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General Services Administration, Regulatory Secretariat (VPR)
1800 F Street, NW, Room 4041
Washington, DC 20405
Attention: Hada Flowers

Re: Comments of National Right to Work Legal Defense Foundation Regarding the Proposed Rule to Implement the Project Labor Agreement Requirements of Executive Order 13502, FAR Case 2009-005, Federal Register / Vol. 74, No. 133, 33953 (14 July 2009)

Dear Ms. Flowers:

Please accept the following as the comments of the National Right to Work Legal Defense Foundation ("Foundation") regarding the proposal to amend the Federal Acquisition Regulation ("FAR") to implement Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects ("EO 13502").

In short, it is the Foundation's position that EO 13502 is an unlawful and unwise policy, because it infringes on the rights of nonunion employees and taxpayers. *See* Section I, *infra*. However, to minimize this infringement and lend some semblance of rationality to the EO 13502, the Foundation suggests two changes to the proposed rule for implementing the order if implementation is finalized.

First, the rule must require that agencies determine whether to use a PLA on a project only *after* all bids for a project are submitted and considered. Only then can agencies rationally decide whether a PLA is in the government's procurement interests.

The proposed rule irrationally puts "the cart before the horse" by requiring that agencies decide to use a PLA *before* any bids are submitted. But at that time, an agency will not know: (1) the terms of the PLA it is imposing; or (2) the alternatives to a PLA, namely bids submitted without a PLA. Agencies obviously cannot make an informed judgement about whether a PLA is in the government's procurement interests without this information. The judgment can only rationally be made after bids are submitted with PLAs and without PLAs, at which time the agency can compare the bids to determine if a bid with a PLA is superior to the alternatives.

Second, the proposed rule should limit any PLA included in a contract award to two substantive terms: a prohibition against union strikes and a dispute resolution procedure for union contractors. *See* Section III, *infra.* These are the only terms that potentially relate to the government's ostensible procurement interest in preventing unions from disrupting work on a construction project through strikes and other job actions. Notably, these are also the only two substantive terms specifically required by EO 13502.

The no-strike and dispute resolution clauses should be applicable to *only* union contractors, as only union contractors are susceptible to union strikes and job actions. Nonunion contractors do not have problems with union strikes because their employees are not unionized. Imposing a union no-strike or dispute resolution clause on nonunion contractors would be a senseless attempt to cure nonunion contractors of an affliction from which they do not suffer.

The government certainly has no procurement interest in imposing any other terms of union contracts on contractors or employees as a condition of working on a federal construction project. This includes contractual terms that force employees: into union representation; to pay union dues as a condition of employment; to be hired through union hiring halls; to work under inefficient union work rules, and to have their compensation diverted to union trust funds from which they will receive no benefits. Indeed, imposing such burdens on employees and contractors can only serve to *harm* the government's procurement interest by greatly decreasing the pool of employees and contractors willing to work on a project. As such, any PLA required under EO 13502 must be limited to a no-strike clause and a dispute resolution procedure applicable only to unionized contractors.

I. Foundation Opposition to EO 13502

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, suffer violations of their Right to Work; freedoms of association, speech, and religion; right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the states. Since its founding in 1968, the Foundation has provided legal assistance in all of the United States Supreme Court's cases involving employees' right to refrain from joining or supporting a labor organization as a condition of employment.[1]

The Foundation has experience with the issues presented by project labor agreements ("PLA's"), as it has participated in cases concerning the legality of PLAs, *e.g., Building and Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), and government mandated union agreements, *e.g., U.S. Chamber v. Brown,* 128 S.Ct. 2408 (2008); *MMAC v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005). A Foundation attorney has published an article about PLAs. *See* William Messenger, *Boston Harbor's Unresolved Presumption: Can Owner-Developers Enter Into or Enforce a Project Labor Agreement?,* 10 J. Fed. Soc. Prac. Grp. 87 (2009).[2]

The Foundation's position is that EO 13502 is unlawful no matter how it is implemented. The administration lacks the lawful authority to impose union-only PLAs on employees. Among other things, EO 13502 is preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et. seq*., and unlawful under the Competition in Contracting Act of 1984, 41 U.S.C. § 253.

EO 13502 will serve only to harm construction workers who reject union representation (who are the vast majority of construction workers).[3] To work on federal projects affected by EO 13202, these employees will be subjected to unwanted union representation; forced to pay union dues as a condition of employment in non-Right to Work states; forced to use union hiring halls to obtain

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[1] *E.g., Davenport v. Washington Education Ass'n*, 127 S. Ct. 2372 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ*., 431 U.S. 209 (1977).

