Construction Industry Round Table

# CIVILIAN AGENCY ACQUISITION COUNCIL AND THE DEFENSE ACQUISITION REGULATIONS COUNCIL

## Notice of Proposed Rule: Federal Acquisition Regulation

## FAR Case 2009-005
## Use of Project Labor Agreements for Federal Construction Projects

## RIN 9000-AL31



## Comments of the Construction Industry Round Table, Inc. (CIRT)

On behalf of it members, the Construction Industry Round Table (CIRT) submits these comments with respect to the Notice of Proposed Rule issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) in the above referenced matter. The Proposed Rule purports to implement the President's Executive Order No. 13502 (Feb. 6, 2009), which for the first time establishes a policy of "encouraging" federal agencies to consider imposing union-only project labor agreements (PLAs) on federal construction projects whose total costs exceed $25 million dollars. [Hereinafter the two documents (i.e. 74 Fed. Reg. 33953; July 14, 2009 and the E.O. 13502 upon which is based) are referenced as "the rulemaking" and/or "the proposal"].

For the reasons enumerated below CIRT respectfully request that the Councils withdraw the proposed rule and/or at a minimum substantially revise and restrict the implementation and reach of the proposed rulemaking.

### Introduction

It is clear from a basic understanding of the laws, precedent, and practice, as well as from the lack of credible empirical evidence supporting the assumptions in the rulemaking that the proposal is seriously flawed and arguably illegal.

At the outset, CIRT states in no uncertain terms that the organization does not oppose all PLAs or their application in certain circumstances in which the parties to the project agree to negotiate its elements and accept that it provides a framework under which to proceed with the project. This however, is <u>not</u> the case with respect to how the rulemaking proposes to go forward with PLAs on federal projects.


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[Moreover, the proposal contemplates expanding that mandate to projects that do not directly involve the federal government (or its agencies) as a party to the contract but rather simply attaches the requirement to the funding element. CIRT questions the legality of such an expansion especially in the face of Supreme Court rulings on such issues].[1]

As an organization composed of senior executive officers from the leading design and construction firms doing billions of dollars in both public and private sector infrastructure work – CIRT views itself as well qualified to comment on this rulemaking and its potential impacts.[2] Furthermore, as service providers to the federal government CIRT members are directly impacted both economically and legally by the rulemaking.

**Discussion**

The proposed rule seeks to implement a Presidential Executive Order which is itself a potentially unlawful exercise of power that violates numerous federal laws and the Constitutional rights of government contractors and their employees. Specifically, as further explained below, the proposed rule should be rescinded or greatly modified for the following reasons:

- The proposal interferes with the Congressional mandate that federal agencies should strive to "obtain full and open competition" in procurement of government contracts, as set forth in the Competition in Contracting Act (CICA). The proposal instead has the potential to undermine competition by discriminating against and discouraging bids from non-union contractors and by showing blatant favoritism toward a small class of unionized contractors on large federal construction projects.

- The proposed rule improperly declares that "this rule is not a major rule under 5 U.S.C. § 804" – when under even a simple analysis it demonstrably is – and thus it violates the Congressional Review Act codified therein.[3]

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[1] *Currently, the law and court cases appear to make it clear that the federal government must be a party to the agreement otherwise it is a" regulation" that mandates or prohibits parties to enter into a labor agreement – such a regulation is not allowed by the NLRA.. Relying on the principle laid out in the Bldg & Constr. Trades Council v. Associated Builders & Contractors, 507 U.S. 218 (1993) the U.S. Court of Appeals for DC concluded that the federal government must have a "proprietary interest" and interacting with the private participants in the marketplace otherwise it is outside of its authority to impose or prohibit a labor agreement. Moreover, the proposed rule may be in direct violation of Section 8(d) of the NLRA, which was not addressed in the Supreme Court case and raised separate issues with regard to imposition of a PLA over the objections of a party.*

