DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0076, Sequence 3]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–41; Introduction

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

ACTION: Summary presentation of final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by GSA, DoD, and NASA in this Federal Acquisition Circular (FAC) 2005–41. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov*.

DATES: For effective date, see separate document, which follows.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005–41 and the specific FAR case number. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

RULE LISTED IN FAC 2005–41

Subject	FAR case	Analyst
Use of Project Labor Agreements for Federal Construction Projects	2009–005	Woodson.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to FAR Case 2009–005.

FAC 2005–41 amends the FAR as specified below:

Use of Project Labor Agreements for Federal Construction Projects (FAR Case 2009–005)

This final rule amends the FAR to implement Executive Order (E.O.) 13502, Use of Project Labor Agreements for Federal Construction Projects. The E.O. encourages the use of project labor agreements for Federal construction projects where the total cost to the Government is $25 million or more in order to promote economy and efficiency in Federal procurement. The rule provides that an agency may, if appropriate, require that every contractor and subcontractor engaged in construction on a construction project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations. The rule identifies factors that agencies may consider to help them decide, on a case-by-case basis, whether the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project, and multiple strategies for timing the Federal Government's receipt of project labor agreements.

Dated: April 2, 2010.

Al Matera,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-41 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-41 is effective May 13, 2010.

Dated: April 1, 2010.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: April 2, 2010.

Rodney P. Lantier,

Acting Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Dated: April 1, 2010.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010–8117 Filed 4–12–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 17, 22, and 52

[FAC 2005–41; FAR Case 2009–005; Item I; 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: Final rule.

SUMMARY: GSA, DOD, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13502, Use of Project Labor Agreements for Federal Construction Projects. The E.O. encourages the use of project labor agreements for large-scale Federal construction projects in order to promote economy and efficiency in Federal procurement.

DATES: *Effective Date*: May 13, 2010.

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 FAC 2005–41, FAR case 2009–005.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the Federal Acquisition Regulation to implement Executive Order (E.O.) 13502, signed by President Obama on February 6, 2009, and published in the **Federal Register** at 74 FR 6985, February 11, 2009. The E.O. encourages Federal agencies to consider the use of a project labor agreement, as they may decide appropriate, on large-scale construction projects, where the total cost to the Government is $25 million or more, in order to promote economy and efficiency in Federal procurement. A project labor agreement is 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.

The E.O. establishes requirements and standards that must be met by Federal agencies when using project labor agreements. Specifically, such agreements must—

a) Bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;

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

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

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

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

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

E.O. 13502 is an exercise of the President's authority under the Federal Property and Administrative Services Act to prescribe policies and directives governing procurement policy "that the President considers necessary to carry out" that Act and that are "consistent" with the Act's purpose of "provid[ing] the Federal Government with an economical and efficient" procurement system. 40 U.S.C. 101, 121. Section 3(a) of the E.O. states that executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where use of such an agreement 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."

Section 1 of the E.O. explains the rationale underlying the policy for encouraging the use of project labor agreements on large-scale Federal construction projects:

a) Large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government. Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts and to ensure a steady supply of labor on contracts being performed. Challenges also arise due to the fact that construction projects typically involve multiple employers at a single location. A labor dispute involving one employer can delay the entire project. A lack of coordination among various employers, or uncertainty about the terms and conditions of employment of various groups of workers, can create frictions and disputes in the absence of an agreed-upon resolution mechanism. These problems threaten the efficient and timely completion of construction projects undertaken by Federal contractors. On larger projects, which are generally more complex and of longer duration, these problems tend to be more pronounced.

b) The use of a project labor agreement 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. . . .

While the E.O.'s explicit policy focuses on large-scale construction contracts, section 5 states that the E.O. does not preclude use of a project labor agreement in circumstances not covered by the order, including leasehold arrangements and projects receiving Federal financial assistance.

The Supreme Court has recognized that project labor agreements are valid pre-hire agreements under sections 8(e) and (f) of the National Labor Relations Act, which authorizes the use of these agreements in the construction industry. See *Building and Construction Trades Council v. Associated Builders, 507 U.S. 218 (1993) ("Boston Harbor").* The Supreme Court has rejected arguments that project labor agreements are inappropriate for use by a public entity:

> There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement.

Boston Harbor, 507 U.S. at 231 (emphasis in original).

