

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 17, 22, 36, and 52

[FAR Case 2009-005; Docket 2009-0024; Sequence 1]

RIN 9000-AL31

Federal Acquisition Regulation; FAR Case 2009-005, Use of
Project Labor Agreements for Federal Construction Projects

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13502, Use of Project Labor Agreements for Federal Construction Projects. The new E.O. encourages Federal departments and agencies to consider requiring the use of project labor agreements for Federal construction projects where the total cost to the Government is more than \$25 million in order to promote economy and efficiency in Federal procurement.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before **[Insert 30 days after publication in the FEDERAL REGISTER]** to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2009-005 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-005" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2009-005. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2009-005" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2009-005 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAR case 2009-005.

SUPPLEMENTARY INFORMATION:

A. Background

On February 6, 2009, the President issued E.O. 13502 which encourages executive agencies to consider requiring the use of project labor agreements in connection with large scale construction projects in order to promote economy and efficiency in Federal procurement. The E.O. encourages executive departments and agencies to consider the use of project labor agreements for construction projects where the total cost to the Government is valued at \$25 million or more and permits agencies on a project-by-project basis to require the use of a project labor agreement where certain criteria would be met.

The term "project labor agreement" means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

The E.O. describes how project labor agreements may help agencies manage workforce challenges that arise in connection with large-scale construction projects. For example, large-scale construction projects typically involve multiple employers at a single location.

The E.O. explains that a "lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, can create friction and disputes in the absence of an agreed-

upon resolution and mechanism". The use of project labor agreements may "prevent these problems from developing by providing structure and stability to large-scale construction projects thereby promoting the efficient and expeditious completion of Federal construction contracts." A project labor agreement may help an agency manage these problems by providing an agreed-upon resolution mechanism that promotes the efficient and expeditious completion of Federal construction projects.

In accordance with E.O. 13502, this proposed rule amends the FAR to—

- Provide a new FAR Subpart 22.5, Use of Project Labor Agreements for Federal Construction Projects.
- Add a new provision at 52.222-XX, Notice of Requirement for Project Labor Agreement, to be included in solicitations where the agency has exercised its discretion to require a project labor agreement as prescribed at FAR 22.505(a).
- Add a new clause 52.222-YY, Project Labor Agreement, to be included in contracts in accordance with FAR 22.505(b).

The Councils invite comment on the process, in which the solicitation incorporates the provision providing for submission of the project labor agreement prior to the

contract award (i.e., should agencies require this from each offeror as part of its bid or only from an apparent successful offeror).

The Councils are also considering factors for the contracting officer to consider, on a project-by-project basis, in determining whether use of a project labor agreement will be in the best interest of the Government. The Councils welcome public comment on the factors that should be considered, such as the difficulty of coordinating multiple contracts in the absence of a project labor agreement, the importance of timely project completion, etc.

The Director of the Office of Management and Budget (OMB) is working with the Secretary of Labor and other officials, to provide recommendations to the President on whether to broaden the application of project labor agreements on both construction projects awarded under Federal contracts and construction projects receiving Federal financial assistance, to promote the economical, efficient, and timely completion of such projects.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rationale for this determination is based on the discretionary nature of the regulation being promulgated and the fact that the application of the rule is only in connection with large scale construction projects over \$25 million (those that would likely impact large businesses). Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 17, 22, 36, and 52, in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, et seq.; (FAR case 2009-005), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) addresses the collection of information by the Federal government from individuals, small businesses and state and local governments and seeks to minimize the burdens such information collection requirements might impose. A collection of information includes providing answers to identical questions posed to, or identical reporting or record-keeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the

United States. In accordance with the requirements of the Paperwork Reduction Act, agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number or the number appears in the Code of Federal Regulations (see FAR 1.106).

