

October 17, 2022

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Re: Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects
[RIN 9000-AO40]

Submitted via www.regulations.gov.

Dear Mr. Austin, Mr. Nelson, and Ms. Carnahan,

We appreciate this opportunity to provide comment on the proposed rule, “Federal Acquisition Regulation: Use of Project Labor Agreements for Federal Construction Projects.”

Proposed Rule Summary

The proposed regulation alters current policy that encourages the use of Project Labor Agreements (PLAs) on federal construction projects over \$25 million by raising that threshold to \$35 million and by mandating, instead of encouraging, the use of PLAs unless one of three exceptions applies.

The rule summarizes the basis for the change, stating:

“PLAs may provide structure and stability needed to reduce uncertainties for all parties connected to a large-scale construction project.”¹

The rule states that an exception from the PLA requirement may be made if:

“1. Requiring a PLA would not achieve economy and efficiency in Federal procurement, as described in 22.504(d);

¹Federal Register, Vol. 87, No. 160, p. 51045.

“2. Requiring a PLA would substantially reduce the number of potential bidders so as to frustrate full and open competition, i.e., where adequate competition at a fair and reasonable price could not be achieved; or

“3. Requiring a PLA would be inconsistent with statutes, regulations, other E.O.s., or Presidential Memoranda.”²

The Proposed Rule Could Result in Hundreds of Millions of Dollars in Wage Theft from Workers, and Mandated Pension and Other Fringe Benefit Contributions Could Limit Competition by Imposing Millions in Unfunded Liabilities on Nonunion Employers

The majority of small businesses in the construction sector are not unionized, and even if they are unionized, entering into a PLA typically requires the employer to use a workforce that comes from the hiring halls of whatever unions are subject to the PLA. Moreover, the contractor—union or not—must pay into the fringe benefit systems of the unions designated in the PLA, even if this means paying twice on behalf of any workers it retains from its own workforce.³

Those fringe benefits, or health and welfare plans, typically include the designated unions’ healthcare and multiemployer pension plans. Those pension plans are particularly harmful to employers and workers drawn into them. For workers temporarily brought into union pension plans, the contributions made on their behalf will effectively be taken from them most pension plans require a minimum of a five years of service before workers become vested and entitled to future benefits.

A 2021 study of government-mandated PLA projects by Dr. John R. McGowan found that:

“(N)onunion employees lose an estimated 34% of their total compensation package when working on a construction project subject to a government-mandated PLA. These lost wages and benefits should be considered “wage theft,” as nonunion employees on PLA contracts are required to pay a portion of their paycheck to unions and union benefits plans as a condition of employment, yet they will not realize any benefit unless they join the union and/or meet certain vesting requirements. This study concludes that nonunion employees could lose an estimated \$159 million to \$530 million in compensation on federal construction contracts depending on how many contracts are subjected to PLAs required by federal government agencies.”⁴

Moreover, as explained below, the overwhelming majority of multiemployer pensions continue to make broken promises. Thus, even workers who remain in the plans long enough to become vested and entitled to future pensions will receive only pennies on the dollar in promised benefits.⁵

²*Federal Register*, Vol. 87, No. 160, p. 51045-46.

³Congressional Research Service, “Project Labor Agreements,” June 28, 2012, https://www.everycrsreport.com/files/20120628_R41310_731846eb1c5bc373a7ea40ebd566f72ded8a8771.pdf (accessed October 17, 2022).

⁴John McGowan, “Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers,” Build America Local, October 2021, <https://buildamericalocal.com/wp-content/uploads/sites/18/2021/10/McGowan-Project-Labor-Agreement-and-Multiemployer-Pension-Study-October-2021.pdf> (accessed October 16, 2022).