Use of project labor agreements by public entities has been sanctioned repeatedly where agencies ensure that their actions are tailored to reflect their proprietary interests and do not prescribe how Government contractors and subcontractors handle their labor relations beyond performance of the specific Government construction project involved. *See id.*; *Associated General Contractors of America v. Metropolitan Water Dist. of So. Cal.*, 159 F.3d 1178, 1182–84 (9th Cir. 1998); *Sheet Metal Workers Intern. Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly*, ____F.Supp.2d ____, 2009 WL 4667101 (D.N.J. 2009). The use of project labor agreements on Federal and other publicly funded projects, such as dams, defense installations, and atomic energy facilities, can be traced back many decades. The Government Accountability Office (GAO), in a 1998 study, described use of project labor agreements in connection with the construction of the Grand Coulee Dam in Washington State in 1938, the Shasta Dam in California in 1940, atomic energy and defense construction projects during and after the Second World War, and construction at Cape Canaveral by NASA during the 1960s. *U.S. Gen. Accounting Office Project Labor Agreements: The Extent of Their Use and Related Information (GAO Report)*, GAO/GGD–98–82 (May 1998), at page 4. At the time GAO reviewed Federal use of project labor agreements in 1998, four agencies—the Department of Energy (DoE), DoD, the Tennessee Valley Authority (TVA), and NASA—had a total of 26 projects covered by project labor agreements. GAO Report at 2.

DoE has invoked the authority of Pub. L. 85–804 to require the use of project labor agreements by contractors and subcontractors at certain of the Department's facilities. Project labor agreements have been, and continue to be, used at a majority of DoE's key sites,

including the Hanford Site in Washington State, the Savannah River Site in South Carolina, the Oak Ridge Reservation in Tennessee, the Nevada Test Site (NTS), and the Idaho National Laboratory. The project labor agreement at the NTS dates back to 1964.

As of the summer of 2009, 21 of 25 DoE construction projects were, or were slated to be, covered by project labor agreements. Challenges to the use of project labor agreements at DOE sites have been successfully defended. *See, e.g., Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, 966 F.2d 1513, 1518–22 (6th Cir. 1992).

Current and past DoE representatives have stated that project labor agreements have contributed to economy and efficiency of DoE construction projects, including completion of projects on time and within budget, by, among other things—

- Providing a mechanism for coordinating wages, hours, work rules, and other terms of employment across the project;
- Creating structure and stability through the use of broad provisions for grievance and arbitration of any disputes that may arise on site, including procedures for resolving disputes among the construction crafts;
- Prohibiting work stoppages, slowdowns, or strikes for the duration of a project and obligating senior union management to use their best efforts to prevent any threats of disruptions of work that might arise; and
- Ensuring expeditious access to a well trained, assured supply of skilled labor, even in remote areas where skilled labor would have otherwise been extremely difficult to find in a timely fashion.

TVA has used project labor agreements on its construction projects for nearly 19 years. In the nearly 200 million man hours of work on TVA construction projects using project labor agreements, there have been no formal strikes or any organized work stoppages. The rate of injury on TVA projects has also been significantly reduced, especially over the last approximately 5 years.

Federal use of project labor agreements has been curtailed twice since 1992, including most of the past decade. E.O. 12818 of October 23, 1992 prohibited agencies from requiring the use of project labor agreements by any parties to Federal construction projects, although this bar was removed in 1993, by E.O. 12836, and a Presidential Memorandum was issued in 1997 to encourage the use of project labor agreements (see "Use of Project Labor Agreements for Federal Construction Projects," June 5, 1997). E.O. 13202 of February 17, 2001 and E.O. 13208 of April 6, 2001 again prevented agencies from requiring the use of project labor agreements. This restriction remained in effect from early 2001 until early 2009 when section 8 of E.O. 13502 revoked E.O. 13202 and E.O. 13208.

Use of project labor agreements has not been limited to Federal construction projects. Project labor agreements have been used at the State and municipal levels as well. Project labor agreements have been used in all 50 States and the District of Columbia. Use of project labor agreements at the State and local level has been connected to an array of construction projects covering an expanding range and size of projects—from schools, hospitals, roads, bridges, and police buildings, to convention centers, courthouses, manufacturing facilities, airports, power plants, transit systems, stadiums, and a prison. Project labor agreements have been used in connection not only with new construction, but also with demolition, restoration, and reconstruction.

