by providing training that replicates on-the-job experiences before apprentices are referred to a construction site.

Training itself is critically important to ensure worker safety in construction, “where challenges and the work environment can change rapidly,” and “trainer competency and workplace requirements for training are equally significant in assuring worker safety and providing a positive safety culture.”<sup>15</sup> Quality apprenticeship programs greatly improve worker safety and productivity.<sup>16</sup>

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<sup>14</sup> See Luz S. Marin & Cora Roelofs. “Promoting Construction Supervisors’ Safety-Efficacy to Improve Safety Climate: Training Intervention Trial.” *J. Constr. Eng. Management*, at 1 (published on-line on April 10, 2017): “Safety leadership is necessary to confront” the “inherent challenges in achieving safe worksites, including highly variable, risky, and changing worksites; short-term job and employment contracts” and to “achieve safer sites despite inherent risks.” The authors further state that “safety leadership has been identified as the key factor in determining the presence or absence of safety on construction sites.” <https://ascelibrary.org/doi/epdf/10.1061/%28ASCE%29CO.1943-7862.0001330>

<sup>15</sup> Miller, Henry, et al., “An Analysis of Safety Culture & Safety Training: Comparing the Impact of Union, Non-Union, and Right to Work Construction Venues,” 5 *OnLine Journal for Workforce Education and Development* 2 (Fall 2013), available at <https://pdfs.semanticscholar.org/b9df/f8c4f85ebbf6d0cf298ba2f03625f3e0c3d7.pdf>.

<sup>16</sup> Keith Wrightson (former Worker Safety and Health Advocate for Public Citizen’s Congress Watch division), *The Price of Inaction: A Comprehensive Look at the Costs of Injuries and Fatalities in Maryland’s Construction Industry*, 2012, which addresses the connection between safety and increased productivity in advocating for safety and health prequalification. <https://www.citizen.org/wp-content/uploads/migration/price-of-inaction-maryland-worker-safety-report.pdf> See also Peter Philips & Norman Waitzman. *Contactors Safety Prequalification*, Working Paper No: 2013-07, March 2013.

Competent safety and health professionals recognize that, to ensure that young workers have the ability to meet the hazards and risks in the work environment, safety training given at the start of employment is critical. Studies have found higher risk for work-related injuries in the first months of a new job.<sup>17</sup> JATCs in the sheet metal industry have made mandatory safety training an essential part of their curricula. Early in apprenticeship, SMART JATCs provide OSHA-30, which provides them with a greater depth and variety of training than OSHA-10. The JATCs exercise their best professional judgment in determining the optimal timing for safety training, but all provide OSHA-10 training **at a minimum** before assigning an apprentice to on-the-job training. Local 2's JATC in Kansas City, Missouri, for example, provides OSHA-30 training to apprentices during orientation. The St. Louis JATC and the JATC serving Maryland, Virginia, and the District of Columbia include OSHA-30 in the first class taken by apprentices following orientation.<sup>18</sup> Local 24's JATC in Ohio provides OSHA-10 within first 15 days of apprenticeship and follows up with OSHA-30 within the first year.

Well-trained instructors in SMART JATCs make sure that they engage the attention of the apprentices by using interactive exercises, modeling correct use of personal protective equipment (PPEs), using hands-on techniques/demonstrations, and sharing their own experiences on worksites and/or inviting other journeypersons or more experienced apprentices to speak at the safety training. These instructors understand that the method of delivery of training – passive or active techniques – impacts its effectiveness.<sup>19</sup> Research shows that the “most engaging” methods

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<sup>17</sup> Vicki Kaskutas, Anne Marie Dale, Hester Lipscomb, John Gaal, Mark Fuchs, & Bradley Evanoff, “Fall Prevention Among Apprentice Carpenters.” *Scandinavian Journal of Work, Environment & Health* (2010), 258-6. (In residential carpentry, “the strongest single risk factor predicting falls was having less than one year of experience,” which means an apprentice worker.)

<sup>18</sup> SMART Local 2's collective bargaining agreement requires that all members receive OSHA-30 training: “Sheet metal workers shall complete OSHA 30 training, as well as any refresher course, as a condition of employment in the in the sheet metal industry.”

<sup>19</sup> OSHA interpretation letters describe the value of hands-on delivery of training in the context of hazardous training. According to an Aug. 16, 2004 letter written by the Director Directorate of Enforcement Programs, for example, the “use of computer-based

of safety and health training “emphasize principles of behavioral modeling,” which involves “observation of a role model, modeling or practice, and feedback. These methods also include hands-on demonstrations.”<sup>20</sup> Another study shows that high safety engagement training has a “greater beneficial effect” than lower engagement training.<sup>21</sup> Construction workers “consistently” prefer “participatory teaching methods over traditional classroom instruction,” *i.e.*, “hands-on” and “reality-based” training.<sup>22</sup>

### **B. Small Employers Who Work on Projects with PLAs Greatly Benefit from Access to Highly Trained Workers**

Registered apprenticeship programs serve an important safety role by offering quality training to the employees of small contractors who would otherwise be unable to afford it.<sup>23</sup> A 2016 Department of Commerce report states it is “difficult for individual small employers to keep up with new developments in technology” and that “joint training centers have staff that ensure

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training by itself would not be sufficient to meet the intent of most of OSHA’s training requirements, in particular those of HAZWOPER.” This letter interpreted 29 CFR § 1910.120(e)(3)(i), which requires that “[g]eneral site workers (such as equipment operators, general laborers and supervisory personnel) engaged in hazardous substance removal or other activities which expose or potentially expose workers to hazardous substances and health hazards shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the direct supervision of a trained, experienced supervisor.” <https://www.osha.gov/laws-regs/standardinterpretations/2004-08-16-0>

<sup>20</sup> Michael J. Burke, Sue Ann Sarpy, Kristin Smith-Crowe, Suzanne Chan-Serafin, et al., “Relative Effectiveness of Worker Safety and Health Training.” *American Journal of Public Health* (2006), 96(2):315-324.

<sup>21</sup> Lynda Robson, Carol M. Stephenson, Paul A. Schulte, Benjamin C. Amick III, et al., “A Systematic Review of the Effectiveness of Occupational Health and Safety Training.” *Scandinavian Journal of Work Environmental Health* (2012), 386(3):193-208.