⁵The entire multiemployer pension system is only 42 percent funded. A recent federal bailout passed through the American Rescue Plan will keep some pensions afloat through 2051, but most construction workers laboring on federal contracts today will be well beyond 2051. Rachel Greszler, “How Congress Exacerbated the Union Pension Crisis Under the Guise of Coronavirus Relief,” *The Washington Times*, March 10, 2021,

Employers who are forced through a PLA to contribute into multiemployer or union pension plans can incur massive liabilities, including becoming party to plans' existing unfunded obligations and incurring withdrawal liabilities, both of which could potentially bankrupt small businesses. Multiemployer pensions are collectively bargained union pension plans whereby multiple employers— usually within the same industry such as construction or trucking—contribute to a shared plan.⁶ The plans are jointly managed by union trustees and representatives of participating employers. These plans have been mismanaged for decades, resulting in the accumulation of \$757 billion in unfunded pension liabilities across roughly 1,400 pension plans that cover 10.6 million participants.⁷ If a new employer begins contributing a multiemployer pension plan, they become party to the plan and incur a portion of the plan's unfunded liabilities. That includes taking on a “withdrawal liability” that equals a prescribed amount that employers must pay to get out of the plan and to no longer continue to incur growing liabilities.

According to the PBGC's most recent 2018 data that compiled from multiemployer or union pension plans' form 5500 filings, pensions in the construction industry make up 55 percent of multiemployer pension plans, and represent 37 percent of all union pension participants .⁸ Construction sector union pension plans have \$368 billion in unfunded liabilities and are collectively 43 percent funded.⁹ On average, each of the 753 construction sector union plans has \$488 million in unfunded pension liabilities. When an employer makes contributions to a plan on behalf of workers they employ, they become a part of that plan and take on withdrawal liabilities that equal the cost they would have to pay to withdraw from the plan without further obligations to it.

Dr. McGowan's analysis of government-mandated PLA projects examined the risk of exposure to multiemployer pension plan withdrawal liabilities and concluded:

“Using Form 5500 data, we project that the withdrawal liability exposure for each firm could range between \$1 million and \$7 million when construction contractors trigger withdrawal liability.”¹⁰

Such large potential exposures could prevent most or all small businesses from participating in PLA-mandated federal construction projects. That is especially problematic, and potentially unlawful, in light of the requirements of 51 U.S.C. 20113(e), which demands that

To the maximum extent practicable and consistent with the accomplishment of the purpose of this chapter, ... contracts, leases, agreements, and other transactions shall be allocated by the

<https://www.washingtontimes.com/news/2021/mar/10/how-congress-exacerbated-union-pension-crisis-unde/> (accessed October 18, 2022).

⁶ Rachel Greszler, “Bankrupt Pensions and Insolvent Pension Insurance: The Case of Multiemployer Pensions and the PBGC's Multiemployer Program,” Heritage Foundation *Background* No. 3029, July 30, 2015,

http://thf_media.s3.amazonaws.com/2015/pdf/BG3029.pdf

⁷PBGC, PBGC 2019 Data Tables, <https://www.pbgc.gov/sites/default/files/2019-pension-data-tables.pdf> (accessed October 13, 2022).

⁸PBGC, PBGC 2019 Data Tables, <https://www.pbgc.gov/sites/default/files/2019-pension-data-tables.pdf> (accessed October 13, 2022).

⁹Ibid. Table M-14 “Funding of PBGC-Insured Plans by Industry (2018).”

¹⁰McGowan, “Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers.”

Administrator [of NASA] in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration.¹¹

Moreover, shifting retirement contributions from non-union pension plans to union pension plans would undoubtedly harm workers. Compared to union construction pensions' \$368 billion in unfunded obligations and 43 percent funded ratio, non-union or single-employer construction industry plans have \$9.8 billion in unfunded liabilities and are 76 percent funded.¹² Construction businesses that provide 401(k) pension plans have \$0 unfunded liabilities because employees own their accounts.

For all these reasons, the proposal would have a deeply deleterious effect on small businesses and workers. Yet the proposal does not even attempt to analyze its effects on them. Disregard of the effect of the proposal on small businesses and workers is arbitrary and capricious. To prevent smaller businesses from being excluded from large federal construction projects at the DOD, NASA, and GSA due to the consequences of having to incur massive unfunded pension withdrawal liabilities and pay into PLA-designated health and welfare benefit plans (including pension plans), the department should consider adding exceptions for contractors regarding union health and welfare plans.