[2] *See* http://www.fed-soc.org/doclib/20090216_MessengerEngage101.pdf

[3] The Bureau of Labor Statistics reports that only 14.4% of construction workers were represented by a union in 2007. *See* BLS Annual Economic News Release on Union Membership, Table 3 (available at http://www.bls.gov/news.release/union2.t03.htm).

employment (which also often charge additional fees); forced to work under unfamiliar and slothful union work rules; and will have large portions of their compensation diverted to union pension plans from which they will receive no benefits.[4]

EO 13502 is equally detrimental to taxpayers and the public fisc. It is well-documented that union-only PLAs increase government construction costs by limiting the pool of available contractors to those few who are willing to execute a union-only PLA.[5] Indeed, basic logic dictates that artificially limiting a pool of bidders can only serve to increase the costs of a project.

There is no legitimate legal or policy basis for forcing employees and contractors to abide by union-only PLAs to work on federal construction projects. Instead, EO 13502 is simply a naked political payback by the current administration to its union political supporters. Unable to prevail in free and fair bidding for construction work in competition with efficient nonunion employees and merit-shop contractors, union officials have turned to the political process to increase their dwindling market share.[6] EO 13502 is the fruit of this political rent seeking and nothing more. Employees, contractors, and taxpayers will be harmed by EO 13502 for the craven purpose of funneling monies to the administration's political supporters.

For these reasons and others, EO 13502 should be rescinded immediately. In its place, the administration should reissue and reinstate EO 13202, which properly required government neutrality as to whether contractors use or do not use union pre-hire agreements.

Unfortunately, the political origins of EO 13502 make such recision unlikely. Therefore, the Foundation offers two suggested changes to the proposed rules to lend some rationality to EO 13502 and minimize its detrimental impact until such time as it is struck down in court.

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[4] Union pension funds generally require the maximum vesting periods permitted by law for obtaining benefits, under which employees are entitled to no benefits: (1) prior to five years of service under the plan, after which the employee becomes fully vested; or (2) prior to three years of service under a plan, after which a graduated vesting schedule applies. Few employees will work on any specific construction project for as long as these vesting periods. Indeed, many construction projects do not last three or five years. Consequently, the vast majority of nonunion employees forced to work under a PLA with a mandatory union pension plan will not be entitled to any retirement benefits for their work on a project covered by a union-only PLA.

[5] *See* Vincent E. Mcgeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 SETON HALL LEGIS. J. 423, 449-50 (1995) ("It is axiomatic that reducing the pool of eligible bidders will increase costs," and "[s]tudies show that union labor increases costs over open shop contractors by twenty to sixty percent"); Dr. Herbert R. Northrup & Linada E. Alario, *Government-Mandated Project Labor Agreements in Construction, The Institutional Facts and Issues and Key Litigation*, 19 GOV. UNION REV. 3, 22-25, 35-37 (2000); Maurice Baskin, *The Case Against Union-Only Labor Project Agreements*, 19 Construction Law. 14, 14-15 (Jan. 1999).

[6] PLAs are often imposed because of union political influence instead of any true pecuniary benefits to the contracting agency. *See* Mcgeary & Pellegrino, *supra* at note 5, at 431-34; Northrup & Alario, *supra*, note 5, at 22, 57-58.

II. The Proposed Rules Must Be Revised to Require That Agencies Decide Whether to Incorporate a PLA Into a Contract Award Only *After* Competitive Bidding

The proposed rules must be revised to mandate that agencies decide whether to impose a PLA under EO 13502 only *after* competitive bidding for a project is completed. As established below in Section A, the proposed rule puts the "cart before the horse," because agencies must decide whether to use a PLA: (1) before knowing the terms of the PLA; (2) before the PLA is negotiated; (3) without knowing the alternatives to a PLA; and, (4) without any standards for determining whether a PLA is superior to the alternatives. Section B proposes a revision to correct this irrational decision-making sequence.

A. The Decision-Making Sequence Mandated by the Proposed Rule is Irrational

1. The Proposed Rule Irrationally Requires That Agencies Decide Whether to Use a PLA *Before* Knowing the Terms of the PLA

The proposed rule permits agencies to use a PLA if they determine that a PLA "will advance the Federal Government's interest in achieving economy and efficiency in Federal procurement" and other matters. Sec. 22.504(a)(1). Section 22.505(a) of the proposed rule provide that a PLA requirement must be included in the bid solicitations for a project. Thus, an agency must decide whether to use a PLA *before* issuing solicitations for bids under the proposed rule.