<sup>22</sup> Vicki Kaskutas, Ann Marie Dale, Hester Lipscomb, John Gaal, Mark Fuchs, & Bradley Evanoff, “Changes in Fall Prevention Training for Apprentice Carpenters Based on a Comprehensive Needs Assessment.” *Journal of Safety Research* (2010), 221-7

<sup>23</sup> In the union and non-union sector, the dollar value of contributions of small employers to safety training conducted by a registered apprenticeship program is far lower than the amount spent by medium-sized and large employers. In the union sector, since each contractor contributes to a registered program an amount based on the number of hours of work performed by each employee, total contributions of small employers constitute relatively small percentage. In the non-union sector, registered apprentices account for a minor percentage of trainees available to work on projects regardless of employer size. Robert Bruno & Frank Manzo IV (Jan. 6, 2020). *The Apprenticeship Alternative/Enrollment, Completion Rates, and Earnings in Registered Apprenticeship Programs in Illinois*, at 3. <https://faircontracting.org/wp-content/uploads/2020/01/ilepi-pmcr-the-apprenticeship-alternative-final.pdf> In California, JATCs train 92% of apprentices in the state. Dan Calamuci (2020). *Training the Golden State: An Analysis of California Apprenticeship Programs. Smart Cities Prevail.* <https://faircontracting.org/wp-content/uploads/2021/01/Training-the-Golden-State.pdf>



that new skills are incorporated into apprentice training and continuing education.”<sup>24</sup> Employers of all sizes employed on projects with PLAs – both union and non-union - benefit from having access to the unions’ referral systems, designed to matches employers to jobseekers possessing the requisite with specific skills.<sup>25</sup> By providing equal, non-discriminatory access to trained workers, PLAs increase workplace safety for all workers on a job site.

The high costs of training may be an explanation for the disproportionate percentage of accidents, including fatalities, that occur on small employer jobsites in the construction industry.<sup>26</sup> A recent report, *Preventing Fatalities in the Construction Industry*,<sup>27</sup> commissioned by the Associated General Contractors of America finds that 47% of fatalities on construction sites occur at small construction establishments (ten or less) even though they employ only 25% of construction workers.<sup>28</sup> Another study reports that small employers (less than 20 employees) account for 37.5% of employment, are responsible for 57% of all fatalities.<sup>29</sup> These employers lag

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<sup>24</sup> The U.S. Department of Commerce partnered with Case Western Reserve University in producing this study. Susan Helper, Ryan Noonan, Jessica R. Nicholson, and David Langdon (2016), *The Benefits and Costs of Apprenticeship: A Business Perspective*, at 15. <https://files.eric.ed.gov/fulltext/ED572260.pdf>

<sup>25</sup> Maria Figueroa and Jeff Grabelsky, at 17.

<sup>26</sup> Marin & Roelofs (2017) report at page 1 that “Construction safety experts have also noted that small firms experience less safety standards enforcement. Their workforce also differs from larger firms; employees are less likely to be well-trained, speak fluent English, or be employed directly by the firm.”

<sup>27</sup> This study was conducted by the Myers-Lawson School of Construction at Virginia Polytechnic Institute and State University. [https://www.agc.org/sites/default/files/Files/Safety%20%26%20Health/AGC-VT%20Fatality%20Report%20%5BFinal%5D\\_0.pdf](https://www.agc.org/sites/default/files/Files/Safety%20%26%20Health/AGC-VT%20Fatality%20Report%20%5BFinal%5D_0.pdf)

<sup>28</sup> According to data from the 2012 Economic Census, roughly 80% of construction establishments are small. *Id.* at 18, *citing* U.S. Census Bureau data. The Small Business Administration notes that the construction industry in particular is comprised of a large number of small businesses – with more than an 86% of construction firms considered small businesses. *See* Small Business Admin., Office of Advocacy, *The Small Business Economy: A Report to The President*, (2009). <https://www.govinfo.gov/content/pkg/CRPT-115hrpt1068/html/CRPT-115hrpt1068.htm>

<sup>29</sup> Knut Ringen, Xiuwen Sue Dong, Linda M. Goldenhar & Christine T. Cain, “Construction Safety and Health in the USA: Lessons from a Decade of Turmoil.” *Annals of Work Exposures and Health* (2018), Vol. 62, No. S1, S25–S33.

far behind in adopting essential elements of good safety cultures and management practices.<sup>30</sup> OSHA records demonstrate that preventable fatalities are often caused by a failure to train.<sup>31</sup>

### **C. An Appropriate Ratio of Apprentices to Journeypersons Specified in PLAs Further Protects Inexperienced Workers from Injury**

Most PLAs permit contractors to employ a specified ratio of apprentices to trained journeypersons on the project. The importance of appropriate ratios to worker safety is recognized in academic research and in federal<sup>32</sup> and state apprenticeship standards. There is a substantial body of research that focuses on reduction of injury rates among apprentices in many different trades.<sup>33</sup> The data from research on the benefits of appropriate ratios is clear: “for every 10 percent increase in the percentage of apprentices to journeypersons on the jobsite [in carpentry] there was a 27 percent increase in ladder falls.”<sup>34</sup> Experienced workers serve as role models to apprentices for use of PPE at jobsites that prevent falls from scaffolds and ladders, exposure to respiratory contaminants, hearing loss, and other hazards and for safe execution of assigned tasks.<sup>35</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> Benita Mehta (June 1, 2016). *Failure to Train: a Common Violation*. <https://www.ishn.com/articles/104093-failure-to-train-a-common-violation>

<sup>32</sup> See 29 C.F.R. § 29.5(b)(7): “A numeric ratio of apprentices to journeyworkers consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language must be specific and clearly described as to its application to the job site, workforce, department or plant.”

<sup>33</sup> See Laurel D. Kincl, Dan Anton, Jennifer A. Hess, & Douglas L. Week, “Safety Voice for Ergonomics (SAVE) Project: Protocol for a Workplace Cluster Randomized Controlled Trial to Reduce Musculoskeletal Disorders in Masonry Apprentice.” *BMC Public Health* (2016),16:362; Hester J. Lipscomb, James Nolan & Dennis Patterson, “Continued Progress in the Prevention of Nail Gun Injuries among Apprentice Carpenters: What will it Take to See Wider Spread Injury Reductions?” *Journal of Safety Research* (2010), 41, 241–245 (Between 2005 and 2008, reduction in injuries occurred as carpenter apprentices had “early instruction in tool use”); Vicki Kaskutas, et al., “Changes in Fall Prevention Training for Apprentice Carpenters Based on a Comprehensive Needs Assessment.” (By seeking input from learners, a research team developed a fall prevention curriculum that provides new apprentices with basic information needed to protect themselves from fall from heights “early in their training” and additional training later in their apprenticeship); Marcelo M. Soares, Karen Jacobs, & Bradley Evanoff, “Outcomes of a Revised Apprentice Carpenter Fall Prevention Training Curriculum.” *Work* (2012) 41, 3806-3808.

<sup>34</sup> Vicki Kaskutas, et al., “Fall Prevention in Apprentice Carpenters,” at 262.

<sup>35</sup> Natalie V Schwatka, & John C. Rosecrance, “Safety Climate and Safety Behaviors in the Construction Industry: The Importance of Co-workers Commitment to Safety,” Center for Health, Work and Environment, Department of Environmental and Occupational Health, Colorado School of Public Health, University of Colorado Denver, Aurora, *Work* 54 (2016) 401–413.