An exception from the PLA mandate should apply if a nonunion contractor provides its employees with bona fide health and welfare benefits (including a pension or retirement account), it may continue to continue providing those benefits in lieu of contributing to the health and welfare funds designated by the PLA. If the benefits of the contractor are less than those of the PLA's bargaining agreement, the contractor will directly pay employees the difference.

An exception from the PLA mandate should apply if either the multiemployer pension plan or healthcare fund that the employer would have to pay into as a condition of the PLA are less than 70 percent funded based on the most recent form 5500 filings, the nonunion contractor may instead make equivalent payments directly to its employees.

An exception from the PLA mandate should apply if a contractor subject to a PLA would incur a multiemployer pension withdrawal liability that exceeds the payments they are estimated to make into the multiemployer pension plan over the period of the contract, they will be excluded from making payments into and becoming a party of the multiemployer pension plan. The contractor will instead make equivalent payments directly to its employees.

Economic Analysis of PLAs Show That They Almost Universally Increase Costs and Limit Competition, Reducing Economy and Efficiency.

Multiple economic studies conclude that PLAs increase costs and reduce the number of bids, limiting economy, efficiency, and competition.

- **New Jersey.** New Jersey's 2002 Project Labor Agreement Act (P.L. 2002, Chapter 44) authorized the use of PLAs on public works building projects in New Jersey with total costs of \$5 million or more and required reports evaluating the effectiveness of PLA projects be prepared by the

¹¹Legal Information Institute, "51 U.S. Code § 20113 - Powers of the Administration in performance of functions," <https://www.law.cornell.edu/uscode/text/51/20113> (accessed October 16, 2022).

¹²Ibid. Table S-50 "Funding of PBGC-Insured Plans by Industry (2018)."

Commissioner of Labor and Workforce Development. The first 2010 study, completed by the New Jersey Department of Labor and Workforce Development, found:¹³

When optional, as under the law, very few public projects chose to use PLAs.: “Since the enactment of the PLA Act in 2002 to date, a total of 409 construction projects meeting the PLA criteria have been completed. Of these 409 total projects, 70 (17.1%) used PLAs, with projects administered by the Schools Development Authority (SDA) accounting for nearly 96 percent (67), or all but three of the PLA projects identified to date.”

PLAs significantly increased costs: “The indexed cost per square foot for all PLA projects was \$260.00, or 30.5 percent higher than for all non-PLA projects, which averaged \$199.19 per square foot.”

- **California.** A study conducted by the National University System Institute for Policy Research provided a scientifically rigorous and large-scale evaluation that “examine[d] the inflation-adjusted square foot construction costs for 551 school projects in California built between 1995 and 2009. Sixty-five of these projects were built using PLAs in eight separate school districts.”¹⁴ The large number of projects included in this study corroborate the study’s conclusions, which should be elevated above any studies examining a small number of projects.

PLAs increased costs: The study’s authors concluded: “Our research shows that PLAs are associated with higher construction costs. We found that costs are 13 to 15 percent higher when school districts construct a school under a PLA. In inflation-adjusted dollars, we found that the presence of a PLA is associated with costs that are \$28.90 to \$32.49 per square foot higher.”

- **Ohio.** A study by the Beacon Hill Institute looked at the impact of PLAs on 88 school construction projects in Ohio between 2000 and 2017.¹⁵ The analysis included a formal regression analysis that controlled for factors that affect construction costs such as the size of the project, the features of the building constructed, whether the projects were new builds or renovations, and the type of school (elementary vs. other).

PLAs increase costs: The study’s authors concluded: “PLA projects added \$23.12 per square foot (in 2016 prices) relative to non-PLA projects. Because the average cost per square foot of construction is \$176.23, PLAs raised the base construction costs of building schools by 13.12 percent.” Out of a total of \$240.8 million in construction costs included in the study, the authors said, “Our estimates show that taxpayers would have saved \$39.3 million, or over \$2.6 million per project, if PLAs had not been used.”