Project labor agreements have also been used by the private sector for a variety of construction projects that are similar in nature to those undertaken in the public sector, including for manufacturing plants, power plants, parking structures, and stadiums. For example, project labor agreements have been used in connection with building such high profile facilities as the trans-Alaska pipeline and Disney World. GAO Report at 4. According to one study on private sector experiences in California, companies wanted "project labor agreements in order to meet their speed-to-market demands, and ensure against delays that can be caused by worker shortages, work stoppages or collective bargaining negotiations." See Kimberly Johnston-Dodds, CA State Library, *Constructing California: A Review of Project Labor Agreements* 59 (2001).

B. FAR Rulemaking

Section 7 of E.O. 13502 directed GSA, DoD, and NASA to amend the FAR to implement the provisions of the E.O. Accordingly, GSA, DoD, and NASA issued a final rule in the **Federal Register** at 74 FR 34206, on July 14, 2009, rescinding FAR 36.202(d), a FAR provision that had prohibited agencies from requiring project labor agreements. This prohibition had implemented E.O. 13202 and E.O. 13208—E.O.s that were revoked by section 8 of E.O. 13502.

On the same date, GSA, DoD, and NASA also published for public comment a proposed rule in the **Federal Register** at 74 FR 33953, to provide a new FAR subpart 22.5, Use of Project Labor Agreements for Federal Construction Projects, to implement the provisions of E.O. 13502. The proposed rule—

- Stated that agencies are encouraged to consider requiring the use of project labor agreements in connection with large-scale construction projects;
- Described the general requirements for use of project labor agreements, including the standards that must be met by project labor agreements, as specified in section 4 of the E.O., which includes allowing any contractors and subcontracts to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements; and
- Created new solicitation provisions and contract clauses that (i) would be used in large-scale construction projects where the agency makes a determination that a project labor agreement will be required, and (ii) would give agencies the flexibility to require that project labor agreements be executed either prior to award from the apparent successful offeror or after award from the awardee.

Based on the comments received on the proposed rule (which are discussed in greater detail below) and additional deliberations, GSA, DoD, and NASA have adopted a final rule that—

1) Encourages agency planners to consider use of project labor agreements early in the acquisition process—*i.e.*, during acquisition planning (FAR 7.103);

2) Clarifies the policy for using project labor agreements to more closely track the terms of the E.O. (FAR 22.503(b));

3) Identifies a number of factors that agencies may consider to help them decide, on a case-by-case basis, whether the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project, such as whether the project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades or whether there is a shortage of skilled labor in the region in which the construction project will be sited (FAR 22.503(c));

4) Makes clear that a solicitation may include project labor agreement requirements that are in addition to those specified in section 4 of the E.O., as the agency deems necessary to satisfy its needs (FAR 22.504(b)(6));

5) States that an agency may specify in the solicitation, as appropriate to advance economy and efficiency in a given procurement, the terms and conditions of the project labor agreement and require the successful offeror to become a party to a project

labor agreement containing these terms and conditions as a condition of receiving a contract award (FAR 22.504(c)); and

6) Modifies the proposed solicitation provisions and contract clauses to give agency contracting officers the additional option of requiring offerors to submit a copy of the project labor agreement with their offers (FAR 52.222–33 and 52.222–34).

The final rule is structured to maximize an agency's ability to identify and successfully use project labor agreements when doing so promotes economy and efficiency.

• The rule encourages agency managers and members of the acquisition team to work together in evaluating whether to use a project labor agreement and to start the evaluation early in the planning process, so that all relevant circumstances and the needs of stakeholders can be fully considered in deciding what is best for the agency in meeting its mission.

• Consistent with the express terms of the E.O., the final rule preserves the flexibility agencies need to evaluate whether a project labor agreement is appropriate for a given construction project. This discretion helps to ensure that agencies will have the opportunity to bring their relevant experiences to bear on circumstances particular to a project, such as whether similar projects previously undertaken by the agency have experienced substantial delays or inefficiencies due to labor disputes or labor shortages in a particular locale or job classification.

