



**AGC**  
THE CONSTRUCTION  
ASSOCIATION

June 12, 2022

U.S. Department of the Interior  
1849 C Street NW  
Washington, DC 20240

*Sent via electronic mail to [getinfo@osmre.gov](mailto:getinfo@osmre.gov)*

**RE: Guidance on Bipartisan Infrastructure Law Abandoned Mine Land Grant Implementation**

On behalf of The Associated General Contractors of America (“AGC”), I thank the U.S. Department of the Interior (“DOI”) for soliciting input its draft guidance to eligible states and the Navajo Nation on how to apply for the first \$725 million in funding available for reclaiming abandoned mine lands (AML) as part of President Biden’s Bipartisan Infrastructure Law. While AGC is not an interested source, as the largest trade association representing potential offerors on your projects, we are an interested party and wish to offer our input. As explained below, DOI should abandon its guidance that effectively mandates PLAs on AML projects or aggregated projects in excess of \$1 million.

AGC believes that the DOI should not mandate the use of a PLA on any project. AGC neither supports nor opposes contractors’ *voluntary* use of PLAs on AML projects or elsewhere but strongly opposes any *government mandate or prohibition* of contractors’ use of PLAs. AGC is committed to free and open competition for publicly funded work and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency’s selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. AGC also believes that government mandates for PLAs can restrain competition, drive up costs, cause delays, and lead to jobsite disputes. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. Accordingly, AGC urges DOI to refrain from imposing any PLA mandates on any of its contractors and to defer to the contractor’s judgment as to whether a PLA is appropriate for a given project.

AGC questions the DOI’s assessment of the need for a PLA mandate and urges DOI to rescind those portions of the guidance that effectively mandates PLAs. Portions of the relevant text from the guidance assert the following:

*Require contractors to support safe, equitable, and fair labor practices by adopting collective bargaining agreements, local hiring provisions (as applicable), project labor agreements, and community benefits agreements. (Page 4)*

In lieu of such PLA, DOI provides a laundry list of requirements and certifications that effectively makes PLAs mandatory on these AML funded projects.

*For projects or aggregated projects in excess of \$1 million, States or Tribes may provide a certification that a Project either uses a unionized project workforce or includes a project labor agreement, meaning a pre-hire collective bargaining agreement consistent with section 8(f) of the National Labor Relations Act (29 U.S.C. 158(f)). (Page 9).*

Should skilled labor shortages arise, how would a PLA mandate remedy the problem? Is there objective evidence that the local union hiring halls for the specific trades needed for this project will be able to supply the number of workers needed? Is there evidence that they can supply such labor more efficiently or effectively than other labor and recruitment resources that may be available? The data below indicates otherwise.

Data from the Bureau of Labor Statistics (BLS), derived from the Current Population Survey (CPS), evidence that the majority of construction in the U.S. in general, as well as in the vicinity of AML projects, is performed on an open-shop basis. According to BLS, only 13.6 percent of workers in the U.S. private construction industry were represented by a union (covered by a CBA) in 2021 and only 12.5 percent were members of a union. (Barry T. Hirsch and David A. Macpherson. 2020. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved June 9, 2022, from <http://unionstats.com>.) Given the low level of union representation in the project area, AGC does not see how a PLA mandate would help solve any potential labor shortage, at least not without robbing local workers of job opportunities.

Even if there are such time-sensitive issues and scheduling requirements – as is typically the case with a large-scale construction project – how will a PLA mandate help? Under certain circumstances, a PLA may help avoid delays caused by labor disputes, but it cannot do anything to prevent the vast majority of causes of construction project delay. It cannot prevent delay caused by the supply chain problems that are currently plaguing the industry. Nor can a PLA prevent other common causes of delay, such as weather, force majeure (including COVID-19), permitting, or unexpected site conditions. As discussed, a PLA is also unlikely to prevent delay caused by labor supply. As there is no reliable evidence that indicates that a government mandated PLA would impact construction schedule or advance the federal government’s interest in achieving economy and efficiency.