In a 1970's rulemaking, the Bureau of Apprenticeship and Training [now the Office of Apprenticeship] recognized the importance of appropriate ratios to the safety of apprentices in stating in the preamble to a Final Rule implementing the National Apprenticeship Act of 1937 that “[p]aragraph (b)(7) has been amended to include safety as one of the factors to be weighed by the Bureau of Apprenticeship and Training when it considers the proposed ratio of apprentices to journeymen.”<sup>36</sup> The proposed rule included stated that program standards must include a “numeric ratio of apprentices to journeymen consistent with proper supervision, training, and continuity of employment...” and did not include safety.<sup>37</sup> State-mandated ratios of apprentices to journeypersons also recognizes the value of ratios to apprenticeship safety and often vary in relationship to the relative dangers of the work performed by a craft.<sup>38</sup>

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<sup>36</sup> Final Rule, 42 *Fed.Reg.* 10139 (Feb. 18, 1977). Labor Standards for the Registration of Apprenticeship Programs.

<sup>37</sup> 41 *Fed.Reg.* 46148 (Oct. 19, 1976), Apprenticeship Programs/Proposed Registration Standards.

<sup>38</sup> *See e.g.*, Minn. Stat. § 178.036 Standards of Apprenticeship, for the “purposes of direct supervision and the safety and instruction of the apprentice,” a ratio of apprentices to journeypersons is mandated in the absence of a collective bargaining agreement. As stated by the Minnesota Dept. of Labor and Industry, this requirement “is meant to promote safety and proper instruction of the apprentice.”

<https://www.dli.mn.gov/business/workforce/apprenticeship-ratios#:~:text=Minnesota's%20Apprenticeship%20Ratio%20Policy%20provides,each%20additional%20three%20journeyworkers%20employed.>

## II. PLAs DECREASE THE NUMBER OF “UNKNOWN” ON A PROJECT AND ADDRESS PROJECT-SPECIFIC LOGISTICS

As stated in the NPRM, on large-scale construction projects, it is “difficult for Federal contractors to predict labor costs when bidding on contracts and to ensure that a steady supply of labor exists on the contracts being performed.”<sup>39</sup> By establishing the labor-relations framework for the entire project, these agreements are designed to reduce many of the uncertainties inherent in large-scale construction projects and to harmonize the work schedules of all the contractors and promote the efficient utilization of labor, thereby improving project performance.

PLAs, if broadly used by contracting agencies, can promote greater stability by decreasing the numbers of unknowns. Any sizable construction project – including those with a “total estimated value” of \$35 million – involves a constantly changing stream of contractors and subcontractors responsible for discrete aspects of the job that are functionally integrated with the overall structure under construction. Standardizing the terms and conditions of employment of all workers – such as rates of pay, fringe benefits, a reliable supply of qualified workers, work rules, schedules, holidays, show up pay, and shift differentials – stabilizes employment in a highly fragmented industry and makes labor costs far more predictable. PLAs also facilitate the sequencing work by requiring pre-bid and pre-job conferences, which enable the parties to identify challenges the project will present, and regular worksite labor-management meetings, to anticipate problems, secure cooperation among the contractors and subcontractors operating on the site, and ensure that work progresses smoothly.

Some projects present complicated logistics that might result in increased project costs if such issues are not addressed in PLAs. Two examples are renovation and rehabilitation of schools

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<sup>39</sup> 87 *Fed.Reg.* at 51045.

and highway construction. The New York City School Construction Authority's (NYCSCA) use of a PLA on the renovation and rehabilitation elements of the capital program costing approximately \$4.6 billion in its Five-Year Capital Plan for Fiscal Years 2005-2009 demonstrates the value of PLAs in the former context. According to the Hill Report, since the rehabilitation and renovation work took place after school hours so that students and teachers were no longer at the work site, there would have been "significant additional labor costs in the form of shift differentials. Limiting these costs was an important incentive for the NYCSCA to consider use of a PLA."<sup>40</sup> The PLA identified the first shift as commencing after the school day ends, with a flat shift differential applied to all unions. Regarding highway construction, the 2011 Hill Report states that "a shift differential clause on a highway project might allow work to begin on Sunday night to avoid weekday traffic congestion, but with a defined (and presumably reduced shift differential)."<sup>41</sup>

In addition to addressing the logistics created by project exigencies, PLAs also promote stability by incorporating labor practices that are reflected in local CBAs. A review of local PLAs demonstrates the great variety of topics addressed. "Show-up Pay," which is pay for craft employees who report to work and for whom no work is provided, is commonly addressed in PLAs in California.<sup>42</sup> Those agreements typically provide that, when prior notification not to report to work is lacking, the worker receives a minimum of two hours of pay at the appropriate rate in the applicable wage determination.

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<sup>40</sup> Hill Report, at 23.

<sup>41</sup> *Id.* at 20.

<sup>42</sup> See e.g., Community Workforce Agreement by and between the City of Costa Mesa Los Angeles Building and Construction Trades Council: <http://ftp.costamesaca.gov/costamesaca/council/agenda/2020/2020-07-21/NB-6-Attach-1.pdf>; and City of Long Beach Project Labor Agreement for Phase 1 Improvements to the Terminal Area at the Long Beach Airport: [https://nhlp.org/files/01%20PLA%20re%20Long%20Beach%20Airport%20\(Aug.%203,%202010\).pdf](https://nhlp.org/files/01%20PLA%20re%20Long%20Beach%20Airport%20(Aug.%203,%202010).pdf)

### **III. USE OF PLAs HAS IMPROVED EFFICIENCY AND CERTAINTY, STABILIZED LABOR RELATIONS, AND ENHANCED NATIONAL SECURITY AT DOE AND TVA SITES**

#### **A. PLAs Promote National Security at Nuclear Sites**

The DOE has recognized the value of PLAs in advancing national security for many generations. It has utilized PLAs, dating back to the Manhattan project during World War II, and earlier. Because of the strategic nature of the project and the need to assure a continuous supply of qualified labor in a remote location, the DOE entered into agreements with unions that could assure the labor requirements of the project, including access to a “sufficient supply of skilled, safety trained and security cleared labor.”<sup>43</sup> The DOE determined that use of PLAs was in the interest of national security at sensitive locations, such as Nevada test site, Idaho, and Richland, Washington, where nuclear energy was being produced for national defense purposes. The PLAs were used to ensure a “continuing supply of labor that had security clearance and specialized skills. In certain locations, enclaves were designated to allow payment of higher wages than on non-defense related projects to assure work could continue without labor disruption and projects were on-time and on budget.”<sup>44</sup>

#### **B. PLAs at DOE and TVA Have Stabilized Labor Relations and Achieved Efficiency and Economy**

There is a long history of use of PLAs at DOE’s “key sites,” including Hanford Site in Washington State, the Savannah River Site in South Carolina, the Oak Ridge Reservation in Tennessee, the Nevada Test Site (NTS), and the Idaho National Laboratory, with the PLA at the

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<sup>43</sup> See Hill Report at 3, which states that the DOE exercised its authority under the War Powers Act.

<sup>44</sup> *Id.* at 3.