But an agency will not know the terms of the PLA it is deciding to impose before it issues bid solicitations. Indeed, the proposed rule contemplates that the PLA will be negotiated only after a successful bidder is chosen for the project. *See* Sec. 52.222-XX(b). The proposed rule does not require that the PLA have any specific substantive terms other than a no-strike clause and dispute resolution procedure. Sec. 22.504(b)(3) and (b)(4).[7] The agency has no other control over the terms of the PLA it is deciding to impose, as "[t]he Government will not participate in the negotiations of any project labor agreement." Sec. 52.222-XX(e); 52.222-YYY(e). Thus the proposed rule requires that agencies blindly deciding whether to use a PLA "sight unseen."

Logically, an agency cannot rationally decide if a PLA will advance or hinder the government's procurement interests under EO 13502 without first knowing the specific terms of that PLA. The exact terms of these collective bargaining agreements vary considerably. Nor is there any limit on what terms and conditions can be included in a PLA. A specific PLA could (and likely will) have terms detrimental to the government's procurement interests, such as inefficient work rules.

An agency can only rationally decide whether using a PLA on a specific project is in the government's procurement interests if the agency first knows the exact terms of that PLA. This necessarily means that an agency must decide whether to use a PLA only *after* bids submitted to the agency with executed PLAs. Only at this time can an agency rationally determine whether use of the PLA is in the government's procurement interests as opposed to the alternatives.

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[7] The requirements of Section 22.504(b)(1) and (2) are not substantive, but are procedural requirements that the PLA bind subcontractors and not preclude bidding on the project. Sections 22.504(b)(5) and (6) are so vague as to be meaningless.

2. The Proposed Rule Irrationally Requires That Agencies Decide Whether to Use a PLA *Before* the Terms of the PLA Are Negotiated With a Union

The proposed rule contemplates that successful bidders will negotiate a PLA with a union *after* the decision to require a PLA is made by the agency. *See* Secs. 52.222-XX(e); 52.222-YY(e). But the rule does not require that unions execute a PLA with a successful bidder. This irrational policy creates a host of problems, as it gives unions the power to hold bidders and federal construction projects hostage to their demands.

First, mandating use of a PLA before it is negotiated will lead to the very work disruptions that EO 13502 ostensibly exists to prevent. Unions need not engage in strikes or boycotts to disrupt a project under the proposed rule. Unions can cause a federal construction project to grind to halt by merely sitting on their hands and refusing to enter into a PLA not to their liking. Any agency that decides to use a PLA under the proposed rules is effectively giving union officials a unilateral veto power over the initiation of work on the agency's project.

Second, requiring use of a PLA before it is negotiated gives unions the power to exclude successful bidders from projects by simply refusing to execute a PLA with them. This will inevitably lead to discrimination against traditionally nonunion contractors and their employees. Unions will have every incentive to hobble their competition by excluding nonunion contractors from lucrative federal projects by refusing to sign PLAs with them (or effectively doing so by making outrageous demands with which a nonunion contractor cannot agree), while being amenable to negotiating and executing PLAs with contractors that usually work union.

Third, mandating use of a PLA before it is negotiated with a union guarantees that the PLA will have the most egregious terms and wasteful union work rules. Unions will enjoy incredible bargaining leverage over successful bidders in any negotiations when the bidder needs the union's agreement to work on the project. Moreover, union bargaining demands will not be limited by any concerns over efficiency or cost effectiveness, as the decision to require a PLA has already been made and the contract awarded. *See* Sec. 52-22-YY (Alternative I). Unlike when unions contractors must compete with nonunion contractors in a competitive bidding process to obtain work, unions have no reason to temper their bargaining demands when they already have the project "in the bag" before the bidding even starts.

The irrational sequence mandated by the proposed rule turns the purpose of a PLA on its head. To the limited extent they are used in the private sector, PLAs are negotiated by contractors well before a project begins in order to *maximize* the contractors' bargaining leverage and wrest work and efficiency concessions from unions.[8] Unions that do not agree to sufficient concessions risk losing the project, as the contractors still have the option of operating nonunion. The proposed rule turns this bargaining strategy upside-down, guaranteeing unions all work on a project before negotiations for the PLA even begin.