AGC believes that a PLA *mandate* would *not* advance the Federal Government’s interests in achieving economy and efficiency in federal procurement. There are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. While case studies have had varying results, research regarding the impact of PLA use on the economy or efficiency of projects in general is inconclusive. In a 1998 study by the agency then called the Government Accounting Office, the agency reported that it could not document the alleged benefits of past mandates for PLAs on federal projects and that it doubted such benefits could ever be documented due to the difficulty of finding projects similar enough to compare and the difficulty of conclusively demonstrating that performance differences were due to the PLA versus other factors. (U.S. Government Accounting Office, *Project Labor Agreements: The Extent of Their*

*Use and Related Information*, GAO/GGD-98-82.) The Congressional Research Service reached the same conclusion in a report issued in July 2010. (U.S. Congressional Research Service Report R41310, *Project Labor Agreements*, by Gerald Mayer.) Government mandates for PLAs—even when competition, on its face, is open to all contractors— can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. For example:

- PLAs typically limit open shop contractors' rights to use their current employees to perform work covered by the agreement. Such PLAs usually permit open shop contractors to use only a small "core" of their current craft workers, while the remaining workers needed on the job must be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.
- PLAs frequently require contractors to change the way they would otherwise assign workers, requiring contractors to make sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers competent in more than one skill and perform tasks that cross such boundaries. It can also burden union contractors by requiring them to hire workers from the hiring halls of different unions from their norm and to assign work differently from their norm.
- PLAs typically require contractors to subcontract work only to subcontractors that adopt the PLA. This may prevent a contractor (whether union or open shop) from using on the project highly qualified subcontractors that it normally uses and trusts and that might be the most cost-effective.
- PLAs typically require open-shop contractors to make contributions to union-sponsored fringe benefit funds from which their regular employees will never receive benefits due to time-based vesting and qualification requirements. To continue providing benefits for such employees, such contractors must contribute to both the union benefit funds and to their own benefit plans. This "double contribution" effect significantly increases costs.
- PLAs typically require contractors to pay union-scale wages, which may be higher than the wage rates required by the Secretary of Labor pursuant to the Davis-Bacon Act. They often also require extra pay for overtime work, travel, subsistence, shift work, holidays, "show-up," and various other premiums beyond what is required by law.

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiated the terms of the PLA and when the PLA must be submitted to the agency. With regard to who negotiates the PLA, the Federal Acquisition Regulation implementing Executive Order 13502 ("FAR Rule") allows (but does not require or even

encourage) agencies to include in the contract solicitation specific PLA terms and conditions. Exercising that option, though, can lead to added costs, particularly when the agency representatives selecting the PLA terms lack sufficient experience and expertise in construction-industry collective bargaining. AGC strongly believes that, if a PLA is to be used, its terms and conditions should be negotiated by the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, that have a vested interest in forging a stable employment relationship and ensuring that the project is complete in an economic and efficient manner, that are authorized to enter into such an agreement under the National Labor Relations Act (“NLRA”), and that typically have the appropriate experience and expertise to conduct such negotiations. Under no circumstances should a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated by the agency or by a contractor (or group of contractors) not employing covered workers on the project.

With regard to the timing of PLA negotiation and submission, the FAR Rule provides agencies with three options. The agency may require submission of an executed PLA: (1) when offers are due, by all offerors; (2) prior to award, by only the apparent successful offeror; or (3) after award, by only the successful offeror. Since issuance of the rule, some agencies have exercised the option to require all offerors on a particular project to negotiate a PLA with one or more unspecified labor organization and to submit an executed PLA with their bids. This practice is highly inefficient and unduly wasteful of both the bidders’ and labor organizations’ time and resources, not to mention that of the agencies that must review all of the proposals. Furthermore, many contractors interested in submitting an offer—particularly where construction in the project area or of the project type are typically performed by open-shop contractors—have no familiarity with the labor organizations there and have no idea of whom to contact for the required negotiations. In these ways, the PLA mandate is likely to deter many qualified contractors from bidding on the project.