NTS dating back to 1964.<sup>45</sup> As of the summer of 2009, 21 of 25 DOE construction projects were, or were slated to be, covered by PLAs and challenges to the use of PLAs had been successfully defended.<sup>46</sup> According to current and past DOE representatives, PLAs have “contributed to economy and efficiency” of DOE construction projects, including “completion of projects on time and within budget,” as well as creating labor stability, standardizing terms and conditions of employment, and ensuring “expeditious access to a well-trained, assured supply of skilled labor, even in remote areas where skilled labor would have otherwise been extremely difficult to find in a timely fashion.”<sup>47</sup>

As of 2009, the TVA had used PLAs on its construction projects for nearly 19 years that succeeded in stabilizing labor relations. Indeed, in the nearly 200 million man hours of work on TVA construction projects using PLAs, there had been no formal strikes or any organized work stoppages.<sup>48</sup> The Hill Report noted that TVA personnel were “unable to cite any significant issues or problems resulting from the use of the PLA, and have commented that recent large scale construction projects, such as the Watts Bar Nuclear Plant near Spring City Tennessee and the Browns Ferry Nuclear Plant in Alabama completed in 2007, were on time and on budget.”<sup>49</sup>

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<sup>45</sup> Final Rule, *Use of Project Labor Agreements for Federal Construction Projects*, 75 *Fed.Reg.* 19168, 19169-19170 (Apr. 13, 2010).

<sup>46</sup> *Id.* at 19170, citing *Phoenix Engineering, Inc. v. MK Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1518-22 (6th Cir. 1992).

<sup>47</sup> *Id.*

<sup>48</sup> 75 *Fed.Reg.* at 19170.

<sup>49</sup> Hill Report at 2.

#### **IV. CONSISTENT USE OF PLAs WOULD FACILITATE MUCH NEEDED CERTAINTY AND STABILITY IN THE FEDERAL PROCUREMENT PROCESS**

Studies undertaken by the GAO, Congressional Research Service, the Office of Inspector General of various federal agencies, and other similar entities demonstrate the urgent need for greater certainty and efficiency in the procurement process for construction of new buildings and repairs and alterations (R&A) of deteriorating and unsafe in buildings that are well beyond their expected “life expectancies.” The studies discussed below demonstrate that completion rates on construction of new buildings and R&A of existing building typically are neither on-time nor on-budget and that there are serious deficiencies in building systems. The studies make clear that there are a multitude of variables unrelated to labor that create uncertainty and inefficiency on federal projects.

##### **A. PLAs Create Certainty and Stability on an Important Element of Procurement**

Consistent use of PLAs would serve an important function by eliminating additional potential variables that would otherwise stem from lack of coordination of discrete tasks performed by an ever-changing stream of contractors and subcontractors, and thus, provide greater efficiency and certainty in areas governed by PLAs. While labor costs, including benefits and payroll taxes, are a “relatively small component” of total construction costs, using PLAs creates greater control and certainty over this element.<sup>50</sup> PLAs provide far greater value than providing predictability on labor costs, because they ensure that qualified workers are available when needed,<sup>51</sup> even when the other procurement factors described below cause delays.

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<sup>50</sup> Kevin Duncan, Ph.D., Lameck Onarigo, Alan Atalah (2020). *The Effect of Prevailing Wages on Building Costs, Bid Competition, and Bidder Behaviour: evidence from Ohio School Construction*. <https://faircontracting.org/wp-content/uploads/2022/10/Theeffectofprevailingwagesonbuildingcosts.pdf>

<sup>51</sup> Use of the referral system ensures that qualified workers are available on projects with PLAs. See NABTU’s comments at 4-5 for a discussion of the value of hiring halls.



## **B. Aging Federal Buildings are Often Unsafe and Have Deteriorating Structures and Antiquated Mechanical Systems**

As of 2020, the average age of the more than 1,600 federally owned buildings under the GSA’s custody and control was 49 years old.<sup>52</sup> Each year, GSA spends hundreds of millions of dollars on R&A projects to address their repair, renovation, or modernization needs.<sup>53</sup> According to a 2020 Congressional Research Service report,<sup>54</sup> over the past four decades, GSA has accumulated a multibillion-dollar R&A liability. In 2001, GSA’s unmet R&A needs reached an estimated \$4 billion. At the end of FY2019, the GSA reported that it would need \$3.39 billion for R&A projects needed to bring its inventory up to acceptable condition. As stated in the CRS report:

Older properties are more likely to have structural deterioration, failing building systems, and unsafe working conditions (such as asbestos in the ceiling). With an average age of 49 years, many GSA buildings are already beyond their life expectancies. One study estimated that GSA-owned buildings over the age of 61—about 11% of its portfolio—accounted for 40% of GSA’s annual repair and maintenance costs.

The CRS points to “aging heating and ventilation systems [that] could fail any time,” “antiquated heating and cooling systems,” and “levels of carbon dioxide” in the air that exceed industry standards.<sup>55</sup>

The deficiencies in air quality in GSA-owned and managed facilities are a threat to the health of building occupants.<sup>56</sup> In a March 2022 study, GSA detailed a failure to comply with the

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<sup>52</sup> Garrett Hatch (June 12, 2020). *Repairs and Alterations Backlog at the General Services Administration*. Congressional Research Service. <https://crsreports.congress.gov/product/pdf/R/R46410/2>

<sup>53</sup> U.S. General Accountability Office, GAO-18-595, Real Property: GSA Is Taking Steps to Improve Collection and Reporting of Repair and Alteration Projects’ Information (July 2018).

<sup>54</sup> Congressional Research Service Report at 3.

<sup>55</sup> *Id.* at 12.

<sup>56</sup> U.S. General Services Administration, Office of Inspector General, Office of Inspections, Report No. JE22-001. *Management Alert: Inadequate Ventilation in GSA Headquarters Child Care Center* (Mar. 10, 2022)(“The childcare center does not have functioning ventilation and is not compliant with the code required ASHRAE 62 ventilation requirements. The current condition of the space and lack of ventilation are likely to cause a ‘sick building’, especially with the Covid-19 Pandemic fresh air requirements.”)<https://www.gsaig.gov/sites/default/files/ipa->

American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) standard for ventilation in the Child Care Center at the GSA Headquarters Building in Washington, D.C. that persisted for years even though the GSA’s Public Buildings Service (PBS) was aware of this problem.<sup>57</sup> This situation was particularly dangerous during the pandemic because inadequate ventilation rates increase the prevalence of airborne infectious diseases, such as SARS-CoV-2, the virus that causes COVID-19.<sup>58</sup>

Federal facilities that are managed by agencies other than the GSA are also in poor condition. NASA manages \$40 billion in facility assets with an inventory of more than 5,000 buildings and structures; however, over 75% of this infrastructure is beyond its design life and the Agency faces a deferred maintenance backlog of \$2.66 billion as of 2020.<sup>59</sup> Nearly 30% of Department of Defense facilities have “exceeded their expected lifespans.”<sup>60</sup> For fiscal year 2020, DOD reported deferred maintenance backlogs totaling \$137 billion. Deferred maintenance leads to the premature failure of facility systems and often leads to more costly repairs.