¹³New Jersey Department of Labor and Workforce Development, “Use of Project Labor Agreements in Public Works Building Projects in Fiscal Year 2008,” October 2010,

https://www.nj.gov/labor/forms_pdfs/legal/2010/PLAReportOct2010.pdf (accessed October 16, 2022).

¹⁴Vince Vasquez, Dr. Dale Glaser, and W. Erik Bruvold, “Measuring the Costs of Project Labor Agreements on School Construction in California,” National University System Institute for Policy Research, <http://www.nusinstitute.org/assets/resources/pageResources/Measuring-the-Cost-of-Project-Labor-Agreements-on-School-Construction-in-California.pdf> (accessed October 17, 2022).

¹⁵Paul Bachman and David Tuerck, “Project Labor Agreements and the Cost of School Construction in Ohio,” Beacon Hill Institute, May 2017, <https://www.beaconhill.org/BHISTudies/PLA2017/OHIO-PLA-FINAL2017-0524.pdf> (accessed October 16, 2022).

PLAs increase costs for all sizes of construction projects: The study also concluded, with 96 percent certainty, that PLA projects have higher construction costs, and that, “The effect persists even when the data are subdivided, so that the effect is evident separately for mid-size projects, small projects, and elementary schools.”

- **Connecticut:** The Beacon Hill Institute has conducted two studies that examine the impact of PLAs on construction projects in Connecticut.¹⁶

PLAs increase costs: The first report¹⁷ covering the period from 1996 to 2002 “found that PLAs increased both bid costs and final construction costs of public-school construction projects by almost 18 percent.”¹⁸

The second report examines school construction awards between 2001 and 2019. The study controlled for factors that affect construction costs. The authors reported:

“Fifteen of 52 PLA projects in our sample had final construction costs that came in over budget. We found that the presence of a PLA increases the final base construction costs of a school by \$89.33 per square foot (in 2019 prices) relative to non-PLA projects. Because the average cost per square foot of construction is \$450.15, PLAs raise the final construction cost of building schools by 19.84 percent.”¹⁹

The authors estimated “that if the \$2.031 billion of construction projects in our sample that were built with a PLA had been built without a PLA, taxpayers would have saved \$503.463 million.”²⁰

- **Associated Builders and Contractors.** The Associate Builders and Contractors (ABC) is a trade association that represents over 21,000 members across the U.S., with the “shared belief that construction projects should be awarded on merit to the most qualified and responsible low bidders.”²¹

PLAs limit competition, decrease economy and efficiency, and increase costs: According to a 2022 ABC member survey:²²

¹⁶William Burke and David Tuerck, “The Effects of Project Labor Agreements on Public School Construction in Connecticut,” Beacon Hill Institute, January 2020, [Project Labor Agreements and Public Construction Costs in Connecticut \(beaconhill.org\)](https://www.beaconhill.org/PLA2020/PLAinCT23Nov2004.pdf).

¹⁷Paul Bachman, Jonathan Haughton, and David G. Tuerck, “Project Labor Agreements and the Cost of School Construction in Connecticut,” Beacon Hill Institute, September 2004, [http://www.beaconhill.org/BHIStudies/PLA2004/PLAinCT23Nov2004.pdf](https://www.beaconhill.org/BHIStudies/PLA2004/PLAinCT23Nov2004.pdf) (accessed October 16, 2022).

¹⁸William Burke and David Tuerck, “The Effects of Project Labor Agreements on Public School Construction in Connecticut.”

¹⁹Ibid.

²⁰Ibid.

²¹Associated Builders and Contractors, “About ABC,” <https://www.abc.org/ABC/About-ABC> (accessed October 16, 2022).