No rational actor would require use of a union agreement on a project before a specific agreement is negotiated with a union. Accordingly, the proposed rule must be revised to require that any PLA be negotiated and agreed to *before* an agency decides whether to use a PLA. Only

[8] " [T]he major motivator for a contractor to enter a project agreement is to fix and reduce costs associated with craft labor. Often the agreement contains union concessions with respect to manning requirements, eliminating work rules and increasing management prerogatives. In the private sector, therefore, project agreements are often used to improve the efficiency of craft contractors." Mcgeary & Pellegrino, *supra,* at note 5, at 447.

this sequence ensures that: (1) unions cannot delay construction projects by refusing to execute a PLA; (2) unions cannot discriminate against bidders who traditionally work nonunion by refusing to execute PLAs with those bidders; and (3) that the terms of the PLA will be tempered by some concern for efficiency and cost-effectiveness on the project.

3. The Proposed Rule Irrationally Requires That Agencies Determine Whether to Use a PLA *Before* Knowing the Alternative to Use of the PLA

Another problem with the decision-making sequence required by the proposed rule is that agencies must decide whether to use a PLA before knowing *the alternatives* to using a PLA—i.e., proposals submitted without PLAs. Obviously, ascertaining whether a PLA "will advance the Federal Government's interest in achieving economy and efficiency in Federal procurement" on a particular project can only be done in comparison to the alternatives. Sec. 22.504(a)(1). This determination cannot be made in a vacuum or in the abstract.

Only a competitive bidding process will accurately reveal the alternatives to using a PLA on a project. Indeed, the underlying principle of the Competition in Contracting Act, 41 U.S.C. § 253, is that the best and most economical option for government procurement is revealed by a competition between competing proposals.

The proposed rule turns this competitive bidding principle on its head by requiring that agencies award construction work to union labor before bids are submitted by firms that use nonunion labor. This amounts to pre-judging the results of a competition. It is no different than an agency awarding work to a political supporter of the administration without competitive bidding.

An agency can only rationally decide whether use of a PLA on a specific project is in the government's procurement interests by comparing bids submitted with PLAs to bids submitted without PLAs. This necessarily means that the decision on whether to require a PLA must be made only *after* all bids for a project are submitted to and considered by an agency.

4. The Proposed Rule Does Not Establish Any Standards to Enable Agencies to Rationally Determine If Use of a PLA Is Superior to the Alternatives

The proposed rule provides no real standard or guidance to agencies in deciding whether to require a PLA on a project. The standard stated at Sec. 22.504(a)(1)(i) is so broad and vague as to be meaningless. Stating that an agency may require use of a PLA if "it will be good" would be just as elucidating as the precatory verbiage of Sec. 22.504(a)(1)(i).

Agencies must be give some standard for deciding whether to use a PLA under EO 13502. Because the ostensible purpose of EO 13502 is to prevent labor disputes that could hinder the efficient and timely competition of a federal construction projects, *see* EO 13502, Sec. 1,[9] it follows that an agency must be required to determine that: (1) labor disputes actually threaten the timely completion of the project under bids submitted without a PLA; and (2) that a bid submitted with a PLA is more cost effective and efficient than bids submitted without a PLA.

Of course, any determination to use a PLA must be supported by evidence and empirical data specific to the project at issue, and not on conjecture or generalities. EO 13502's requirement that

[9] EO 13502's stated purpose is a transparent pretext for its true objective of funneling construction work to the administration's union political supporters. But, for purposes of these suggested revisions, we suspend credulity and accept EO 13502's stated purpose on its face.

agencies decide whether to use PLAs on a case-by-case basis necessarily means that there must be evidence that justifies use of a PLA in each and every case.

B. The Proposed Rule Must Be Revised to Require That Agencies Decide Whether to Use A PLA *After* Competitive Bidding

For the reasons stated above, the proposed rule must be revised to require that agencies decide whether to use a PLA only after a competitive bidding process in which an executed PLA is submitted with the bid of one or more contractors. Only at this point can an agency rationally determine whether using a bid submitted with a PLA is in the government's procurement interests as opposed to bids without a PLA.