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[reports/Management%20Alert%20Inadequate%20Ventilation%20in%20GSA%20Headquarters%20Child%20Care%20Center%200%28JE22-001%29.pdf](https://www.gsa.gov/asset/reports/Management%20Alert%20Inadequate%20Ventilation%20in%20GSA%20Headquarters%20Child%20Care%20Center%200%28JE22-001%29.pdf)

<sup>57</sup> *Id.* at 6: “Despite their awareness, PBS leadership has allowed the Child Care Center to be used without adequate ventilation to ensure safe occupancy.” See also, “The ventilation system is not supplying fresh air during periods when outdoor temperatures are below 40 [degrees] F, that supply vents in the infant room are essentially covered, and that there are no return vents within any of the Child Care Center spaces.”

<sup>58</sup> *Id.* at 2, citing World Health Organization. (2009). WHO Guidelines for Indoor Air Quality: Dampness and Mould: <https://www.ncbi.nlm.nih.gov/books/NBK143947/>.

<sup>59</sup> Office of Inspector General, Office of Audits, Report No. IG-21-027, *NASA’s Construction of Facilities* (Sept.8, 2021)(“NASA Report”) <https://oig.nasa.gov/docs/IG-21-027.pdf>

<sup>60</sup> U.S. GAO, GAO-22-104481, *Defense Infrastructure/DOD Should Better Manage Risk Posed by Deferred Facility Maintenance* (Jan 31, 2022), at 15. The Report states that there are “challenges and higher costs of sustaining older facilities, including facilities that had exceeded their expected lifespans and were still in use,” and cites the Marine Corps Base Hawaii as an example of a base at which “most of the installation’s sustainment funding goes to maintaining these facilities, especially their aged mechanical and utility systems.”

### **C. Efforts to Redress Deficiencies in Federal Buildings are Impeded by Poor Planning, Cost Over-runs, and Project Delays**

A report of NASA’s Office of Inspector General illustrates the degree to which federal agencies struggle to achieve on-budget and on-time completion of construction projects. To redress its infrastructure problems, NASA instituted “Construction of Facilities (CoF) program,” which focuses on modernizing NASA’s infrastructure by consolidating into fewer, more efficient, sustainable facilities, and repairing failing infrastructure to reduce overall maintenance costs. Of the 20 CoF projects reviewed by NASA’s Office of Inspector General, six incurred significant cost over-runs ranging from \$2.2 million to \$36.6 million (a 28% increase) and 16 of the projects were three months to more than three years behind their initial schedules.<sup>61</sup> Costs increased primarily because “requirements were not fully developed by the Agency before construction began, requirements were not fully understood by contractors, and contract prices were higher than originally estimated.”<sup>62</sup>

Measurement of whether a federal construction project is on-budget and on-time is complicated by the fact that projects typically change as work progresses. Contract modifications may occur for a variety of reasons, including design errors, unforeseen site conditions, funding delays, tenant-caused delays, and site acquisition issues. About 70% of GSA’s 36 “major construction projects” undertaken between 2014 and 2018 involved significant changes that extended the projected completion date and/or increased overall budgets.<sup>63</sup> When the GSA makes contract modifications, known as “rebaseline,” to either the contract cost or planned schedule

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<sup>61</sup> NASA Report, at 20.

<sup>62</sup> *Id.* at 18.

<sup>63</sup> U.S. GAO, GAO-20-144. *Federal Buildings: GSA Can Improve Its Communication about and Assessment of Major Construction Projects* (December 2019). (referred to as “2019 GAO Report”) <https://www.gao.gov/assets/gao-20-144.pdf>

duration or both, the GSA will then use that new value to measure and report on the project's budget and schedule performance. Another complicating factor in determining true on-time and on-budget rates is that the GSA considers a construction project to be on-budget if its actual cost is within the planned construction cost (as measured by the rebaseline amount) and an additional 7 to 10% construction contingency."<sup>64</sup> GSA considers a construction project to be on schedule if its construction duration is within 10% of the planned duration (as measured by the rebaseline duration), from the construction start date to the substantial completion date.<sup>65</sup>

**V. SMART AND SMACNA ENCOURAGE THE FAR AGENCIES TO DEFINE "TOTAL ESTIMATED COSTS" IN THE DEFINITION OF "LARGE-SCALE" CONSTRUCTION TO CLARIFY THE ITEMS INCLUDED THEREIN**

SMART and SMACNA encourage the FAR agencies to define "total estimated cost" as used in section 2(c) of the Executive Order to ensure that all agencies include the same items in determining whether a project is "large-scale." The NPRM defines "large-scale construction project" to mean a "Federal construction project within the United States for which the total estimated cost of the construction contract(s) to the Federal Government is \$35 million or more."<sup>66</sup> Neither the Executive Order nor the proposed rule includes a definition of "total estimated costs" even though the PLA requirement is triggered when such costs are at least \$35 million. To provide greater guidance to contracting agencies and facilitate greater oversight by the FAR agencies, SMART and SMACNA recommend that "total estimated costs" be defined to mean:<sup>67</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Proposed "22.502 Definitions."

<sup>67</sup> A GSA Order defines "estimated total project cost" [ETPC] to include "all construction related costs as well as costs associated with site funding, professional services, management services and any associated move/relocation costs, furniture and IT costs." It defines "estimated cost of construction" to include the "total cost of construction anticipated through the completion of construction

“all estimated costs incurred for completion of the construction project, including, but not be limited to site acquisition, preconstruction environmental work, site preparation, design (including architectural, engineering, and other professional costs), labor costs, construction equipment, construction management, inspection, relocation, and refurbishing.”<sup>68</sup>

**A. Since Existing Federal Definitions of “Total Estimated Costs” are Inconsistent, Contracting Agencies Would Benefit from a Standard Definition for Purposes of Ascertaining Whether the \$35 Million Threshold is Met**

A comparison of items included in the 2019 GAO report cited above with those items included in a DOE directive illustrates the lack of consistency.<sup>69</sup> In undertaking the study of cost over-runs and on-time completion rates on GSA projects, the GAO states that “Our analysis of costs focused on construction costs and did not include other costs such as for planning, design, and construction management and inspection that comprise project’s total cost.”<sup>70</sup> Later in the same report, the GAO states that GSA’s “prospectuses typically identify the building that is the subject of the request and the estimated total project cost that includes costs for site acquisition (if any), design, construction, and management and inspection.”<sup>71</sup> By contrast a 2010 DOE directive

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process and includes the construction contract award amount, construction contingency amount, and reservation amount.” The GSA Order, P-120, *Public Buildings Service Cost and Schedule Management Policy Requirements* (August 4, 2016). The GSA Order also defines “estimated design build contract award amount” and “estimated design build contract award.” [https://www.wbdg.org/FFC/GSA/p1000.6\\_2016.pdf](https://www.wbdg.org/FFC/GSA/p1000.6_2016.pdf) The ETPC on a prospectus for site work, upgrades, and common area improvements” in the Major General Emmett J. Bean Federal Center, for example, includes design and review, estimated construction cost, and management and inspection. [https://www.gsa.gov/cdnstatic/fy11\\_program\\_repair\\_and\\_alteration\\_major\\_general\\_emmett\\_j\\_bean\\_federal\\_center\\_indianapolis\\_in.pdf](https://www.gsa.gov/cdnstatic/fy11_program_repair_and_alteration_major_general_emmett_j_bean_federal_center_indianapolis_in.pdf)

<sup>68</sup> FAR § 31.105(d)(2) defines “construction equipment” as follows: “equipment (including marine equipment) in sound workable condition, either owned or controlled by the contractor or the subcontractor at any tier, or obtained from a commercial rental source, and furnished for use under Government contracts.”