The Paperwork Reduction Act (Pub. L. 104-13) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat will submit a request for approval of a new information collection requirement concerning FAR Case 2009-005 to the OMB under 44 U.S.C. Chapter 35, et seq.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Councils solicit comments concerning: whether these information collection requirements are necessary for the Government to properly perform its functions, including whether the information has practical utility; the accuracy of the estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collecting information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

The rule will apply to large-scale construction projects where the cost to the Government is \$25 million or more and where agencies have determined that use of a project labor agreement, in accordance with requirements prescribed by this rule, will advance the Government's interest in achieving economy and efficiency in the resulting procurement. Most prime contractors for such projects are large business concerns. We estimate the annual total burden hours as follows:

Based on Fiscal Year 2008 data regarding the types of contracts to which this information collection applies, it is estimated that there are approximately 300 large-scale construction contracts (including Architectural and Engineering contracts) exceeding \$25 million that could be subject to an agency determination for use of project labor agreements. Based on advice of labor advisors, approximately 10 percent of these types of projects may be deemed appropriate for a project labor agreement. Therefore, it is estimated the information collection requirement would apply to approximately 30 large-scale construction contracts per year. Each contract would require one project labor agreement submission prior to or after award; therefore, the estimated number of annual respondents is 30. Project labor agreements are often negotiated in advance of the solicitation phase for a

procurement, as the large-scale projects are defined. The estimated time for reporting of this information is 1 hour to cover copying and submitting the agreement to the Government.

We estimate the total annual public cost burden for these elements to be \$900, based on the following:

Respondents	30
Responses/respondent	<u>x 1</u>
Responses	30
Hours per response	<u>x 1</u>
Total hours	30
Cost per hour	<u>x \$ 30</u>
Total annual cost to public	\$900

D. Request for Comments Regarding Paperwork Burden

Submit comments, including suggestions for reducing this burden, not later than **[insert date 30 days after publication in the FEDERAL REGISTER]** to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection

of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requester may obtain a copy of the justification from the General Services Administration, Regulatory Secretariat (VPR), Room 4041, Washington, DC 20405, telephone (202) 501-4755. Please cite OMB Control Number 9000-00XX, Use of Project Labor Agreements for Federal Construction Projects, in all correspondence.

List of Subjects in 48 CFR Parts 2, 17, 22, 36, and 52

Government procurement.

Dated: July 9, 2009

Al Matera,
Director,
Office of Acquisition Policy.

Therefore, the Council propose amending 48 CFR parts 2, 17, 22, 36, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 17, 22, 36, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

2. Amend section 2.101(b)(2) in the third sentence in the definition "Construction" by removing the words "personal property" and adding "personal property (except that for use in Subpart 22.5, see the definition at 22.502)."

PART 17—SPECIAL CONTRACTING METHODS

3. In section 17.603 revise paragraph (c) to read as follows:

17.603 Limitations.

* * * * *

(c) For use of project labor agreements, see Subpart 22.5.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

4. In section 22.101-1 revise paragraph (b)(2) to read as follows:

* * * * *

(b) (1) * * *

(2) For use of project labor agreements, see Subpart 22.5.

5. Add Subpart 22.5 to Part 22 to read as follows:

Subpart 22.5 Use of Project Labor Agreements for Federal Construction Projects.

Sec.

- 22.501 Scope of subpart.
- 22.502 Definitions.
- 22.503 Policy.
- 22.504 General requirements for project labor agreements.
- 22.505 Solicitation provision and contract clause.

22.501 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order 13502, February 6, 2009.

22.502 Definitions.

As used in this subpart—

Construction means construction, rehabilitation, alteration, conversion, extension, repair, or improvement of buildings, highways, or other real property.

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

Large-scale construction project means a construction project, including all contracts associated with the project, where the total cost to the Federal Government is \$25 million or more.

Project labor agreement means a pre-hire collective bargaining agreement with one or more labor organizations

that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).

22.503 Policy.

Project labor agreements are a tool that agencies may use to promote economy and efficiency in Federal procurement. Pursuant to Executive Order 13502, agencies are encouraged to consider requiring the use of project labor agreements in connection with large-scale construction projects.

22.504 General requirements for project labor agreements.

(a)(1) Agencies may require the use of project labor agreements where use of such agreements will—

(i) Advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and,

(ii) Be consistent with law.

(2) If an agency determines that use of a project labor agreement will meet the standards set forth in paragraphs (a)(1)(i) and (ii) of this section, the agency has complete discretion—

(i) To require that every contractor and subcontractor on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more appropriate labor organizations; or

(ii) To decide not to require the use of a project labor agreement.

(b) Project labor agreements established under this subpart shall—

(1) Bind all contractors and subcontractors on the construction project to comply with the project labor agreement;

(2) Allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, and Executive orders.