Specifically, the Foundation proposes modifying the proposed rule by striking Sec. 22.505 in its entirety and replacing it with the following language:

> (a)(1) For acquisition of large-scale construction projects, an agency shall only make a determination pursuant to this subpart that a project labor agreement will be required after all bids have been submitted and considered by the agency, but prior to the contract award.
> (2) The agency shall not require or include in any solicitation any requirement that successful offerers execute or negotiate a project labor agreement, but shall only make a determination as to whether to require a project labor after all bids are received in response to solicitations and considered by the agency.
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> (b) For acquisition of large-scale construction projects, an agency shall require in all solicitations that contractors that intend to use a project labor agreement must execute, or obtain an agreement to execute, a complete project labor agreement with one or more labor organizations prior to submitting their bid and submit a copy of said agreement to the agency.
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> (c)(1) For acquisition of large-scale construction projects, the agency shall, after all bids have been submitted and considered, make the following determinations to decide whether a project labor agreement will be required pursuant to this subpart:
> (i) that labor disputes posed a clear and imminent danger to the timely completion of the project under bids submitted without PLAs, and;
> (ii) that using a bid submitted with a PLA will be more cost effective than using any of the bids submitted without a PLA.
> (2) The above determinations shall be made by the agency based on evidence and empirical data specific to the project at issue, shall be made in writing, and shall be made available to the public.
>
> (d)(1) For acquisition of large-scale construction projects, the agency shall decide pursuant to this subpart to require a project labor agreement only if both determinations required by Sec. 22.505(c)(1)(i-ii) are answered in the affirmative and the contract is awarded to a contractor that submits a bid with a project labor agreement.
> (2) The agency shall not require a project labor agreement if the agency awards the contract to an offerer that submits a bid without a project labor agreement.

These revisions remedy the arbitrary decision-making sequence mandated by the current proposed rules. Specifically, the revisions properly place the "horse before the cart" by requiring that agencies only decide whether to use a PLA: (1) after the agency knows the terms of the PLA; (2) after the PLA is negotiated; (3) after knowing the alternatives to the PLA; and, (4) after comparing use of PLA to its alternatives under definitive standards. This ensures that a PLA will only be used if it is truly in the government's procurement interest.

III. The Proposed Rule Must Be Revised to Limit Any PLA Required by EO 13502 to Only A No Strike Clause and Dispute Resolution Clauses For Union Contractors

The only PLA terms that could potentially relate to EO 13502's ostensible purpose of minimizing union disruption of federal construction projects are a no-strike clause and dispute resolution procedure applicable to union contractors.[10] *See* Section A, *infra*. There is no interest under EO 13502 in imposing these or any other terms of union agreements on nonunion contractors. Indeed, doing so would be counterproductive to the government's procurement interests as it would reduce the pool of nonunion employees and merit-shop contractors willing to work on the project. *See* Section B, *infra*. Consequently, the proposed rule must be revised to limit the PLA terms that can be imposed under EO 13502 to a no-strike clause and dispute resolution procedure applicable only to union contractors. *See* Section C, *infra*.

A. Only a No-Strike Clause and Dispute Resolution Procedure For Unionized Contractors Could Potentially Relate to EO 13502's Ostensible Goal of Minimizing Union Disruptions of Federal Construction Projects

EO 13502's stated purpose for requiring PLAs is to prevent labor disputes that could hinder the efficient and timely competition of federal construction projects. *See* EO 13502, Sec. 1. As previously stated, this is a false pretext for a rather transparent political payback to unions for their political support for the current administration. The pretext does not even make sense. If union disruption of construction projects is a truly the administration's concern, the logical recourse is to *not* use union labor at all—not to use *only* union labor. Indeed, EO 13502's stated rationale makes a PLA nothing more than an extorted price paid for labor peace, akin to the payment of protection money to unions for agreeing not to disrupt the government's projects.[11]

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[10] A "union contractor" means a construction contractor that has a current collective bargaining relationship with a union under §§ 9(a) or 8(f) of the NLRA, 29 U.S.C. §§ 159(a) and 158(f). A "nonunion" or "merit-shop" contractor means a contractor that does not have such a relationship with a union.

[11] *See* Mcgeary & Pellegrino, *supra* at note 4, at 448 ("to the extent that the craft unions cannot work side by side with non-union workers, it would seem to be very questionable policy to appease discontent by granting exclusive representation. Furthermore, there are instances of job site disharmony even where crafts have given concessions in return for a subcontracting clause. Thus, there is little force behind the justification—even in the private sector").

But even if one accepts EO 13502's premise, it could only support requiring PLA terms that ensure that unions do not disrupt federal construction projects. Specifically, it could only support the substantive terms required of PLAs under EO 13502 with respect to union contractors:

> (1) "guarantees against strikes, lockouts, and similar job disruptions;" and
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> (2) "effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement."