<sup>69</sup> As in the federal sector, the definitions” in state and municipal PLAs provide general guidance but lack detail concerning the specific items included in each category. For example, New Jersey municipal PLAs define “total project costs” as “inclusive of environmental work, demolitions, pre-construction and construction costs.” *See e.g.*, the PLAs of East Orange and City of Montclair. <https://ecode360.com/34440673> and <https://ecode360.com/26966637>.

<sup>70</sup> 2019 GAO report at 7.

<sup>71</sup> 2019 GAO report at 15.

does not include site acquisition. It does, however, include design, construction management, and other items.<sup>72</sup>

Total Estimated Cost. All engineering design costs (after conceptual design), facility construction costs and other costs specifically related to those construction efforts. TEC will include, but is not limited to: project, design and construction management; contract modifications (to include equitable adjustments) resulting in changes to these costs; design; construction; contingency; contractor support directly related to design and construction; and equipment rental and refurbishment.

### **B. Standardization of the Items Included in “Total Estimated Costs” Would Achieve Greater Consistency**

Rather than leaving it to the discretion of individual procurement officers to determine which items should be included in the total estimated costs, the FAR agencies can achieve greater consistency in administration of the PLA requirement by informing contracting agencies of the specific items that must be included. Various definitions of costs in government directives from different agencies support standardization of the process of determining whether the \$35 million threshold is met. Standardization is further supported by the fact that “cost estimating can be difficult” under the “best of circumstances.”<sup>73</sup> A failure to inform contracting agencies of the items included in total estimated costs compounds the challenge of appropriate cost estimating to effectuate the intent of the Executive Order.

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<sup>72</sup> DOE O 413.3B, Program and Project Management for the Acquisition of Capital Assets. <https://www.directives.doe.gov/directives-documents/400-series/0413.3-BOrder-b>

<sup>73</sup> See U.S. GAO, GAO-20-195G. *Cost Estimating and Assessment Guide, Best Practices for Developing and Managing Program Costs* (Mar. 2020), at 9, which states “Even in the best of circumstances, cost estimating can be difficult. The cost estimator typically faces many challenges. These challenges often lead to unreliable estimates—for example, estimates that contain poorly defined assumptions, have no supporting documentation, are accompanied by no comparisons to similar programs, are characterized by inadequate data collection and inappropriate estimating methodologies, are sustained by irrelevant or out-of-date data, provide no basis or rationale for the estimate, or adhere to no defined process for generating the estimate.” <https://www.gao.gov/assets/gao-20-195g.pdf>

### **C. SMART AND SMACNA Support Inclusion of “Construction Contract(s)” in the Definition of “Large-Scale Construction Project” to Prevent Subdivision of Contracts to Avoid Coverage**

SMART and SMACNA support the proposed definition of “large-scale construction project,” which states that it means a “Federal construction project within the United States for which the total estimated cost of the construction contract(s) to the Federal Government is \$35 million or more.” The use of the word “contract(s)” will discourage intentionally segmenting, splitting, dividing or otherwise separating contract awards for the purpose of avoiding the \$35 million threshold. Municipal PLAs include a prohibition against artificially splitting contracts or projects for the purpose of avoiding coverage.<sup>74</sup> Likewise, in the context of a Davis-Bacon Related Act, HUD regulations prohibit “[a]rranging multiple construction contracts within a single project for the purpose of avoiding the wage provisions...”<sup>75</sup>

### **VI. A NARROW INTERPRETATION OF THE EXCEPTIONS IS IMPORTANT TO MAKE CLEAR THAT CONTRACTING AGENCIES ARE EXPECTED TO USE PLAs ABSENT EXCEPTIONAL CIRCUMSTANCES**

Mandatory use of PLAs is a vast departure from the position of prior administrations on use of PLAs. For the first time, President Biden has taken the historic step of requiring the use of PLAs on large-scale construction projects. Accordingly, in recognition of this historic step undertaken by President Biden, SMART and SMACNA encourage the FAR agencies to narrowly

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<sup>74</sup> See e.g., LA Metro Transit, Project Labor Agreement between LACMTA and LAOCBCTC: “Covered Work will not be intentionally segmented, split, divided or otherwise separated for contract award purposes to avoid application of this Agreement.” <https://www.metro.net/about/placcp/#documents> See also Special District Risk Management Authority (Mar.-Apr.2015). “Prevailing Wage Issues for Public Agencies,” which states that “Public agencies must be careful that they do not split the jobs up to avoid the \$1,000 threshold.” <https://www.sdrma.org/wp-content/uploads/2015/05/Managing-Risk-March-April.pdf>

<sup>75</sup> See e.g., 24 CFR 92.354(a)(2), which implements Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §§ 12701 - 12898a. Section 286, 42 U.S.C. § 12836, incorporates Davis-Bacon rates and is enforced at 24 C.F.R. § 92.354(a), requiring that every contract for the construction of housing that includes twelve or more units assisted with HOME funds must use Davis-Bacon wage rates.

interpret the exceptions to give full effect to this unprecedented action. The Executive Order unequivocally states that “it is the policy of the Federal Government for agencies to use project labor agreements in connection with large-scale construction projects to promote economy and efficiency in Federal procurement.”<sup>76</sup> In adopting a regulatory scheme to administer the Executive Order, it is important to clarify that any exceptions to the PLA requirement must be construed in a manner that creates no loopholes through which a contracting agency may thwart the President’s mission. Since the Executive Order uses \$35 million as a threshold for coverage, there is a strong presumption that, absent exceptional circumstances, a PLA will be required on projects of this dollar value.

**A. The FAR Agencies’ Estimate of the Number of Exceptions to the Required Use of PLAs is Inconsistent with the President’s Mandate**

The NPRM’s estimate of the percentage of covered contracts that will be exempt from coverage appears to be based on a misconception of the President’s mandate.<sup>77</sup> Exemption of up to half the covered projects is clearly inconsistent with a requirement that contracting agencies use PLAs. The NPRM further states that it is “possible there may be a higher usage of exceptions in the initial year as industry and the Government work to implement the requirement,”<sup>78</sup> a proposition that ignores the bases on which the Executive Order and proposed rule permit exceptions. SMART and SMACNA urge the FAR agencies to minimize the circumstances under which senior procurement officers use exceptions by issuing clear guidance that a broad use of exceptions is inconsistent with the Executive Order. The selection of \$35 million as a threshold

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<sup>76</sup> PLA Executive Order, section 1(c).