22.505 Solicitation provision and contract clause.

(a) (1) For acquisition of large-scale construction projects, if the agency makes a determination pursuant to this subpart that a project labor agreement will be required, the contracting officer shall insert the provision at 52.222-XX, Notice of Requirement for Project Labor Agreement, in all solicitations associated with the project.

(2) If an agency allows submission of the project labor agreement after contract award, the contracting officer shall use the provision with its Alternate I in accordance with agency procedures.

(b) (1) For acquisition of large-scale construction projects, if the agency makes a determination pursuant to this subpart that a project labor agreement will be required, the contracting officer shall insert the clause at 52.222-YY, Project Labor Agreement in all contracts associated with the project.

(2) If an agency allows submission of the project labor agreement after contract award, the contracting officer shall use the clause with its Alternate I in accordance with agency procedures.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. In section 36.202 revise paragraph (d) to read as follows:

36.202 Specifications.

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(d) For requirements on the use of project labor agreements for Federal construction projects, see part 22, Subpart 22.5 of this chapter.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Add section 52.222-XX to read as follows:

52.222-XX Notice of Requirement for Project Labor Agreement.

As prescribed in 22.505(a)(1), insert the following provision:

NOTICE OF REQUIREMENT FOR PROJECT LABOR AGREEMENT (DATE)

(a) Definitions. Labor organization and project labor agreement, as used in this provision, are defined in the clause of this solicitation entitled Project Labor Agreement.

(b) Consistent with applicable law, the apparent successful offeror will be required to execute a project labor agreement with one or more appropriate labor organizations for the term of the resulting construction contract.

(c) Any project labor agreement reached pursuant to this provision shall—

(1) Bind the offeror and all subcontractors on the construction project to comply with the project labor agreement;

(2) Allow the offeror and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, and Executive orders.

(d) Any project labor agreement reached pursuant to this provision does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Government will not participate in the negotiations of any project labor agreement.

(f) The apparent successful offeror shall submit to the Contracting Officer a copy of the project labor agreement—reached pursuant to this provision prior to contract award.

(End of Provision)

Alternate I (DATE) As prescribed in 22.505(a)(2), substitute the following paragraph (b) in lieu of paragraphs (b) through (f) of the basic clause:

(b) Consistent with applicable law, the contractor agrees to bargain in good faith to a project labor agreement with one or more appropriate labor organizations for the term of the resulting construction contract.

8. Add section 52.222-YY to read as follows:

52.222-YY Project Labor Agreement.

As prescribed in 22.505(b)(1), insert the following clause:

PROJECT LABOR AGREEMENT (DATE)

(a) Definitions. As used in this clause—

Labor organization means a labor organization as defined in 29 U.S.C. 152(5).

Project labor agreement means a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for

a specific construction project and is an agreement described in 29 U.S.C. 158(f).

(b) The Contractor shall maintain in a current status throughout the life of the contract the project labor agreement entered into prior to the award of this contract in accordance with solicitation provision 52.222-XX, Notice of Requirement for Project Labor Agreement.

(c) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts.

(End of Clause)

Alternate I (DATE). As prescribed in 22.505(b)(2), substitute the following paragraphs (b) through (g) for paragraphs (b) and (c) of the basic clause:

(b) Consistent with applicable law, the contractor agrees to bargain in good faith to a project labor agreement with one or more appropriate labor organizations for the term of this construction contract. The contractor shall submit an executed copy of the project labor agreement to the Contracting Officer.

(c) Any project labor agreement reached pursuant to this clause shall—

(1) Bind the Contractor and all subcontractors on the construction project to comply with the project labor agreement;

(2) Allow the Contractor and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;

(3) Contain guarantees against strikes, lockouts, and similar job disruptions;

(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement;

(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and

(6) Fully conform to all statutes, regulations, and Executive orders.

(d) Any project labor agreement reached pursuant to this provision does not change the terms of this contract or provide for any price adjustment by the Government.

(e) The Government will not participate in the negotiations of any project labor agreement.

(f) The Contractor shall maintain in a current status throughout the life of the contract the project labor agreement entered into pursuant to this clause.

(g) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (g), in all subcontracts.

(End of Provision)

[BILLING CODE 6820-EP]

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