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**Office of Information and Regulatory Affairs (OIRA) Meeting**

**Office of Management and Budget (OMB)**

**Federal Acquisition Regulatory Council (FAR Council)**

**FIN: 9000-AO40**

**FAR Case 2022-003**

**Use of Project Labor Agreements for Federal Construction Projects**

**May 2, 2022**

**AGENCY:** FAR

**RIN:** 9000-AO40

**Status:** Pending Review

**TITLE:** Federal Acquisition Regulation (FAR); FAR Case 2022-003, Use of Project Labor Agreement for Federal Construction Projects

**Introduction:**

I am a Management Labor Relations and Workforce Development Consultant. I negotiate and administer Project Labor Agreements (PLAs) and Community Workforce Agreements (CWAs) throughout the U. S. As a Management Consultant, I represent, Owners, both Government entities or Contractors who want to adopt PLAs/CWAs. I have done this on over fifty projects, with a total value in excess of \$100 billion, with PLAs/CWAs in twenty-three states, both in high- and low-density Union areas, since the U. S. Supreme Court Case "Boston Harbor" in 1993 established PLAs as legal bid specifications. This experience has included PLAs/CWAs for city, county and state agencies.

It has been my experience that overall, PLAs and CWAs have been an excellent tool to deliver on both risk management (i. e. no strikes, picketing, standardized job rules, etc.) and promoting public policy (i. e. community outreach, diversity and inclusion, etc.). The more traditional PLAs that focus on risk management continue to bring value to projects, but usually are used by Contractors on private projects. In the last fifteen years, virtually all public entities have used only CWAs, as a more progressive type of PLA, that focus on promoting public policy. They have become the Labor Agreement of choice. I have not negotiated a traditional PLA for any public agency in years. They have all been CWAs.

Therefore, it is my recommendation that the PLAs referenced in Executive Order 14063 should reflect a progressive CWA approach and reflect President Biden's goals and objectives outlined in his Build Back Better plan.



As the Community Workforce Agreement approach focuses on community outreach and employment of individuals who are underrepresented in the construction industry it is also recommended that the CWA identify individuals as "Targeted Workers" who have struggled to gain employment in construction. This often includes local residents, minorities, women, veterans and underrepresented individuals.

To achieve this, the recommendation would be for the regulations more clearly define the reasons for exception and make it more difficult to not implement a PLA/CWA. It is my experience that in some cases, PLAs/CWAs have become the object of political debate and has led, in some cases, for government officials who are making contract decisions to do so based upon political views, rather than the adopted public policy, in this case, President Biden's Executive Order 14063. The emphasis should be on finding ways to implement EO 14063, not allow for exceptions. If there are exceptions, there needs to be substantial reasons for it. President Obama's Executive Order 13502 had too many exceptions to the degree that only a very few Federal projects were built under one.

Finally, it my recommendation that the Federal Agency negotiate the PLA/CWA and not contract it out to the Contractor bidding the work. It is imperative that the parties understand that the implementation of the PLA/CWA is the dictate of Executive Order 14063 and through it, the Federal Agency. It is the Federal Agency that should take control and ensure that the terms and conditions of the PLA/CWA are achieved. This is due for several reasons:

- Negotiation strategy. If the Federal Agency negotiates the PLA/CWA, it will have the best opportunity to get the terms and conditions it wants, as it ultimately has the right to not have a PLA/CWA if it does not get these terms and conditions. If this responsibility is given to the Contractor, it will not have this opportunity, as it MUST have a PLA/CWA due to the contract requirements and does not have a good negotiation position.
- Terms and Conditions: Not all Contractors will have experience at negotiating PLAs/CWAs, or feel that a PLA/CWA is in their best interest. As a result, they may not get the best terms and conditions as it relates to Community Workforce Agreement goals and objectives. Some may purposely undermine the intent of having a PLA/CWA, as they do not share the value of community outreach, diversity and inclusion.
- It is recommended that the Department of Labor develop a model PLA/CWA and issue it to the Federal Agency that will use them. It will contain the essential components of the PLA/CWA that is required, but also allow Federal Agencies to add components as it deems necessary as it relates to the specific project.
- Due to the fact that PLAs/CWAs are new, complex contracts, to Agencies and some Contractors, it is anticipated that there will be a steep learning curve for the parties and, therefore, it is highly recommended that the PLA/CWA include a provision to have a PLA/CWA Administrator, either internal staff or outside 3<sup>rd</sup> party, to ensure that the terms and conditions are achieved and to have accountability by all parties.



## Questions, Observations and Recommendations:

### 1. Section 5:

Sec. 5. Exceptions Authorized by Agencies. A **senior official** within an agency may grant an exception from the requirements of section 3 of this order for a particular contract by, no later than the solicitation date, providing a specific written explanation of why at least one of the following circumstances exists with respect to that contract:

- i. Recommendation: Within the Federal Agency, the "senior official" should be the Secretary of that Agency.
- ii. Recommendation: Establish a process and procedure for parties to challenge an Agency's decision to grant an exception from the requirements of section 3 for each of the exceptions listed below.

(a) Requiring a project labor agreement on the project would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement. Such a finding shall be based on the following factors:

(i) The project is of short duration and lacks operational complexity;

1. Recommendation: Define "short duration and lacks operational complexity".

(ii) The project will involve only one craft or trade;

1. Recommendation: None

(iii) The project will involve specialized construction work that is available from only a limited number of contractors or subcontractors;

1. Recommendation: Define "limited number".
2. Recommendation: Put out contract for bid first to see how many bids come in and then make the decision as to whether or not there are enough responsible bids.

(iv) The agency's need for the project is of such an unusual and compelling urgency that a project labor agreement would be impracticable;

1. Recommendation: Define "unusual and compelling urgency".
2. Recommendation: Define what would make the project labor agreement "impracticable".

(v) The project implicates other similar factors deemed appropriate in regulations or guidance issued pursuant to section 8 of this order.

1. Recommendation: Define "...similar factors deemed appropriate...".

(b) 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.

1. Recommendation: Define “inclusive market analysis” and “substantially reduce the number of potential bidders”. The surveys done under EO 13502 were not well done.

2. Observation: The market analyses and studies done in the past have not been good indicators of the number of potential bidders of projects.

3. Recommendation: Define and quantify “...so as to frustrate full and open competition.”

(c) Requiring a project labor agreement on the project would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

1. Recommendation: Define/clarify these as Federal statutes, Federal regulations, not State.

## 2. Section 8:

Sec. 8. Regulations and Implementation. (a) Within 120 days of the date of this order, the FAR Council, to the extent permitted by law, shall propose regulations implementing the provisions of this order. The FAR Council shall consider and evaluate public comments on the proposed regulations and shall promptly issue a final rule, to the extent permitted by law.

### I. Recommendations:

a. Establish regulation language that will:

- i. Establish “required” PLA/CWA provisions.
- ii. Model President’s Biden “Build Back Better” goals of diversity and inclusion.
- iii. Establish the PLA as a “Community Workforce Agreement” approach:

1. Priority Training and Employment of “Targeted Workers”:

- a. Local Residents
- b. Minorities
- c. Women
- d. Veterans
- e. Disadvantaged/Underrepresented

2. Encouragement of SBE/WBE/DBE/MBE Businesses.

3. “Core” employee language for non-Union Contractors to use their employees.

4. Guaranteed Preferred Entry of Pre-Apprenticeship/Apprenticeship Readiness program graduates into certified Apprenticeship programs and employment.