

August 13, 2009

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

Attn: Hada Flowers

Re: FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects

Dear Ms. Flowers:

On behalf of the Professional Services Council, I am pleased to submit the following comments regarding the proposed rule titled **FAR (Federal Acquisition Regulation) Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects**, published in the *Federal Register* on July 14, 2009.¹ This proposed rule implements Executive Order 13502 (E.O.), issued on February 6, 2009.²

The Professional Services Council (PSC) is the national trade association of the government professional and technical services industry. Solely focused on preserving, improving, and expanding the federal government market for its members, PSC is the most respected industry voice and leader on legislative and regulatory policy issues related to government procurement, outsourcing and related business policy. PSC helps shape public policy, leads strategic coalitions, and works to build consensus between government and industry. PSC's more than 330 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

The proposed rule amends the FAR to require the inclusion of project labor agreement (PLA) contract clauses when agencies determine that the use of PLAs in connection with large-scale construction projects is in the best interest of the federal government. For purposes of the proposed rule, large-scale construction projects are defined as those in which the total cost to the federal government exceeds \$25 million. Specifically, the FAR Councils are requesting feedback from interested parties about whether a FAR final rule on PLAs should require the submission of a PLA prior to the contract award or only from the successful offeror. The FAR Councils are also

¹ 74 Fed. Reg. 33953

² Executive Order: Use of Project Labor Agreements for Federal Construction Projects (available at http://www.whitehouse.gov/the_press_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects/)

requesting feedback on the factors that a contracting officer should consider, on a project-by-project basis, in determining whether the use of a PLA will be in the best interest of the government.

PSC opposes the proposed rule because we believe that the federal government should maintain neutrality towards government contractors' labor relations on federal construction projects, that the use of PLAs will not achieve the results outlined in the E.O., and that requiring PLAs will have a significant negative impact on competition and small businesses' ability to compete for work on federal construction projects. Furthermore, the E.O. states that the use of PLAs on large-scale construction projects "promote[s] economy and efficiency in Federal procurement." However, the E.O. provides no empirical data to support such claims, and in fact, the use of PLAs may result in higher costs to the government and delays in awarding and executing contracts.

However, PSC recognizes that the FAR Councils are required to implement a proposed rule that implements the E.O., and has limited leeway in diverging from the requirements of the E.O. Hence, PSC's comments focus on the specific questions posed by FAR Councils in the proposed rule.

Regarding the FAR Councils' request for comments on whether PLAs should be required as part of each offerors bid proposal, or if only a successful offeror should be required to submit a PLA after the award of the contract, PSC believes there are negative aspects to each approach and offers the following points for consideration.

Requiring PLAs Prior to the Award of a Contract

Requiring a PLA prior to the awarding of a contract could significantly delay the time it takes an agency to award a contract and could impact the competitive nature of federal contracting. Delays in the contracting process would be caused by the added time it may take for potential bidders to negotiate PLAs with union representatives that can be included in bid proposals. If none of the bidders are able to reach an agreement with labor unions on a PLA then their bid proposals may be deemed incomplete by contracting officers and the agency may be forced to re-solicit for the work, thus delaying the initiation of the project. The inability of potential bidders to reach an agreement on a PLA would be considerably more problematic in instances where agencies wish to award a contract in a rapid manner.

For companies that do not have existing agreements with labor unions, or for small or mid-sized companies that are not experienced in negotiating agreements with labor unions, the inability to reach an agreement may eliminate them from eligibility for a contract award despite the fact that their proposal might offer the most innovative and technically sound approach to the project and present the best value to the government. Eliminating such companies from competition is not in the best interest of the government.

In addition, the requirement to submit a PLA prior to award would give labor unions unintended leverage to affect the outcome of federal procurements. For example, labor unions could "shop" for potential bidders that would offer the unions the most favorable wages and benefits. Unions

could then refuse to enter into PLAs with all other potential bidders, thus eliminating them from consideration for award. This practice would not only drive up the price of the contract, but would also affect the agencies' ability to contract with the most qualified bidder.

Requiring PLAs After the Award of Contract

Requiring the winning offeror to negotiate a PLA after it has been awarded a contract would also lead to delays in initiating work under the contract. In most cases, work would not begin on a project until a PLA is agreed to by all parties. Thus, there would be an initial delay until PLAs are structured and finalized. In the event that a contractor could not reach an agreement with a labor union on a PLA, significant delays would occur. Such delays would have a direct impact on federal agencies and could lead to contract disputes between contractors and contracting officers as the contractor would be more likely to miss agreed upon deadlines.

In addition, in order to avoid delays, contractors may be forced to agree to PLAs that contain wage rates higher than the rates that were included in their winning proposal. In such cases, it is unlikely that the contracting officer will agree to the higher rates, thereby putting a greater amount of risk on the contractor and potentially causing contractors to default on contracts.

Determination Requirements

The FAR proposed rule provides discretion to the federal agencies to determine which large-scale federal construction projects should include the PLA contract clauses. However, no guidance is offered to agencies regarding what factors should be considered in making the determination. PSC concurs with the FAR Councils' assessment in the proposed rule that guidance is needed to assist the agencies in making their decisions. PSC recommends that such guidance should require a thorough analysis by agencies and should include, at minimum, an assessment of how rapidly the contract needs to be awarded and the time frame for initiating work under the contract, the estimated cost savings of requiring a PLA, and the impact on small and mid-sized businesses and on maximizing competition for the contract. In addition, PSC recommends that agencies be required to provide written justification in the solicitation that addresses all of the factors that were considered by the agency in making the determination.

Thank you for the opportunity to comment on this proposed rule. If you have any questions or need additional information, please do not hesitate to let me know. I can be reached at 703-875-8059, or via email at chvotkin@pscouncil.org.

Sincerely,



Alan Chvotkin, Esq.
Executive Vice President and Counsel