EO 13502, Sec. 4(c-d); Sec. 22.504(b)(3-4).[12] These two clauses might preclude unions from disrupting the work of unionized contractors on a project with strikes or other grievances.[13] But, as discussed below, EO 13502's stated purpose does not justify imposing any other terms of union agreements on employees and contractors as a condition of working on a federal project.

B. Imposing Terms of Union Pre-Hire Agreements on Nonunion Contractors Will Not Minimize Union Disruptions of Federal Construction Projects and Is Unrelated to Any Government Procurement Interest

1. Imposing a No-Strike Clause And Union Dispute Resolution Procedure on Nonunion Contractors Does Not Relate To EO 13502's Ostensible Goal Of Minimizing Union Disruptions of Federal Construction Projects

There is no interest in requiring that nonunion contractors become parties to a no-strike or dispute resolution clause with a union under EO 13502. Nonunion contractors are not susceptible to union strikes because their employees are nonunion. Nor do nonunion contractors have any need for a procedure to resolve labor disputes with unions for the same reason—their employees are not represented by a union. Imposing these clauses on nonunion contractors would be a useless attempt to cure them of an affliction they do not have.[14]

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[12] The requirement for "other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health" under Section 4(e) of EO 13502 is so vague as to be meaningless. In any event, any such requirements are unrelated to EO 13502's ostensible objective of eliminating union disruptions of federal construction projects.

[13] Even binding no-strike and dispute resolution clauses are not always successful in protecting projects against union strikes and disruptions. *See* Northrup & Alario, *supra*, note 3, at 28-29 (documenting union strikes that occurred despite no-strike clause).

[14] *See* Mcgeary & Pellegrino, *supra* at note 5, at 448, fn. 100 ("this problem [with jurisdictional disputes] is peculiar to craft labor. Merit shop firms are not faced with jurisdictional disputes. It is counterintuitive to justify eliminating these firms on the grounds that a project agreement is needed in order to protect the public from a problem they do not present"); Northrup & Alario, *supra*, note 5, at 29 ("there is no reason why labor peace cannot prevail if the project is being done in whole or in part by open shop contractors who do not strike").

A no-strike and dispute resolution clause between all unions and unionized contractors resolves any problems with union job disruptions on a construction site (assuming that unions abide by it), irrespective of whether nonunion parties are also parties to the clauses. Union members cannot engage in strikes or job actions on a jobsite to disrupt the work of nonunion contractors if their union is a party to a no-strike and dispute resolution clause with their employers on that site.

Imposing a union no-strike or union dispute resolution clause on nonunion contractors would not effect the degree to which unions can disrupt a construction project in the least. As such, there is no legitimate basis for imposing such clauses on nonunion contractors under EO 13502.

2. Imposing PLA Terms Other Than A No-Strike Clause and Union Dispute Resolution Procedure Will Defeat EO 13502's Ostensible Goal of Minimizing Union Disruptions of Federal Construction Projects

EO 13502's ostensible purpose of minimizing union disruption of construction projects does not support imposing other terms of union pre-hire agreements on contractors and their employees, such as terms that relate to wages, benefits, or working conditions. The labor peace ostensibly sought under EO 13502 is achieved if unions cannot engage in strikes or other job disruptions. Imposing any other union conditions on contractors and their employees would be wholly unrelated to the government's procurement interests.

In fact, requiring other terms of union pre-hire agreements in a PLA can only *harm* the government's procurement's interests, because it will reduce the pool of contractors and employees willing to work on the project. Each additional union burden that nonunion employees and merit-shop contractors must bear to work on a federal project necessarily diminishes the number of nonunion employees and merit-ship contractors willing to work on that project. This will inevitably harm the government's procurement interests, because contractors and employees needlessly driven from the project could have had costs less than, and/or skills greater than, the contractors and employees willing to accept the union burdens.[15]

Specifically, the following contract terms that unions often demand be included in pre-hire or PLAs would be particularly detrimental to the government's procurement interests:[16]

Union Representation Clause: Union pre-hire agreements often require that a union be designated as the exclusive representative of all of the employer's employees on a project.

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[15] "It is axiomatic that reducing the pool of eligible bidders will increase costs. But the problem is exacerbated where the reduction eliminates firms which gain competitive advantage through more efficient work methods. Studies show that union labor increases costs over open shop contractors by twenty to sixty percent. Because merit shops eliminate the inefficiencies associated with craft designations and union work rules, they are often able to force union concessions on jobs where both bid." Mcgeary & Pellegrino, *supra* at note 5, at 449-50.