Moreover, the contractors in such a situation cannot control whether they are able to fulfill the negotiation obligation because they have no means to require the labor organizations to negotiate with them. Even if the prospective offeror is able to identify representatives of appropriate labor organizations and attempts to contact them to request negotiations for a PLA, the contractor has no recourse if the labor representatives fail to respond or refuse to negotiate. Absent an established collective bargaining relationship with the contractor under Section 9(a) of the NLRA, unions have no legal obligation to negotiate with any particular contractor and have no legal obligation to negotiate in a good-faith, nondiscriminatory, and timely manner. Thus, requiring offerors to negotiate with another party—a party with which the offeror has no authority to compel negotiations—effectively grants the other party (i.e., labor organizations here) the power to prevent certain contractors from submitting an acceptable offer.

Such a requirement not only enables the labor organizations to determine which contractors can submit an offer (by picking and choosing with which contractors they will negotiate), it also enables them to determine which contractors will submit an attractive offer (by giving a better deal to one contractor over another). Such a requirement contravenes the executive order’s directive that mandatory PLAs “allow all contractors and subcontractors to compete for contracts

and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements” as well as its objective of advancing economy and efficiency in federal procurement.

On the other hand, if the agency requires only the apparent successful bidder to execute a PLA after offers have been considered, or if it requires only the successful bidder to execute a PLA after the contract has been awarded, then cost terms may be too uncertain at the time that offers are considered to elicit reliable proposals. Also, these options again create a serious risk of granting labor organizations excessive bargaining leverage. The agency could be putting the contractor in the untenable position of having to give labor organizations literally anything they may demand or lose the contract. Parties involved in collective bargaining should never be required to reach an agreement but should be required only to engage in good-faith bargaining to impasse, consistent with the mandates of the NLRA.

Yet another cost that can result from government mandates for PLAs is the high cost of litigation, as such mandates have frequently led to litigation, which is expensive in itself and can lead to costly delays. In its 1993 decision in the Boston Harbor case (*Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190), the U.S. Supreme Court held that the NLRA does not preclude a state agency from including a PLA requirement in the bid specification for a public project when the agency is acting in a proprietary rather than a regulatory capacity. While the decision is often cited by proponents of government-mandated PLAs as establishing unqualified legal authority for government-mandated PLAs, it did not do so. Rather, the decision left many federal and nonfederal legal issues open to challenge in any given case involving a government-mandated PLA, including, but not necessarily limited to the following:

- Whether the PLA mandate violates provisions of the NLRA permitting only employers “engaged primarily in the building and construction industry” to enter into pre-hire CBAs;
- Whether the PLA mandate violates the NLRA’s prohibitions against subcontracting restrictions;
- Whether the PLA mandate is preempted by the NLRA because the government was acting in a regulatory rather than proprietary manner;
- Whether the government-mandated PLA has a disproportionately adverse impact on minority and women business enterprises in violation of Title VI of the 1964 Civil Rights Act, or its state or local counterparts;
- Whether the government-mandated PLA violates employees’ constitutional First Amendment rights by compelling them to pay union agency fees;
- Whether the government-mandated PLA contains provisions requiring contributions to fringe benefit plans or participation in apprenticeship programs in violation of the Employee Retirement Income Security Act (ERISA); and

- Whether the PLA mandate violates the Competition in Contracting Act, Armed Services Procurement Act, Small Business Act, Federal Acquisition Regulation, or other federal procurement laws.

Given the uncertainty of cost savings and potential for cost increases as described above, not to mention the delays that can be caused by litigation and the like, AGC recommends that the DOI refrain from mandating the use of a PLA on AML projects and instead leave to contractors the option of using PLAs on a voluntary basis.