• The rule helps agencies to analyze whether a project labor agreement may be beneficial. The factors set forth in the rule reflect the experience of Federal agencies, such as DOE and TVA, and other governmental and private sector entities, to analyze planned construction projects for the purpose of identifying if a project labor agreement is likely to promote smooth, successful, and timely performance of a construction project.

• The rule includes various approaches regarding when to submit an executed project labor agreement on a particular project (*e.g.*, submission with the initial offer, after offers are submitted but before award, or after award), and options for specifying the specific terms and conditions of the project labor agreement in the solicitation—a practice that has been used successfully by entities experienced with project labor agreements. These alternatives will allow agencies to choose the approach that makes the most sense for their project and best fits with their mission.

C. Response to Comments Received on the Notice of Proposed Rulemaking

GSA, DoD, and NASA received comments from more than 700 respondents on the proposed rule, which was published in the **Federal Register** at 74 FR 33953 on July 14, 2009 for a comment period that originally closed on August 13, 2009. At the request of a respondent, the comment period was re-opened and extended through September 23, 2009 (74 FR 42639, August 24, 2009). Copies of the comments received by GSA, DoD, and NASA are available for review at *www.regulations.gov*. Approximately 650 of the comments were submitted in the format of one of several form letters, or short email that expressed opposition to the use of project labor agreements but did not directly address the proposed rule. Approximately 50 responses that were not form letters or short emails included roughly equal numbers supporting and opposing the use of project labor agreements. (In addition, about eight responses were neutral in their overall tone toward the use of project labor agreements.) Comments largely focused on (1) the exercise of agency discretion in deciding whether to require a project labor agreement, (2) the content of project labor agreements generally and the role of Federal agencies in developing the terms of the project labor agreements, and (3) the timing of entering the project labor agreement. As discussed above, GSA, DoD, and NASA made a number of changes to the rule based on public comments and additional deliberations. A summary description of the comments and GSA, DoD, and NASA responses and changes adopted in the final rule are set forth below.

1. The Use of Discretion

Summary of comments: Many of the respondents, including Federal agencies, Government contractors, labor organizations, trade associations, and individuals, commented on the level of discretion an agency should be afforded in deciding whether to require a project labor agreement on a particular construction project and the manner in which such discretion is exercised. Comments on this subject generally fell into one of three groups. One group of comments focused on the need to retain agency discretion. These comments, which were offered principally by Federal agencies, sought to ensure that Government organizations are able to bring their relevant experiences to bear on the circumstances particular to a project.

A second group of comments focused on reducing discretion in favor of a more defined procedure that would drive agencies to particular outcomes. In particular, some respondents in this group wanted the rule to identify factors that, if met, would create a presumption in favor of a project labor agreement. For example, some of these respondents suggested that the use of a project labor agreement should be presumed appropriate if the project: (i) was over a certain dollar amount, such as $25 million, (ii) would involve two or more contractors at a single site, (iii) would be performed over an extended timeframe, or (iv) was for a certain type of requirement, such as a public work. Some of these respondents were particularly troubled by a statement in the proposed rule that the agency has "complete discretion" to require or not require a project labor agreement. Other respondents wanted the rule to more expressly place the burden on the agency to justify the use of project labor agreements. These respondents requested that the rule identify factors that, unless met, would prohibit use of a project labor agreement. For example, a project labor agreement would not be permitted unless the agency demonstrates that there have been labor-related disruptions causing delays or cost overruns on similar Federal projects undertaken by the agency in the geographic area of the project.

A third group of comments focused on identifying factors or standards that agencies could use to aid in their project-by-project consideration of whether to require a project labor agreement. Many of these comments were offered in response to an invitation by GSA, DoD, and NASA in the **Federal Register** notice for input on the types of factors that might assist agencies in giving meaningful consideration to the use of project labor agreements. Some comments expressed the concern that without meaningful factors, agency decision-making could become arbitrary. Many of the suggested factors focus on helping agencies identify circumstances where project labor agreements may be beneficial. Some examples include—

• Whether the project will require the services of two or more construction contractors or subcontractors that together employ workers in two or more crafts or trades;

• Whether labor disputes threaten timely completion of the project;

• Whether completion of the project will require an extended period of time (*e.g.*, extending beyond one construction season or beyond the expiration date of one or more collective bargaining

agreements covering trades likely to be involved in the project); and

• Whether there is a need for a substantial number of experienced, skilled building trades and craft workers and the ability to obtain specialized skills through the use of hiring halls.