²²Associated Builders and Contractors, “ABC 2022 Survey on Government-Mandated Project Labor Agreements and Biden Administration’s Pro-PLA Policies,” September 27, 2022,

“97% of survey respondents said a construction contract that required a PLA would be more expensive compared to a contract procured via free and open competition.

99% said they were less likely to bid on a taxpayer-funded construction contract if the bid specifications required the winning firm to sign a PLA with labor unions.

97% of respondents said that government-mandated PLAs decrease economy and efficiency in government contracting.

96% expected a requirement to result in less competition from subcontractors.”²³

PLAs harm workers, undermine workforce development, may reduce safety and quality: The same ABC member survey found that:

“95% of survey respondents said the requirements of government-mandated PLAs for firms to contribute to union benefits programs harm employees and 96% said they undermine investments in workforce development programs.”²⁴

And,

“The majority of survey respondents said PLA mandates would either result in construction projects that are less safe (65%) or have no impact on safety (34%). Three-quarters (75%) said PLAs would result in poorer quality or have no impact on quality (24%). Fully 85% said PLA mandates decrease the likelihood of completing a project on time and on budget, with 9% saying there would be no impact.”²⁵

- **A majority of states prohibit government-mandated PLAs.**

PLAs limit competition, economy, and efficiency: The fact that a majority of states (30, according to tracking by ABC)²⁶ and some localities explicitly prohibit government-mandated PLAs is evidence that state policymakers have found PLA-mandates to be counter to their states’ interests.

PLAs could add uncertainty and costs through legal complications: Jurisdictional issues and disputes would add uncertainty, increase administrative costs, and lead to project delays, which are the opposite of the stated intentions of the proposed rule.

<https://www.abc.org/Portals/1/NewsMedia/ABC%202022%20Survey%20on%20Government-Mandated%20Project%20Labor%20Agreements%20FINAL.pdf?ver=gMt0FPkSY5p63PzsWqFaMQ%3d%3d×tamp=1664375575084> (accessed October 17, 2022).

²³Associated Builders and Contractors, “Survey: 97% of ABC Contractors Say Biden’s Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive,” News Release, September 28, 2022, <https://www.abc.org/News-Media/News-Releases/entryid/19616/survey-97-of-abc-contractors-say-bidens-government-mandated-project-labor-agreement-policies-would-make-federal-construction-more-expensive> (accessed October 17, 2022).

²⁴Ibid.

²⁵Ibid.

²⁶Associated Builders and Contractors, “Current GMPLA Bans,” tracker of state and local laws, <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fthetruthaboutplas.com%2Fwp-content%2Fuploads%2F2020%2F02%2FCurrent-State-FOCA-Laws-GMPLA-Bans-through-Texas-Updated-June-3-2019.xlsx&wdOrigin=BROWSELINK> (accessed October 17, 2022).

- **Recent Experience of large-scale government contracts.** The proposed rule cites recent evidence of the use of PLAs.

PLAs rarely used on large-scale government contracts, even when actively encouraged.

According to the proposed rule:

“Currently, the regulations at FAR 22.5 encourage the use of PLAs for ‘largescale federal construction projects,’ which is defined as projects with a total cost of \$25 million or more. According to the data collected by OMB, between the years of 2009 and 2021, there were a total of approximately 2,000 eligible contracts and the requirement for a PLA was used 12 times. Based on the information, on average there are approximately 167 eligible awards annually and approximately one award that includes the PLA requirement.”²⁷

The Executive Order on Use of Project Labor Agreements For Federal Construction Projects (EO 14063) that motivates the proposed rule states that “owners and contractors in both the public and private sector routinely use project labor agreements,”²⁸ but the evidence cited in the proposed rule shows that public sector agencies rarely—not routinely—use PLAs. Mandating the exception—the choice to use a PLA—to become the norm is arbitrary and capricious, because it disregards the effect on economy and efficiency in federal contracting. That is because the agencies fail to show that the proposed rule will promote economy and efficiency—an especially important and demanding showing in light of the data we have offered above. Further, the proposal if finalized would be unlawful because it fails to promote the goals that federal procurement must promote, namely efficiency and economy.

