



October 17, 2022

Federal Acquisition Regulatory Council
Washington, D.C. 20503

Submitted via <https://www.regulations.gov>

Re: Acquisition Regulation: Use of Project Labor Agreements for
Federal Construction Projects (FAR Case 2022-003)

To Whom It May Concern:

The Signatory Wall and Ceiling Contractors Alliance (SWACCA) is a national, non-profit trade association that advocates for the interests of union-signatory wall and ceiling construction industry employers. SWACCA represents more than 400 wall and ceiling construction employers – including many of the largest employers in our industry – who perform framing, drywall and interior systems work nationwide, primarily in the commercial construction industry. Our members employ many thousands of carpenters, drywall finishers, plasterers and other building trades personnel throughout the United States. SWACCA fully supports implementation of the President’s Executive Order on the Use of Project Labor Agreements for Federal Construction Projects and offer the following comments concerning the FAR Council’s proposed regulations.

Project labor agreements (PLAs) provide structure and stability to large-scale construction projects. They help prevent the misclassification of employees as independent contractors, protecting taxpayers, as well as employers, workers, and contracting agencies. And, contrary to arguments being proffered by some industry groups, the use of PLAs does not discourage contractors from bidding on projects.

Background: Use of PLAs in the Construction Industry

A PLA is a single-project agreement between (1) a project owner or prime contractor and (2) the unions that are to provide workers for the project. The agreement, which is entered into prior to the start of work at the jobsite (i.e., “pre-hire”) and typically ends upon substantial completion of the work, governs the terms and conditions of employment for all construction workers (whether union or non-union) on the jobsite (including but not limited to working conditions, wages, benefits, and grievances).

PLAs are often used on large construction projects – such as high-rise buildings, stadiums, or major infrastructure projects – in part because they provide consistency of working conditions for the wide variety of tradespeople on site.

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President Biden recognized this in his Executive Order, noting that lack of coordination among multiple employers, uncertainty regarding work conditions, and “friction and disputes in the absence of an agreed-upon resolution mechanism” are “more pronounced” on large-scale construction projects.¹ The use of PLAs in the United States dates back to the 1930s; they have been used to build dams, nuclear power plants, the Trans-Alaska Pipeline, and Cape Canaveral.²

While the proposed rule concerns public PLAs, it is important to note that PLAs are frequently used on private sector projects. Disney and Toyota are well-known private users of PLAs. Disney used a PLA in the late 1960s to build Disney World³ and uses PLAs on an ongoing basis for “continued construction” of the Disney World resort.⁴ Building trades employees have worked tens of millions of hours on Toyota PLAs, including manufacturing plants in San Antonio, Texas and Blue Springs, Mississippi.^{5,6} In a 2011 study of the use of PLAs in New York, the study author noted that, “[m]ajor corporations, such as Walmart and Delta Airlines now use, and others, such as Toyota, continue to use PLAs for their large manufacturing and commercial projects.”⁷

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PLAs provide structure and stability to large-scale construction projects.

The use of a PLA on a large construction project brings structure and stability to a jobsite that is likely to include multiple employers (i.e., contractors and subcontractors) and hundreds of tradespeople. The Toyota project in San Antonio, Texas is a compelling example: with six contractors and more than 300 subcontractors, coordination would have been essential to avoiding jobsite disputes and delays on a nearly billion-dollar project. Toyota notes that jobsite

¹ Exec. Order No. 14063, 87 Fed. Reg. 7363, 7363 (Feb. 4, 2022).

² Congressional Research Service, *Project Labor Agreements* (June 28, 2012) at 2, available at https://www.everycrsreport.com/files/20120628_R41310_731846eb1c5bc373a7ea40ebd566f72de_d8a8771.pdf (accessed Sept. 21, 2022).

³ LiUNA, “Project Labor Agreements,” available at <https://www.liuna.org/project-labor-agreements> (accessed Sept. 20, 2022).

⁴ See, e.g., Buena Vista Construction Co. Project Labor Agreement dated Jan. 4, 2015-Jan. 4, 2020, available at <https://nabtu.org/wp-content/uploads/2019/08/2015-Project-Labor-Agreement-061615.pdf> (accessed Sept. 20, 2022).

⁵ Electronic Library of Construction Occupational Safety and Health, “Productivity Enhancement: Project Labor Agreements,” available at <https://www.elcosh.org/document/168/121/d000977/5.html#2> (accessed Sept. 20, 2022).

⁶ Dennis Seid, “Toyota uses project labor agreements,” *Daily Journal* (May 26, 2007), available at https://www.djournal.com/news/toyota-uses-project-labor-agreements/article_d59f63c1-d9eb-5e90-9bc7-38800cbdf001.html (accessed Sept. 20, 2022).

⁷ Fred B. Kotler, J.D., *Project Labor Agreements in New York State II: In the Public Interest and of Proven Value* (May 2011) at 28, available at https://ecommons.cornell.edu/bitstream/handle/1813/74333/LaborAgreementsinNYS_II.pdf?sequence=1&isAllowed=y (accessed Sept. 21, 2022).

safety is a top reason their company chooses to use PLAs to set jobsite standards for their large projects.⁸

A major advantage of a PLA is the avoidance of labor-related disruptions. Nearly all PLAs include language addressing the handling of grievances and prohibiting work stoppages or lockouts. Without such language, a labor dispute among one of the trades could result in a shutdown of the project. Even a temporary shutdown to adjudicate the dispute of one trade group impacts the project owner and other trades on the jobsite.