Several respondents emphasized that agencies should initiate their consideration of project labor agreements early in the acquisition process, and with the input of all affected agency stakeholders, as this would improve the agency's ability to evaluate whether it is appropriate to require the use of a project labor agreement.

Other respondents wanted to ensure that agencies document the decision to use, or not to use, a project labor agreement.

Some factors offered by respondents sought to ensure that proper consideration would be given to the potential impact, such as impact on small businesses, of using a project labor agreement before the agency requires its use in a given construction project. At least one respondent recommended that agencies evaluate the legal impact of using a project labor agreement, including compliance with the National Labor Relations Act, the Employee Retirement Income Security Act, the Small Business Act, and the Competition in Contracting Act.

Response: GSA, DoD, and NASA strongly support affording agencies discretion in the use of project labor agreements. As explained in the FAR Rulemaking section above, discussing the development of the regulation, GSA, DoD, and NASA believe this discretion is central to agencies' ability to improve the economy and efficiency of a Federal construction project. However, GSA, DoD, and NASA agree with the concern that the "complete discretion" language in the proposed rule is not appropriately tailored to the policies of E.O. 13502 and, for this reason, have deleted this language from the final rule in favor of language that more closely tracks the wording and structure of E.O. 13502 in its discussion of general policy.

GSA, DoD, and NASA disagree with the recommendations to reduce discretion and create inflexible presumptions favoring or disfavoring the use of project labor agreements. Such presumptions would be inconsistent with the E.O.'s emphasis, as stated in section 3(a), on allowing agencies to evaluate each construction effort independently and to decide "on a project-by-project basis" where use of a project labor agreement will "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement."

GSA, DoD, and NASA agree with the general recommendation to provide additional factors in the final rule that can help agencies evaluate whether use of a project labor agreement would be beneficial for a particular construction project. GSA, DoD, and NASA believe that flexible factors would support the E.O.'s policy of encouraging the consideration of project labor agreements. GSA, DoD, and NASA carefully reviewed the many suggestions respondents made for specific factors, looking for those factors, in particular, that agencies might reasonably apply to the facts of a given project to help determine whether using a project labor agreement would promote economy and efficiency. GSA, DoD, and NASA agreed to the following non-exhaustive list of factors that agencies may consider, in their discretion, in deciding whether a project labor agreement is appropriate for use in a given construction project:

(1) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.

(2) There is a shortage of skilled labor in the region in which the construction project will be sited.

(3) Completion of the project will require an extended period of time.

(4) Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.

(5) A project labor agreement will promote the agency's long term program interests, facilitating the training of a skilled workforce to meet the agency's future construction needs.

(6) Any other factors that the agency decides are appropriate.

In order to preserve agency discretion, GSA, DoD, and NASA believe that the rule should not mandate consideration of these factors. For this reason, the final rule leaves an agency free to decide whether it will adopt some or all of the factors (or any other factor that the agency considers to be appropriate) as part of its own procedures. Similarly, how an organization structures its review team, draws upon agency or external resources, documents any decisions relating to the use of a project labor agreement, and addresses similar management matters is left to the discretion of each agency.

In addition, GSA, DoD, and NASA agree with respondents who recommended that consideration of project labor agreements should begin early in the acquisition process. Early consideration will help ensure that relevant circumstances and the needs of stakeholders can be fully considered in identifying actions that would assist the agency in performing its mission effectively and efficiently. Accordingly, the final rule has been amended to encourage agency planners to consider the use of a project labor agreement during acquisition planning.

The recommended additions regarding impact were not necessary, because the agencies are permitted to consider any factor that the agency considers appropriate. With respect to small business contracting, in particular, the policies in this rule should be read in conjunction with those in FAR part 19 speaking to small business participation.

Finally, both proposed and final rules make clear that project labor agreements established pursuant to the rule "must fully conform to all statutes, regulations, and Executive orders." Agencies requiring project labor agreements must therefore undertake appropriate legal review in implementing the rule. GSA, DoD, and NASA do not, however, agree with the commenter who claimed a need for an additional legal review process to implement the rule, apart from the process otherwise utilized by agencies in the course of making procurement determinations.