Proponents of the proposal would doubtless respond that these concerns are addressed by the exceptions to the PLA mandate found in the proposal. But that is not so, for multiple reasons. One is that the proposal does not contain an exception for when inclusion of a PLA demand would impede economy and efficiency; a PLA could well have such an effect without triggering any of the clauses of the proposed exceptions. For example, agencies could choose a PLA bid that is twice as expensive as an otherwise similar bid that does not include a PLA.

Another is that the proposal would switch the default from the current status (PLAs are optional) to mandating a PLA. In cases in which agencies cannot determine at the time of solicitation whether an exception (such as the one for adverse impact on competition) applies, the proposal would require them to demand a PLA, whereas today they would not be required to do so.

Moreover, even if the use of a PLA can be shown to meet all three circumstances specified by the EO²⁹ and the proposed rule,³⁰ the agencies are merely allowed—not required—to provide an exception.

Agencies should be required not to demand a PLA if any of the specified exceptions are met because failure to do so would violate the goals of promoting economy and efficiency.

²⁷*Federal Register*, Vol. 87, No. 160, p. 51046.

²⁸Executive Order On Use of Project Labor Agreements For Federal Construction Projects, February 4, 2022, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/02/04/executive-order-on-use-of-project-labor-agreements-for-federal-construction-projects/> (accessed October 17, 2022).

²⁹*Ibid.*

³⁰*Federal Register*, Vol. 87, No. 160, p. 51044-52.

An exception from the PLA mandate should apply if it can be demonstrated that the mandate would increase construction costs by a substantial amount, for example by 15 percent or more;³¹

Finally, the proposed rule sets a threshold at which the PLA mandate applies at “projects where the total estimated cost to the Government is \$35 million or more.”³² Under current law, agencies presumably estimate their costs based on contracts that do not use a PLA because 99.4 percent of their projects do not use a PLA.³³ The rule does not specify how agencies must estimate the cost of projects. Consequently, the agencies should either:

Require estimated project costs to be based on fair market costs. When estimating project costs to determine whether or not the \$35 million threshold is met and whether a PLA mandate applies, agencies should be required to use fair market construction costs and should be prohibited from assuming monopoly-rates applicable only to PLAs.

Or, an exception to the PLA mandate should apply to bids of \$35 million or less, regardless of the agencies initial estimated cost of the project.

Proposed Changes to Encourage Economy, Efficiency, and Competition

In lieu of the proposed rule, the agencies should consider abandoning the proposed PLA mandate and instead issue regulations that would better achieve the stated goals of a steady supply of labor, predictable labor costs, and minimized labor disputes that could delay the project.

The agencies failed to consider other alternatives that would achieve these goals, such as: requiring contractors to a bid to have an agreement with a private sector hiring agency to meet workforce needs if or when additional laborers beyond those already employed by the contractors’ are needed; requiring contractors to a bid to provide labor compensation agreements (similar to collective bargaining agreements for compensation, but negotiated between workers and employers) with their workers for the period of the project; and to require contracts to use either all non-union (which represents over 87 percent of the construction workforce) companies that do not strike and are unlikely to have disputes between one another, or to require contracts that utilize union and non-union contractors to enter into exclusively dispute resolution agreements.

Absent replacing the rule with better alternatives, the agencies should limit the consequences of this proposed rule by allowing bids that do not include a PLA to be submitted and evaluated on a level playing field alongside bids that do include a PLA in the following cases:

An exception from the PLA mandate should apply if one or more contractors included in the bid show that they would be unable to obtain a stable workforce through a PLA.

³¹Relief from the mandate could be sought by a state government whose project costs would be made exorbitantly larger by the PLA mandate, or by a small business whose bid would have been competitive in the absence of the PLA mandate.

³²*Federal Register*, Vol. 87, No. 160, p. 51045.

³³*Federal Register*, Vol. 87, No. 160, p. 51046.