AGC strongly recommends that the DOI allow prime contractors to decide whether a PLA is appropriate for a particular project and to execute one voluntarily should they deem it appropriate. If, however, the DOI chooses to reject our primary recommendation, then we urge you, before imposing a PLA mandate on any project, to conduct, on a project-by-project basis, a scientific and well-documented study of relevant factual conditions and circumstances to determine whether a PLA mandate would advance each of the government interests set forth in Section 3(a) of Executive Order 13502 more than the interests would be advanced without a PLA mandate. Such an analysis should include thorough research and analysis of such issues as:

- Which firms normally perform the types of construction services involved in the project and are likely to submit a well-qualified proposal? What proportion of them are union contractors and what proportion are open-shop contractors? What experience do they have in working under a PLA? Are they willing to work under a PLA, or would a PLA mandate deter them from bidding on the project?
- Is there a sufficient number of qualified contractors (including subcontractors) in the local area of the project willing and able to work on the project if it has a PLA mandate? If not, will DOI or the prime contractor have to rely on out-of-town contractors? If so, what impact might this have?
- Is there a set-aside goal for small, minority, or woman-owned businesses? If so, what proportion of the contractors in the area that would qualify to satisfy the goal are union contractors and what proportion are open-shop contractors? Are these contractors willing and able to work under a PLA?
- What specific crafts are needed for the project and what is the specific level of labor surplus or shortage for each of those crafts in the local area? What percentage of each of those craft workforces is represented by a union? What evidence is there that the local union hiring halls for each craft will be able to supply the particular labor needed? What other sources of labor or recruitment are available?
- What is the recent history of construction-industry strikes, jurisdictional disputes, or other delay causing labor strife in the local area? If the area is largely open-shop, is a PLA actually needed to prevent such problems? If the area is largely union, would local-area CBAs offer sufficient protection against such problems? Will all of the unions representing the trades needed for the project be willing to execute the PLA? If not,

could the PLA create problems for contractors signatory to CBAs with the trades that are not party to the PLA and lead to jurisdictional disputes?

- What is the recent history of PLA use on comparable projects in the local area? If PLAs recently have been used there, what quantifiable impact (positive or negative) have they had on project cost, timeliness, quality, and other factors? Have comparable projects in the area been successfully completed without use of a PLA?
- Will the project be subject to a prevailing wage law? If so, which one(s)? How would the requirements of the law differ from the contractual requirements of the PLA with respect to wages, fringe benefits, and labor practices? How will this affect the cost of the project?
- Would a PLA mandate violate the Competition in Contracting Act, Federal Acquisition Regulation, National Labor Relations Act, Employee Retirement Income Security Act, Small Business Act, or any other applicable procurement or funding legislation?
- Are there any local or state laws requiring, prohibiting, or otherwise governing the use of PLAs in the area of the project? If so, do those laws apply to the present project? Would they have an impact on the lawfulness or propriety of a decision to mandate a PLA or to not mandate a PLA?
- Is a PLA mandate likely to provoke a bid protest or other challenge under federal, state or local laws? Could such a challenge increase the cost of the project or delay its initiation and completion? Would a public hearing be required or appropriate under the relevant procurement laws and regulations?

AGC further urges the DOI (if rejecting our primary recommendation of imposing no PLA mandate) to provide offerors maximum flexibility by allowing them three options on any project on which a PLA mandate is being considered: (1) to submit a proposal based on performance under a PLA, (2) to submit a proposal based on performance not under a PLA, or (3) to submit two proposals, one based on performance under a PLA and one based on performance not under a PLA. This will enable the agency to better evaluate the likely cost impact of the PLA. If the DOI rejects this recommendation as well and decides to require negotiation of a PLA, then AGC recommends that the agency refrain from requiring actual agreement and execution of a PLA, and instead require only that the contractor bargain in good faith with one or more labor organizations

In Conclusion, AGC opposes government mandates for PLAs on federal construction projects and urges DOI to refrain from imposing such a mandate on AML funded projects and rescind such language in its final guidance. For the reasons discussed above, DOI should allow its contractors – the parties that have experience in construction labor relations and that would be directly governed by a PLA and that bear liability for delivering the project according to plans – to decide whether a PLA is appropriate for the project and to execute one voluntarily should they deem it appropriate. We appreciate the opportunity to share our insights with you and to

help advance our common goals of fair competition and of economic and efficient performance of publicly funded construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Jordan Howard". The signature is written in a cursive, flowing style.

Jordan F. Howard  
Counsel, Federal Construction & Regulatory Affairs