2. Content of project labor agreement

A number of respondents addressed the contents of project labor agreements. Some offered views about the requirements and issues addressed in a project labor agreement. Others commented on the Government's role in specifying the terms of a project labor agreement.

• a. *Comments related to issues covered in project labor agreements.* Some respondents requested that guidance clarify how project labor agreement requirements and terms handle contractors who are not otherwise parties to a collective bargaining agreement with respect to their use of existing employees, at least their core workers, and the extent to which such employees must contribute to union benefits trust funds. A number of these comments were raised in connection with fears that use of project labor agreements could unduly restrict the participation of open shop contractors in competition for Federal construction projects. One respondent suggested that the content of project labor agreements be limited to (i) a prohibition against union strikes, and (ii) a dispute resolution procedure for union contractors. Another recommended that project labor agreements include a targeted hiring provision. Yet another commenter

recommended that the proposed language requiring project labor agreements to "fully conform to all statutes, regulations, and Executive orders" be changed to say that project labor agreements shall ensure that items such as existing targeting policies, contract compliance requirements, outreach policies, logistical requirements for contractors, and other project administration elements would be addressed. Finally, one commenter suggested seeking amendments to the American Recovery and Reinvestment Act of 2009 (ARRA) and changing the existing FAR clause 52.222–9, Apprentices and Trainees, to provide a model project labor agreement for ARRA-funded projects.

Response: With respect to the general concern raised regarding the participation of nonunion contractors, GSA, DoD, and NASA note that E.O. 13502 expressly states that all project labor agreements must allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements and this requirement is repeated in the final rule. Any contractor may compete for—and win—a Federal contract requiring a project labor agreement, whether or not the contractor's employees are represented by a labor union. The same principle of open competition would protect subcontractors as well. GSA, DoD, and NASA will work with the Office of Management and Budget (OMB), the Middle Class Task Force, the Small Business Administration (as many of these concerns were posed by small businesses), and others to assist with the development of appropriate training on these issues. With respect to the impact of a project labor agreement on particular contractors and subcontractors, GSA, DoD, and NASA have amended the final rule to permit agencies to fashion requirements as appropriate to meet their procurement needs. As explained in greater detail in the response to the next set of comments on the Government's role, GSA, DoD, and NASA have also clarified that an agency may specify the terms and conditions of the project labor agreement, as appropriate to advance economy and efficiency in procurement.

As for the other recommendations described above, GSA, DoD, and NASA do not agree that the rule should be modified to address them. Section 4 of the E.O. specifies the minimum requirements for project labor agreements. The final rule reflects these considerations. Additional references, such as to ARRA, are not required. Further, specific elements such as targeted hiring and outreach policies are not addressed in the E.O. These matters, as appropriate, may be addressed in the project labor agreement, in the context of a particular project. As noted, language has been added to the final rule that allows agencies to include any additional requirements as the agency deems necessary to satisfy its needs.

b. *Comments regarding the Government's role in establishing the terms of a project labor agreement.* Several respondents stated that the final rule should allow an agency to negotiate a project labor agreement, either directly or through an agent, before the solicitation is issued. Other respondents expressed the opposite view—*i.e.*, that the Government should not participate in the negotiations of a project labor agreement—since the terms of the project labor agreement essentially address the relationship between the contractor and the unions.

Response: Experiences of entities that have successfully used project labor agreements suggest that, in some cases, an agency may be able to more effectively achieve economy and efficiency in procurement by specifying some or all of the terms and conditions of the project labor agreement in the solicitation. Their experiences also suggest that, if the agency specifies some or all of the terms and conditions of the project labor agreement in the solicitation, contractors not familiar with project labor agreements may be better able to compete. For this reason, GSA, DoD, and NASA have amended the final rule to clarify that, as appropriate to advance the economy and efficiency in procurement, an agency may specify the terms and conditions of the project labor agreement in the solicitation and require the successful offeror to become a party to a project labor agreement containing these terms and conditions as a condition of receiving a contract award.

Consistent with the FAR and applicable law, an agency may seek the views of, confer with, and exchange information with prospective bidders and union representatives as part of the agency's effort to identify appropriate terms and conditions of a project labor agreement for a particular construction project and facilitate agreement on those terms and conditions. However, agency actions must not prescribe how Government contractors and subcontractors handle their labor relations beyond performance of the specific Government contract project involved.