An exception from the PLA mandate should apply if contractors party to the bid can collectively show that a PLA would drive up their bid price by five percent or more and that not using a PLA would not negatively impact the quality, timeliness, and safety of the project.

An exception from the PLA mandate should apply if all contractors party to the bid can sign agreements that meet two terms of the PLA mandate,³⁴ including that the agreement: “guarantees against strikes, lockouts, and similar job disruptions” and specifies a set of “effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the” project.

An exception from the PLA mandate should apply if the mandate reduces the number of qualifying bids below a certain threshold, for example to fewer than three bidders. This would signal that there is a lack of competition for the project in question.

PLAs Discriminate Against Majority of Non-Unionized Construction Workforce

According to the Bureau of Labor Statistics, 12.6 percent of private sector construction and extraction workers were members of unions in 2021, and 13.6 percent were represented by unions.³⁵

PLAs have the practical effect of eliminating competition from the nonunion construction workforce by requiring employers (contractors or subcontractors) of nonunionized workers to enter into PLA agreements over which they typically have no say, and to use workers hired through the union hiring hall, instead of their existing workforce.³⁶

While it is possible for nonunionized workers to obtain work on PLA construction projects by applying through the union hiring halls, they would be second in line to existing union members and would be required to join the union or at least pay union fees. Workers on a PLA must give up their right to bargain individually with their employer and are forced into exclusive union representation.

Forced entry into a PLA can impose massive liabilities on employers and result in large-scale wage theft from previously non-unionized workers (as described earlier in this comment).³⁷ For this reason, few non-union employers seek to participate in PLA construction projects, and few nonunion construction workers want to give up their existing employment relationships and benefits for a temporary job in which a large portion of their compensation could be effectively stolen from them.

Limiting the pool of eligible employers and workers to a small fraction of all construction employers and workers directly limits competition and effectiveness, undermining the statutory goal of federal contracting and rendering the proposal arbitrary and capricious.

³⁴*Federal Register*, Vol. 87, No. 160, pp. 51045-46.

³⁵Bureau of Labor Statistics, “Union Members - 2021,” *News Release*, January 20, 2022, <https://www.bls.gov/news.release/pdf/union2.pdf> (accessed October 14, 2022).

³⁶Congressional Research Service, “Project Labor Agreements,” June 28, 2012, https://www.everycrsreport.com/files/20120628_R41310_731846eb1c5bc373a7ea40ebd566f72ded8a8771.pdf (accessed October 17, 2022).

³⁷John McGowan, “Government-Mandated Project Labor Agreements Result in Lost and Stolen Wages for Employees and Excessive Costs and Liability Exposure for Employers,” *Build America Local*, October 2021, <https://buildamericalocal.com/wp-content/uploads/sites/18/2021/10/McGowan-Project-Labor-Agreement-and-Multiemployer-Pension-Study-October-2021.pdf> (accessed October 16, 2022).

This is particularly important given the current and future environment, including significant workforce shortages in construction and massive recent increases in federal spending on infrastructure projects that will further drive up demand for construction workers. According to the most recent data from the Bureau of Labor Statistics, there are currently 407,000 unfilled job openings in construction, representing 5.0 percent of all construction jobs. The job openings rate in construction over the past year has averaged 4.86 percent, which is more than twice the 2.27 percent average over the prior 20 years.³⁸

PLAs can also harm local hiring and disproportionately affect women, veterans, and other groups of workers. A member survey from the Associated Builders and Contractors in 2022 found:

“94% of survey respondents said a PLA would result in worse local hiring outcomes for a project. Almost 69% of respondents agreed that a PLA would decrease the hiring of women, veteran and disadvantaged business enterprises and construction workers, which have traditionally been unaffiliated with labor unions, while another 27% of respondents felt that PLAs would have no effect in hiring these disadvantaged populations and contractors.”³⁹

Restricting large-scale federal construction projects at the DOD, GSA, and NASA to unionized workers that represent fewer than 14 percent of all construction workers and without evidence that unionized workers are more productive and efficient than non-union workers is arbitrary and capricious.