<sup>77</sup> See 87 *Fed.Reg.* at 51046: “Considering the lack of available data on the proposed exceptions, it is estimated that exceptions may be granted for 10 percent to 50 percent of covered contracts; in other words, an estimated 60 to 107 construction contract awards may require PLAs.”

<sup>78</sup> *Id.*



eliminates a significant amount of complex construction work from coverage, as evidenced by the far lower thresholds on state and municipal projects deemed to be complex.

**B. A Narrow Interpretation of All Exceptions in the Executive Order Would Avoid Swallowing the General Rule that Contracting Agencies Must Use PLAs on Large-Scale Projects**

The exception’s text must be read in the context of the purpose of the EO, as gleaned from an examination of the text, as a whole.<sup>79</sup> The breadth of an interpretation of an exception should be informed by the interplay between the exception and the general rule and read narrowly to “preserve the primary operation” of the “general statement of policy.”<sup>80</sup> Based upon these rules of interpretation, the FAR agencies should narrowly construe the exceptions to avoid “swallowing” the general rule,<sup>81</sup> and thereby, “contravene” the “design” of the Executive Order.<sup>82</sup> The text of the Executive Order as a whole demands a narrow reading of the exceptions rather than an interpretation that enables contracting agencies to rely on them up to half the time. The NPRM does not provide examples of construction contracts that would satisfy the exceptions. The absence of examples leaves contracting agencies with no parameters in determining whether an exception is justified.

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<sup>79</sup> See, Congressional Research Service (Aug.18, 2020). *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, at 46, citing *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (reasoning that “‘unduly generous interpretations of the exceptions [in the Federal Tort Claims Act] run the risk of defeating the central purpose of the statute,’ which ‘waives the Government’s immunity from suit in sweeping language’” (internal citations omitted). <https://crsreports.congress.gov/product/pdf/R/R46484/2>

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; See also, CRS report at 43, citing 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:11 (7th ed. 2019) (“A true statutory exception exists only to exempt something which would otherwise be covered by an act.”).

**C. SMART and SMACNA Encourage the FAR Agencies to Provide a Bright-Line Rule Concerning the Maximum Duration of a Project that can Appropriately be Labelled as “Short Duration”**

SMART and SMACNA encourage the FAR agencies to make clear that the two-pronged exception – a project that is “of short duration and lacks operational complexity” – will rarely be justified by providing a bright-line rule that strictly limits its use. The Executive Order makes clear that the President views projects with a value of at least \$35 million as “complex” and long-term in explicitly describing large-scale projects as “generally more complex and of longer duration.” Since there is an expectation that large-scale projects generally possess both qualities, it would be exceptional if a project had neither of these qualities. Additionally, absent gross inefficiencies, projects with a higher value – at least \$35 million – will normally be of greater length than projects with a lesser value.

To ensure an interpretation of the “short-duration” criterion that is consistent with the requirement in the Executive Order that contracting agencies use PLAs on large-scale projects, SMART and SMACNA encourage the FAR agencies to provide a bright-line rule concerning the maximum duration of a project that can appropriately be labelled as “short duration.” We urge the FAR agencies to find that it is inappropriate to characterize a project as short-term if data concerning the completion rates of similar federal projects<sup>83</sup> in terms of construction type (e.g., work on GSA-managed buildings) and competing activities in the vicinity demonstrate that such projects are not generally completed in the calendar year in which the project commences.<sup>84</sup> This

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<sup>83</sup> There are characteristics of federal construction that make comparisons to state, local, and private projects inappropriate. Those factors include delays related to background checks and security clearances, which can add to contractors’ overhead costs and present schedule risks since obtaining a clearance, for example, can be a months-long process. 2019 GAO Report at 10.

<sup>84</sup> See e.g., 26 C.F.R. § 1.460–3(a): the IRS defines “long term construction contracts” as follows: (a) In general. Section 460 generally requires a taxpayer to determine the income from a long-term construction contract using the percentage-of-completion method described in §1.460–4(b) (PCM). A contract not completed in the contracting year is a long-term construction contract if

interpretation would not mean that projects with a duration of less than one year should be characterized as short-term; the ceiling is intended to ensure that the short-duration exception is not misused.

Adoption of an objective interpretation would prevent application of this part of the two-pronged exception based on an individual procurement officer's subjective opinion of what constitutes a short period of time. Additionally, a ceiling on the duration of projects deemed short-term would take into account data demonstrating that "major" projects typically take longer to complete due to exigencies that were not predicted at the time of contract bidding. As discussed above, about 70% of GSA's 36 "major construction projects" undertaken between 2014 and 2018 involved significant changes that extended the projected completion date and/or increased overall budgets. When unexpected hiatuses in construction derail meeting the original completion date or the original completion date is underestimated, so-called short-term projects often become long-term.

A bright-line rule will also take into account that certain types of projects, such as R&A are undertaken while a building is occupied by federal workers and the general public; highway work that requires the diversion of traffic; or construction in dense urban environments, often take longer than anticipated due to competing activities in the same location. The one calendar year maximum would appropriately treat projects of "short duration" as an exceptional circumstance since major projects typically take at least one year and would ensure that this part of the two-pronged exception is not used to avoid the PLA requirement mandated by the Executive Order. The 2019 GAO study states that the project durations for "major" construction ranged between

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it involves the building, construction, reconstruction, or rehabilitation of real property; the installation of an integral component to real property; or the improvement of real property (collectively referred to as construction).

about 12 months and 79 months, with an average of about 43 months.<sup>85</sup> Projects involving R&A to “modernize” existing buildings made up the majority of projects (64%), with an average cost of about \$74.2 million and an average duration of about 47 months. New construction projects accounted for 36%, with an average cost of about \$116 million and an average duration of about 35 months. On average, R&A projects cost about \$42 million less than new construction projects but took about 13 months longer to complete. According to the report, these projects had a minimum cost of \$20 million and a total cost of \$3.2 billion. Project costs ranged between \$21 million and \$343 million, with an average cost of about \$89.3 million.<sup>86</sup>

Finally, regarding the complexity part of the two-pronged exception, there is a strong correlation between complexity and costs of a project since there are many factors that may make costly building construction inherently complex, such as a dense population in the location of the project, which involves “complexity” that is “fluid and rapid, both in a spatial and temporal sense”<sup>87</sup> and conflicting activities that are ongoing at sites, such as military bases, DOE sites, GSA buildings which may be modernized while workers and the general public continue to occupy them, and highways.

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<sup>85</sup> 2019 GAO Report at 7. This page of the report includes a chart that summarizes the typical length of major GSA projects.