PLAs help prevent worker misclassification on large construction projects.

PLAs help prevent the misclassification of employees as independent contractors on large jobsites not only due to the requirements they typically contain, but also because they provide a general structure and level of oversight that prevents worker misclassification from occurring in the first place.

Increasingly, SWACCA's members find themselves competing with companies that seek to reduce their cost structures and liabilities by dissociating themselves from the traditional obligations that come with being an employer. The key to these schemes is often a contractor's willingness to characterize most or all their regular, recurring workforce as independent contractors rather than as employees. This business model allows unscrupulous employers to get the benefits of workers' labor while evading the costs of paying overtime, employee benefits, employment taxes, workers compensation, unemployment insurance, and even minimum wage for their workforce. When these costs aren't paid by the employer, they are transferred to the American taxpayer via increased burdens on social safety net programs.

Misclassification of employees as independent contractors is regrettably commonplace in the construction industry. As described by SWACCA President Scott Casabona in 2020, "[i]n my industry – construction – the issue of classifying workers as independent contractors gained critical significance long before anyone spoke of the 'gig economy.'"⁹ The model is "prone to abuse," and provides unscrupulous employers with an unfair advantage against a law-abiding company that "pays middle-class wages, pays overtime, sets aside money for

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⁸ Seid, "Toyota uses project labor agreements," *supra* n. 6.

⁹ Scott Casabona, "How a new regulation would let businesses avoid the law by classifying employees as independent contractors," *Fortune* (Oct. 31, 2020) (available at <https://fortune.com/2020/10/31/independent-contractors-regulations-labor-department/> (accessed Oct. 6, 2022)).

unemployment and workers compensation, sponsors registered apprenticeship programs, and offers a retirement plan and health benefits.”¹⁰

In 2019, SWACCA President Matt Townsend highlighted this problem when he testified before the Workforce Protections Subcommittee of the Education and Labor Committee of the U.S. House of Representatives:

In my industry, misclassification is not about making tough calls applying complicated laws to ambiguous facts. Rather, it is a choice simply to disregard wage and hour laws, workers’ compensation laws, unemployment insurance regulations, and other basic responsibilities of being an employer. This is done for the purpose of gaining an advantage against law-abiding competitors, realizing tremendous profits, and avoiding the financial risks that honest entrepreneurs must accept. Business owners using the misclassification model do not bear the risks of unanticipated overtime, bad planning, or poor execution. Instead, this racket transfers these risks onto workers and taxpayers.¹¹

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A pre-hire agreement between the project owner or prime contractor and the building trades unions makes it much more difficult for a contractor (or subcontractor) to misclassify its workers as independent contractors. The very responsibilities a dishonest contractor is trying to avoid – the employer-employee relationship and the obligations that come with it – are agreed upon before a worker steps foot on the jobsite. These agreed-upon terms apply to workers across the board (whether union or non-union), provide assurance that employees will be properly classified and paid on the project, and are enforced by labor representatives from the signatory building trades union. This arrangement assures that employee misclassification will not thrive on large, government projects at taxpayer expense.

PLAs do not prohibit contractors from bidding on a large construction project.

Some industry groups have claimed that requiring PLAs for large construction projects will discourage contractors from bidding on such a project. This argument fails for several reasons. First, nothing in the proposed rule prevents any contractor from submitting a bid on a large-scale project.

¹⁰ *Id.*

¹¹ Testimony of Matt Townsend, Hearing on Misclassification of Employees: Examining the Costs to Workers, Businesses and the Economy, 116th Congress (2019), available at <https://edlabor.house.gov/imo/media/doc/TownsendTestimony092619.pdf> (accessed Sept. 21, 2022).

Second, to the extent these groups are focusing their arguments on the ability of non-union contractors to bid, PLAs don't require contractors to become signatory with a union. While PLAs are negotiated with the relevant union(s), they allow for non-union companies and workers on the jobsite. A non-union contractor has the exact same opportunity as a union contractor to bid on a project subject to a PLA. Indeed, the Executive Order *requires* that any PLA entered into "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.*"¹²

The proposed rule overestimates the operating costs to contractors bidding on a job that requires a PLA.

The proposed rule overestimates the operating costs to contractors bidding on a job that requires a PLA. The proposed rule estimates 40-80 hours of work for a senior executive, legal counsel, project manager, and/or 1-2 labor advisers to negotiate a PLA on behalf of a contractor.¹³ This estimate ignores the fact that PLAs are standardized in many markets – especially markets with a high union density. In such cases the owner or prime contractor may find the standard PLA to be acceptable, or may choose to negotiate key terms; however, it is unlikely that a PLA would be negotiated "from scratch." As such, negotiations in many markets will require much less time (and cost) than the proposed rule states.

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Conclusion

For the foregoing reasons, SWACCA supports adoption of the proposed rule regarding Use of Project Labor Agreements for Federal Construction Projects. Thank you for consideration of these comments.

Sincerely,



Robert Klugh
President

¹² Exec. Order No. 14063, *supra* n. 1, at 7364 (emphasis added). See also, e.g., Zachary Phillips, "Despite Biden PLA order, non-union contractors can win federal projects," *Construction Dive* (Feb. 24, 2022), available at <https://www.constructiondive.com/news/project-labor-agreement-pla-union-iiija-bidens-executive-order/619320/> (accessed Oct. 6, 2022).

¹³ Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects, 87 Fed. Reg. 51044, 51046-47 (Aug. 19, 2022) (to be codified at 48 C.F.R. parts 1, 7, 22, 36, and 52).