[2] *CIRT is a national business trade association composed of approximately 100 CEOs from the leading architectural, engineering, and construction companies doing business in the United States; these firms directly employ nearly half a million people that deliver billions of dollars in both public and private infrastructure projects that improve the quality of life for all Americans. For more information go to:* www.cirt.org

[3] *The Congressional Review Act defines a major rule as including any rule likely to result in: (A) an annual effect on the economy of $100 million or more; (b) a major increase in costs or prices for consumers, government agencies, etc. or (C) significant adverse effects on competition, employment, investment, productivity, innovation, etc. It seems apparent even under a non-critical eye – virtually any one of these criteria would apply to the proposed rulemaking.*

- Incredibly the proposed rule fails to include an Initial Regulatory Flexibility Analysis (on its face such an analysis is warranted by the potential economic impact PLAs can have on the cost of labor in addition to the potential impact on competition and pricing) and therefore the proposal violates the Regulatory Flexibility Act, 5 U.S.C. § 601.

In addition to these potential legal violations, the proposal also fails to provide any credible empirical evidence to support its imposition beyond assumptions and broad declarations; as described below:

- None of the labor-related "challenges" cited in the proposed rule as purported justifications for PLAs have in fact been demonstrated to cause any significant delays or overruns on any of the thousands of large federal construction projects built during the past decade. [The proposal simply makes this assertion without any empirical evidence to support its conclusion].[4]

- The proposed rule "claims" as a reason for its promulgation that it will increase the economy or efficiency of the federal government's procurement of construction. In fact, credible evidence suggests that the opposite is more likely to occur with projects experiencing increased costs and delayed construction.[5]

- The proposed rule fails to provide and/or establish any measurable, discernible, or meaningful criteria for the agencies to use as the basis for imposing a PLA on a specific project. The result will be an arbitrary, capricious, inconsistent application of the requirement across agencies – leaving the decisions to bureaucratic whim and potential legal challenges.

Moreover, although not mandatory in union negotiations, in reality any agreement with the unions includes enrollment in what is often a failing union pension system. While many employers and open shop contractors have made the appropriate adjustments to bring their retirement programs into a more viable position, the union pension systems have not shown the same willingness / ability to do so with little real hope for change. PLA's will force contractors to partake in such pension programs and make contributions that are insufficient to support the old defined benefit system that really now only exists for union workforces. Thus, contractors must sign up for "withdrawal liability exposure" from these pension plans that open shop contractors, with defined contribution programs, don't have.

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[4] *The Associated Builders and Constructors, Inc.(ABC), submission recounts the extensive efforts the organization went through to FOIA agencies and OMB to determine if there was any statistical evidence to justify the Administration's claim – none was forth coming – and none is known of in the community.*

[5] *A study issued by Beacon Hill Institute (BHI), referenced in the ABC submission, estimates that PLAs on federal construction projects will increase the cost to taxpayers by millions of dollars (i.e., between 12% to 18% of the total cost of construction).*

Furthermore, in addition to these serious concerns the true impact of unintended consequences has not be considered or understood by the E.O. and/or rulemaking. The unintended impact of dampened competition not only potentially increases costs it also reduces alternative approaches, innovative solutions and may even disrupt the labor relations/contracts of the private sector businesses – outside of the federal project.[6]

**Conclusion**

Given the compelling reasons enumerated, the rulemaking should be rescinded and/or significantly modified. This will prevent specific contracting procedures such as PLAs that may be appropriate in limited cases, from being used with a "broad brush" across numerous construction related contracts in a mindless bureaucratic manner.

Sincerely,

Mark A. Casso, Esq.
President

[6] *The proposed rule will likely reduce competition since some union-free employers may be concerned that once their employees are represented by a union on a PLA, the employees might seek representation on other work. Even more subtle is the concern of contractors with unionized workforces that are parties to privately negotiated labor agreements. Given the uncertain potential of the proposal – these employers may be told in the future that their agreements aren't with the appropriate union or that the terms are inadequate for a particular government PLA/agency.*