<sup>86</sup> *Id.*

<sup>87</sup> John P. Spillane, Michael Flood, Lukumon O. Oyedele, Jason K. von Meding, & Ashwini Konanahalli (2013). *Urban High-Density Construction Sites and their Surrounding Community: Issue Encountered and Strategies Adopted by Contractors*, Proceedings 29th Annual ARCOM Conference, 2013. [https://pureadmin.qub.ac.uk/ws/portalfiles/portal/16285945/urban\\_high.pdf](https://pureadmin.qub.ac.uk/ws/portalfiles/portal/16285945/urban_high.pdf) (“Dense urban areas represent one of the most complex operational environments due to the coalescence of various domains and scales. Here, the contest to control scale and domain plays out in a relatively small region, with a very dense and complex population. It is in dense urban areas where the challenges of MDO [multi-domain operations] reach their zenith and where complexity is fluid and rapid, both in a spatial and temporal sense.”)

**D. “Unusual and Compelling Urgency” is a Term of Art that the FAR Agencies Should Read Narrowly in Light of the Limitations on its Use Set Forth in FAR 6.302-2**

Section 5(a)(iv) of the PLA Executive Order states that as a factor that the “agency’s need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable.” The term “unusual and compelling urgency” is derived from a federal statute stating when “use of noncompetitive procedures” is appropriate, which states as follows:<sup>88</sup>

(a) When Noncompetitive Procedures May Be Used.—An executive agency may use procedures other than competitive procedures only when—

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Use of noncompetitive procedures: “(2) the executive agency’s need for the property or services is of such an unusual and compelling urgency that the Federal Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals.”

The FAR implementing this statute states that the authority to use noncompetitive procedures applies in those situations where “An unusual and compelling urgency precludes full and open competition” and “Delay in award of a contract would result in serious injury, financial or other, to the Government.”<sup>89</sup> To further ensure that this noncompetitive procedure is not used when circumstances do not warrant an exemption,<sup>90</sup> the FAR states that “contracts awarded using this authority shall be supported by the written justifications and approvals.”<sup>91</sup>

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<sup>88</sup> 41 U.S. Code § 3304 - Use of noncompetitive procedures. The above FAR reg cites as its authority 10 U.S.C.2304(c)(2) or 41 U.S.C.3304(a)(2). 10 U.S. Code § 2304 was repealed. Pub. L. 116–283, div. A, title XVIII, § 1881(a), Jan. 1, 2021.

<sup>89</sup> FAR 6.302-2 Unusual and compelling urgency.

<sup>90</sup> See U.S. GAO, GAO-14-304. *Federal Contracting: Noncompetitive Contracts Based on Urgency Need Additional Oversight* (May 2014). Even though FAR 6.302-2(d)(ii) limits contracts using the urgency exception to one year in duration unless the head of the agency or a designee determines that exceptional circumstances apply, 10 of the 34 contracts in GAO’s sample that were “properly coded as having used the urgency exception” for the fiscal years 2010 to 2012 had a period of performance of more than one year. <https://www.gao.gov/products/gao-14-304>

<sup>91</sup> 6.303 and 6.304 Limitations in 6.302-2(c)

To ensure consistency between the language proposed § 22.504(d)(1)(i)(D) and FAR 6.302-2, SMART and SMACNA support NABTU's recommendation that the FAR agencies similarly permit an exception from the PLA requirement when "[t]he agency's need for the project is of such an unusual and compelling urgency **that requiring a PLA on the project would result in serious injury, financial or other, to the Government.**"<sup>92</sup>

**E. SMART and SMACNA Urge the FAR Agencies to View the "Market Analysis" Exception Narrowly to Prevent its Use as a Justification for Evading the Mandatory Use of PLAs**

The Executive Order includes an exception where "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."<sup>93</sup> SMART and SMACNA encourage the FAR agencies to adopt NABTU's recommendations,<sup>94</sup> which would prevent unduly broad use of this exception to thwart the intent of the Executive Order. We agree with NABTU's statement that "Given the change in policy between this Executive Order and the Obama Order, the 'market surveys' agencies conducted, and are continuing to conduct, in deciding whether to use PLAs

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<sup>92</sup> NABTU's comments at 47.

<sup>93</sup> PLA Executive Order, Section 5(b).

<sup>94</sup> See NABTU's comments at 47.

(1)(ii) 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. (See 10.002(b)(1) and 36.104). A likely reduction in the number of potential offerors is not, by itself, sufficient to except a contract from coverage under this authority unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price.

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(2) When determining whether the exception in paragraph (d)(1)(ii) of this section applies, contracting officers shall 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.

under the Obama Order in most cases will have absolutely no relevance to the issues now before the contracting officers.”<sup>95</sup>

## **VII. IN PROMULGATING THE FINAL RULE, SMART AND SMACNA ENCOURAGE THE FAR AGENCIES TO DISMISS RESEARCH THAT FAILS TO ISOLATE RELEVANT VARIABLES**

SMART and SMACNA encourage the FAR agencies to dismiss research that fails to isolate variables that contribute to cost over-runs and delays that are unrelated to labor and that automatically attribute performance deficiencies to PLAs. Reliable research on the value of PLAs must isolate variables involved in procurement that might account for performance differences that are unrelated to labor. This is a difficult task because “many of the federal construction projects using PLAs involve unique facilities,” with “unique missions, facilities, and circumstances.”<sup>96</sup> According to a 1998 GAO study, based on the then available research, it is “difficult to compare contractor performance on federal projects with and without PLAs because it is highly unlikely that two such projects could be found that were sufficiently similar in cost, size, scope, and timing.”<sup>97</sup> An added complication is that a PLA in “use on a project that might be appropriate for comparison with a non-PLA project may not be representative of all PLAs because the specific provisions of PLAs can vary based on local negotiations.

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<sup>95</sup> NABTU comments at 49. Under the Obama administration, the DOD directive on “market research” and “market surveys” that included factors that are unrelated to whether there will be such a substantial reduction in competition to render it impossible to conduct the project at a fair and reasonable price. See Use of Project Labor Agreements on DoD Construction Projects, September 14, 2016. <https://www.acq.osd.mil/dpap/policy/policyvault/USA003701-16-DPAP.pdf>

<sup>96</sup> U.S. General Accounting Office (May 1998). Project Labor Agreements: The Extent of Their Use and Related Information”, GAO/GGD-98-82, at 12. <https://www.gao.gov/assets/ggd-98-82.pdf>

<sup>97</sup> *Id.*

SMART and SMACNA encourage the FAR agencies to reject studies that compare projects that do not involve similar types of construction (building, highway, heavy, or residential); that fail to take into account the lack of consistency and specificity in amounts included in total project costs and the practice of rebaselining; do not account for competing activities (building occupancy while rehabilitation and repairs are taking place) that might account for delays; and that ignore delays necessitated by shortage in supplies, design errors, unforeseen site conditions, funding delays, tenant-caused delays, and site acquisition issues. Reliable research should take into account the lack of consistency and specificity in the items included in total project costs.

## **CONCLUSION**

SMART and SMACNA strongly support the Biden Executive Order on PLAs and urge the FAR agencies to provide clear guidance to contracting agencies to ensure that PLAs are consistently used on large-scale projects in accordance with the Executive Order's mandate.

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