3. **Timing for submission of project labor agreement**

Summary of comments. Many respondents submitted comments regarding the timing of a project labor agreement's execution. (In the notice of proposed rulemaking, GSA, DoD, and NASA expressly sought input from the public on this issue.) The comments focused on three options: (i) require submission of project labor agreement with offer, (ii) require submission of project labor agreement from apparent awardee, or (iii) require project labor agreement before construction begins. Proponents of requiring submission of an executed project labor agreement (or at least a binding letter of understanding) with bids stated that this timing best ensures compliance with the requirement for project labor agreements (*i.e.*, the contracting officer has documented proof before he or she begins evaluating offers) as well as better planning and more accurate pricing in offers, because the offerors will be able to accurately predict their labor costs. They noted that early negotiation and execution of the project labor agreement can best ensure that labor issues will not become a distraction or lead to unanticipated problems at the beginning of the project. Opponents raised concerns that requiring every offeror to negotiate a project labor agreement would impose a significant burden on offerors and could cause significant delay in contract awards.

The pros and cons offered for requiring submission of the project labor agreement from only the apparent awardee were essentially the opposite from those offered for requiring submission with offers. Those who favored post-award submission felt this timing posed the smallest likelihood of pre-award delay and gave the contractor the greatest amount of time to negotiate the best project labor agreement possible. Critics cautioned that post-award execution of project labor agreements potentially undercuts key purposes of the agreement, such as addressing potential labor differences before they occur and receiving offers with more accurate pricing. Several respondents were particularly concerned that the language of the proposed rule, which would require the offeror to "negotiate in good faith," does not assure that a project labor agreement will be reached, despite the Government having concluded that it should be utilized.

Response: GSA, DoD, and NASA believe that the Government's procurement interests are best served by allowing agencies broad discretion in formulating the process and timing for the submission of a project labor

agreement. Accordingly, under the final rule, agencies may choose from among three options. Submission may be required: (1) when offers are due; (2) prior to award (by the apparent successful offeror); or (3) after award.

Providing these three options allows agencies with project labor agreement experience to continue with the model they have found most effective; it also allows other agencies to craft an approach unique to each project, and, as experience is gained, follow best demonstrated practices. If an agency decides that permitting execution of the project labor agreement after award is the best approach, the contractor will be required to submit an executed copy of the agreement to the contracting officer. This is a change from the proposed rule, which only required the contractor to "bargain in good faith." In the view of GSA, DoD, and NASA, the language of the proposed rule could result in a situation where the Government concluded that execution of a project labor agreement was in its best interest, but has no recourse should the project labor agreement never be executed as long as the contractor bargained in good faith.

4. Other issues

a. *Comments regarding retroactive imposition of project labor agreements on contracts already awarded.* One commenter recommended that the rule be clarified to prohibit agencies from pursuing a project labor agreement after a contract has been awarded. The commenter's concern relates to a scenario where the contracting agency has not previously informed parties that a project labor agreement was being considered.

Response: GSA, DoD, and NASA agree with this concern. Any such action, without any prior indication that a project labor agreement was contemplated, could disrupt the project's schedule and impact contract price. FAR 1.108(d) requires that any application of a new procedure to existing contracts must be bilaterally negotiated and involve adequate consideration. Consistent with section 11 of the E.O., the final rule will apply to solicitations for large-scale construction projects issued on or after the effective date of this rule.

b. *Comments addressing the applicability of project labor agreements to certain contractors.* Some respondents questioned the application of a project labor agreement to particular activities related to, or occupations involved with, construction projects. One commenter stated that the proposed rule was "overly comprehensive" by not distinguishing between contractors engaged in the construction and subcontractors who are not part of the construction project. Another commenter stated that the proposed rule failed to exclude designers, site engineers, surveyors and other engineering related personnel from its requirements. The commenter stated that the quality assurance/quality control functions performed by such personnel would give rise to certain conflicts of interest if they were subject to a project labor agreement.

Two respondents stated that any determination relating to the use of a project labor agreement under Federal contracts for projects on Indian reservations should take cognizance of tribal sovereignty and self-determination as contemplated by Pub. L. 93–638 and various Executive orders. Both respondents stated that the determination whether to use a project labor agreement should be vested in the affected tribe rather than the Federal agency. One commenter stated that a tribal-specific project labor agreement has been developed and that it is generally referred to as a "Tribal Labor Agreement." This commenter recommended that the final rule reflect the unique aspects of Federal projects located on Indian reservations.