[16] Unions often seek the listed terms in pre-hire agreements. *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 265-266 (1983); *Building and Const. Trades Dept., v. Allbaugh*, 295 F.3d 28, 30 (D.C. Cir. 2002);

Imposing unwanted union representation on nonunion employees does not advance the government's procurement interests in any way. This requirement will serve only to reduce the pool of employees and contractors willing to work on the project. Nonunion employees will be loathe to submit to unwanted union representation. Their merit-shop employers also will be resistant, as they are accustomed to operating freely and independently. This is particularly true with respect to the many small contractors that are privately or family owned. Being forced to bargain with union bosses about how they can operate *their own* businesses is an indignity that many proud merit-shop contractors will refuse to bear.

Compulsory Unionism Clause. A "compulsory unionism" or "union shop" clause that requires that all employees become union members or pay union dues as a condition of employment bears no relation to any government procurement interest. Such a clause can only dissuade employees from working on a construction project (those who want to pay union dues don't need to be forced to do so). This includes not only employees with a moral or political opposition to unions, but those who simply do not wish to see a portion of their hard earned wages diverted from their paychecks to a special interest group. Merit shop contractors will not want to inflict this harm on their employees if they can avoid it. A compulsory unionism clause will serve only to drive merit-shop contractors and their employees from a project, in contravention of the government's procurement interests.

Exclusive Union Hiring Hall. Union pre-hire agreements often require that hiring be done exclusively through union hiring halls. This hiring restriction does not advance the government's procurement interests, but only harms that interest. An exclusive union hiring hall prevents skilled and experienced nonunion employees from working on a project because hiring is based on seniority in the hiring hall. Nonunion employees will necessarily lack seniority in the hall, regardless of their skill or experience. Moreover, signing up to obtain work through a union hall is itself burdensome for employees and often requires payment of additional fees to the union. An exclusive hiring hall will also dissuade merit-shop contractors from working on a project, because the contractors will be unable to use their own employees for the project and will lack the ability to choose who they employ. Indeed, many merit-shop contractors will be unable to operate efficiently, or even at all, if they cannot use personnel who are familiar with their practices and operating procedures.

Union Work Rules. Union pre-hire agreements often impose a byzantine system of union work rules in which job functions are strictly separated into exclusive union jurisdictions based on craft (i.e., carpenter, electrical, etc.) and limits are placed on the amount and types of work that employees can perform. It will be difficult, if not impossible, for merit-shop contractors to operate efficiently under unfamiliar union work rules, as these contractors will naturally be accustomed to working according to their own procedures and practices.[17] That union work rules are also notoriously inefficient—as

[17] *See A. Pickett Constr. v. Luzerne County Convention Ctr. Auth.*, 738 A.2d 20, 23 (Pa. Commw. Ct. 1999) (noting that the requirement to employ union members causes non-union contractors to have to make drastic revisions in the structure of their working relationships with

(continued…)

they exist to increase the amount of union labor needed to accomplish a task and to protect the jurisdictional turf of competing unions—makes using union work rules even more counterproductive.[18] Forcing merit-shop contractors to abandon their normal operating procedures and work according to union work rules will not serve the government's procurement interests in any way, but will only reduce the number of contractors and employees willing to work on a construction project.

Union Pension Funds. Perhaps the greatest impediment to attracting contractors and employees to a construction project is a requirement that contractors make contributions to union pension plans for their employees. Of course, forcing contractors and employees into union pension plans does not advance any government procurement interest any way. But such a requirement will certainly drive nonunion employees from the project, because these employees will receive *no retirement benefits* for their work on a project. The reason is that union pension plans have vesting periods that are longer than the duration of most projects. Employees are entitled to no benefits from union pension plans: (1) prior to five years of service under a plan under so-called "cliff vesting;" or (2) prior to three years of service under a plan, after which graduated vesting schedule applies, under "graduated vesting." Few nonunion employees will work on any specific construction project for as long as these vesting periods. Indeed, many construction projects do not even last three or five years. Consequently, nonunion employees forced to work under a PLA with a mandatory union pension plan will not become entitled to any vested benefits for their work on the project. Instead, their money will subsidize the pensions of longtime union members. Few nonunion employees will be willing to tolerate this inequity and forego accumulating retirement benefits if other work is available.