Unless the agencies provide evidence that workers hired through union halls are more productive and efficient than workers hired directly by contractors (unionized or non-unionized), the agencies should not be mandated to utilize PLAs. Barring such evidence in justification of the rule:

An exception from the PLA mandate should be apply if a majority of contractors included in a project bid provide justifiable analysis that utilizing the union hiring hall for their workforce will reduce the efficiency of their work—based on anticipated costs, quality, safety, and timeliness of the project—that bid should be considered exempt from the PLA requirement.

Proposed Rule Fails to Estimate the Additional Costs Imposed on Private Parties or Government

The proposed rule provides estimated costs for the compensation of workers involved in negotiating PLAs and in formulating exemptions, and for government employees’ additional time required as a result of the proposed PLA-mandate. The proposed rule fails to include any estimates of the additional costs imposed on private parties (such as additional fringe benefit contributions, pension liabilities, and higher total compensation costs) or on taxpayers. As specified above, that could include up to \$530 million in total wage theft for workers and hundreds of millions—even billions—of dollars in unfunded pension liabilities for nonunion employers.⁴⁰

³⁸Bureau of Labor Statistics, “Job Openings and Labor Turnover Survey,” <https://www.bls.gov/jlt/> (accessed October 15, 2022).

³⁹Associated Builders and Contractors, “Survey: 97% of ABC Contractors Say Biden’s Government-Mandated Project Labor Agreement Policies Would Make Federal Construction More Expensive,” *News Release*, September 28, 2022, <https://www.abc.org/News-Media/News-Releases/entryid/19616/survey-97-of-abc-contractors-say-bidens-government-mandated-project-labor-agreement-policies-would-make-federal-construction-more-expensive> (accessed October 16, 2022).

⁴⁰The rule estimates that between 60 and 107 contract awards may require PLAs in the initial year, and John McGowan estimates between \$1 million and \$7 million in pension liabilities for each firm exposed to a multiemployer pension plan. Most contracts involve multiple subcontractors that are all required to contribute to the designated multiemployer pension plans. This will likely translate into hundreds of millions of dollars in unfunded pension liabilities in the first year alone.

For taxpayers, the added costs could be enormous. The proposed rule specifies that in the initial year, “an estimated 60 to 107 construction contract awards may require PLAs.”⁴¹ Applying the minimal \$35 million threshold to the estimated 60 to 107 contracts, and assuming between 13 percent and 30 percent cost increases for PLA projects, this amounts to an between \$242 million to \$864 million in additional construction costs for taxpayers within just one year and across just three federal agencies.⁴²

The proposed rule should be put on hold until agencies provide more comprehensive cost estimates for the impacts on private parties and government. Failure to grapple with these costs in a serious way would render the proposal irrational in violation of the Administrative Procedure Act if finalized.

The agencies should withdraw the proposed rule and consider alternatives that would achieve the stated objectives of the rule without imposing arbitrary and capricious mandates, without restricting competition in federal procurement, without reducing economy and efficiency in federal procurement, and without imposing added costs on a majority of companies that want to bid on federal construction projects at the DOD, GSA, and NASA by way of forcing them to spend time and money proving what has been consistently proven through many large-scale economic studies as well as by federal procurement history.

Absent withdrawing the rule, the Biden Administration should substantially amend the proposed rule to limit its undesired consequences of limiting competition, reducing economy and efficiency, and discriminating against the overwhelming majority of construction-sector workers and employers by adding the proposed exceptions included in this comment.

Respectfully submitted,

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⁴¹*Federal Register*, Vol. 87, No. 160, p. 51046.

⁴²This estimate is extremely conservative because it assumes that all construction projects that require a PLA will cost exactly \$35 million after accounting for PLAs adding between 13 percent and 30 percent to reach the \$35 million threshold. Incorporating construction projects above the \$35 million threshold would significantly increase the costs to taxpayers.

⁴³This comment is submitted in my personal capacity, with my title provided for informational purposes only.

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