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Project Labor Agreements Will Now Be Required for Large-Scale Federal Construction Projects

On February 4, 2022, President Biden issued an Executive Order on Use of Project Labor Agreements for Federal Construction Projects (EO), which will require the use of project labor agreements (PLAs) on large-scale federal construction projects with a total estimated cost of \$35 million or more unless a senior official within the agency grants an exception. Agencies also may require the use of PLAs on projects that are less than \$35 million.



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While the EO is effective immediately, it will only apply to solicitations issued on or after the effective date of final regulations issued by the FAR Council. The FAR Council has 120 days to propose regulations implementing the EO. Often there is a significant period of time between the publication of proposed regulations, evaluation of public comments, and publication of final regulations.



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The White House announced that the intent of the EO is to “help alleviate the management and coordination challenges that can stymie progress on major construction projects” at the federal level. The White House further determined that, “[b]ased on FY2021 figures, [the EO] could affect \$262 billion in federal government construction contracting and improve job quality for the nearly 200,000 workers on federal construction contracts.”

Currently, the FAR permits the use of PLAs on federal construction projects of \$25 million or more under Executive Order 13502, which was issued in 2009. See, FAR Subpart 22.5. However, PLAs under Executive Order 13502 are not mandatory and many federal construction projects do not have government-required PLAs, likely because of the significant discretion agencies currently have in determining whether a PLA for a project is appropriate. The EO revokes Executive Order 13502 effective on the date that the final FAR regulations are issued.

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What is a PLA?

PLAs are collective bargaining agreements between building trade unions and contractors that set forth the terms and conditions of employment, such as wages and dispute resolution procedures, for a specific construction project. It is customary for PLAs to require that employees hired for the project be referred through union hiring halls, that any nonunion workers pay applicable union dues while working

on the project, and that the contractor is obligated to adhere to union rules regarding working conditions and pension fund contributions for the project's duration. The terms of a PLA apply to all contractors and subcontractors who successfully bid on the project and supersede any existing collective bargaining agreements.

What are the PLA Requirements?

Section 4 of the EO requires that any PLA reached pursuant to the EO:

- Bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;
- Allow all contractors and subcontractors on the construction project to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
- Contain guarantees against strikes, lockouts, and similar job disruptions;
- Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the PLA;
- Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
- Fully conform to all statutes, regulations, Executive Orders, and Presidential Memoranda.

Which Contracts Are Subject to the EO?

The EO applies to federal government contracts awarded by an executive department or agency, including independent establishments. It does not apply to construction projects financed through grants or loans. However, a senior official within an agency may grant an exception to the PLA requirement for a specific project. The exception must be granted no later than the solicitation date and provide a specific written explanation of the circumstances justifying the exception. Section 5 of the EO identifies the circumstances that could justify an exception as follows:

- Requiring a PLA on the project would not advance the Federal Government's interests in achieving economy and efficiency in Federal procurement because: (i) the project is of short duration and lacks operational complexity; (ii) the project will involve only one craft or trade; (iii) the project will involve specialized construction work that is available from only a limited number of contractors or subcontractors; (iv) the agency's need for the project is of such an unusual and compelling urgency that a PLA would be impracticable; or (v) the project implicates other similar factors deemed appropriate in the implementing FAR regulations or guidance.
- Based on an inclusive market analysis, requiring a PLA on the project would substantially reduce the number of potential bidders so as to frustrate full and open competition.
- Requiring a PLA on the project would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

Perhaps to ensure that the use of exceptions is limited, Section 6 of the EO requires agencies, to the extent permitted by law and consistent with national security and executive branch confidentiality interests, to publish on a centralized public website data showing the use of PLAs as well as descriptions of exceptions granted. Agencies also will have to report this information to OMB on a quarterly-basis.

The EO also instructs that the Departments of Defense and Labor, along with OMB, coordinate in designing a training strategy for agency contracting officers to enable those contracting officers to effectively implement the EO.

What is the Industry's Reaction?

Since its announcement, the EO has been met with both praise and resistance. The Association of Union Constructors, which represents 1,800 contractors, stated that requiring the use of PLAs will “streamline[] the negotiation process and give[] employers access to a highly skilled pool of craftworkers.” However, the Associated Builders and Contractors, a national trade association representing the non-union construction industry, opposes mandating PLAs on federal projects, stating that the EO will “serve to further worsen the current nationwide labor shortage and reduce opportunities for skilled workers.”

Final Thoughts

This area of law is changing rapidly and provisions of the EO will need to be examined in conjunction with other relevant law for employers bidding in the federal procurement space. Employers are encouraged to consult with qualified counsel in collective bargaining and negotiations when considering entering into a PLA or any other collective bargaining agreement.

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