Merit-shop contractors will also be loathe to participate in a union pension plan for even a short time because it could entail onerous, long term liabilities for the contractor. This includes withdrawal liabilities after leaving the fund at the end of the project and liability arising from the underfunded nature of many construction union pension plans.[19] Few merit contractor will be willing to incur the burdens that participating in a union trust fund entails as a price for working on one federal construction project.

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[17](…continued)
their employees).

[18] *See* Mcgeary & Pellegrino, *supra* at note 4, at 450 (discussing finding that "open shops are able to operate more efficiently by eliminating job classifications, eliminating work restraint rules such as double-time pay; eliminating reporting pay and mandatory eight hour work days; increasing management prerogatives; eliminating shift premiums; and eliminating manning requirements") (citing to Herbert R. Northrup et al., Doublebreasted Operations and Pre-Hire Agreements in Construction: The Facts and the Law, A Supplement to Open Shop Construction Revisited 1 (1987)); Northrup & Alario, *supra*, note 3, at 35 (" unionized contractors face a difficult task in competing with open shop contractors because their direct labor costs remain higher and their methods of organizing work is less efficient.").

[19] *See, e.g.,* 29 U.S.C. § 1381 (withdrawal liability)

> Forcing contractors and their employees to participate in union benefit plans as a condition of working on a federal construction project is the surest way to drive merit-shop contractors and nonunion employees from the project. While this may advance union interests to the detriment of nonunion employees and their employers, it is certainly will not advance the government's procurement interests.

In short, requiring these and other terms of union pre-hire agreements, other than no-strike and dispute resolution clauses, can only serve to harm the government's procurement interest by decreasing the pool of employees and contractors willing to work on a project. These other clauses do not minimize union disruptions to a construction project in any way. Thus, there is no legitimate basis for requiring these other terms in any PLA imposed under EO 13502.

Furthermore, imposing union terms other than no-strike and dispute resolution clauses is incompatible with EO 13502's requirement that agencies must "allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements." EO 13502, Sec. 4(b). As made clear above, only unionized contractors can actually operate under the terms of unions contract with any degree of efficiency. A PLA that requires that contractors use union labor instead of their own employees, operate under union work rules instead of their own procedures, and change their benefit package to union plans, is a de facto prohibition on nonunion contractors.

3. The Proposed Rule Must Be Revised to Limit The PLA Terms Imposed Under EO 13502 To A No-Strike Clause And Dispute Resolution Procedure For Unionized Contractors

To ensure that agencies only require PLA terms that advance the government's ostensible procurement interest in minimizing union disruption of federal construction projects, and do not require PLA terms that will harm the government's procurement interests by diminishing the pool of contractors and employees willing to work on a project, the proposed rule should be revised by adding the following to Section 22.504:

> (c)(1) Project labor agreements established under this subpart shall not contain any terms or requirements that do not directly advance the government's interest in achieving economy and efficiency in government procurement.
> (2) The only terms that shall be required in a project labor agreement required by this subpart are clauses between unions and union contractors that prohibit union strikes and job disruptions and that establish a binding procedure for resolving disputes between unions and unionized contractors.

IV. The Proposed Rule Does Not Comply With the Regulatory Flexibility Act

Finally, the proposed rule does not comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*., because of the Councils' failure to analyze the huge impact that the rule will have on small entities that serve as subcontractors on construction projects. The proposed rule incorrectly states that such an analysis is unnecessary because "the application of the rule is only in connection with large scale construction projects over $25 million (those that would likely impact large businesses)." Fed. Reg. 33, 953 (14 July 2009). The notion that the rule will only impact the large businesses that bid for a project is belied by the plain text of the proposed rule,

which requires that all PLAs "shall . . . bind all contractors *and subcontractors* on the construction project to comply with the project labor agreement." Sec. 22.504 (b)(1) (emphasis added). By its terms, the proposed rule will impact all subcontractors on a construction project where a PLA is imposed. Many of these subcontractors will be small merit-shop contractors. As established above, these small nonunion contractors will be detrimentally impacted if compelled to execute a union PLA as a condition of working on a federal construction project. *See* pp. 9-13, *supra*. The Regulatory Flexibility Act has not been satisfied.

Conclusion

For the foregoing reasons, the Foundation opposes any implementation of EO 13502. But, to the extent that it is implemented, the proposed rule must be revised to lend some rationality to the order by requiring that: (1) the decision to require a PLA be made only after competitive bidding is completed; and (2) the terms of any PLA be limited to no-strike and dispute resolution clauses limited solely to union contractors.

Respectfully submitted this 13th day of August, 2009.

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