Response: GSA, DoD, and NASA have clarified in the final rule that project labor agreements cover subcontractors engaged in construction. This change makes clear that employers who do not perform construction work need not sign the project labor agreement.

With respect to the handling of engineering-related personnel, GSA, DoD, and NASA note that no other trades or crafts are referenced in either the E.O. or the proposed rule and believe these concerns are best addressed by the agency or the parties on a project-by-project basis.

Regarding issues related to tribal self-determination, GSA, DoD, and NASA concluded that no change is required to the FAR rule. Each of the affected funding agencies may develop internal guidance, as necessary, to accommodate its unique authorities.

c. *Guidance to employers that have no relationship to labor organizations.* One commenter stated that the proposed rule failed to provide guidance to employers that have no relationship with any labor organization. The commenter stated that the terms and conditions of employment common in union-represented workforces differ from the terms and conditions of employment common for individuals not represented by unions.

Response: This issue is outside the scope of this FAR case. Such general guidance may be provided by individual agencies as they believe appropriate. However, the rule reiterates that, as provided in E.O. 13502, contractors and subcontractors must be permitted to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements.

d. *Comments regarding the use of project labor agreements for initiatives other than large-scale Federal construction projects.* A number of respondents recommended that the E.O.'s policy for encouraging the use of project labor agreements be broadened. Some respondents recommended that the threshold for applicable projects be lower than $25 million. They stated that it is common for project labor agreements to be used on construction projects under $25 million and that the total cost of a project is less significant than the factors referenced in the E.O. in determining whether a project labor agreement serves the Government's interest. Some suggested this be accomplished by lowering the threshold to $5 million. Others recommended that the definitions of "large-scale construction project" and "Project labor agreement," be revised to include a construction program comprised of multiple projects when calculating the $25 million threshold. A few recommended no threshold and suggested that the rule be revised to require that agencies analyze all construction projects, regardless of value or form, to determine whether the use of a project labor agreement results in a more efficient procurement. Finally, a number of respondents addressed use of project labor agreements in connection with Federally-assisted projects. Most who discussed the issue favored the use of project labor agreements for construction contracts funded by Federal grants. A few respondents opposed the use of project labor agreements on such projects, and two questioned the legality of such use.

Response: Modifying the coverage of the final rule to address expanded consideration of project labor agreements is outside the scope of this rulemaking. This rulemaking is intended to support the implementation of the policy set forth in section 1(b) of E.O. 13502, which is expressly directed at Federal acquisitions involving large-scale construction projects. Under section 5 of the E.O., agencies are not precluded from using project labor agreements on projects not covered by the order. GSA, DoD, and NASA note that this final rule does not limit agencies' exercise of their authorities to require project labor agreements in appropriate circumstances and to the

extent permitted by law. Finally, with respect to recommendations addressing construction projects funded by Federal grants, GSA, DoD, and NASA note that such transactions are outside their policy jurisdiction and the purview of the FAR.

D. Significant rule.

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.

GSA, DoD, and NASA received a number of comments that made arguments in favor of declaring this rule as major. A summary of these comments and GSA, DoD, and NASA' response is below.

Comment: One respondent stated that the proposed rule improperly declares that this rule is not a major rule under 5 U.S.C. 804, and thereby violates the Congressional Review Act codified therein.

5 U.S.C. 804 defines a major rule as including any rule likely to result in—

(A) An annual effect on the economy of $100,000,000 or more;

(B) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) A significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic export markets. Respondents made the following arguments:

- Project labor agreements will have significant adverse effect on competition.
- Project labor agreements will create major increases in construction costs for Federal agencies.
- Project labor agreements may have an annual impact on the economy of $100,000,000 or more.
- Without the benefit of a cost/benefit analysis, it is difficult to determine if the NPRM would satisfy the criteria of a major rule under paragraph A or calculate if increases are major under paragraph B.

Response: OMB determines whether a rule is a major rule. OMB has not determined this rule to be a major rule.

The purpose of the E.O. is to further economy and efficiency in Federal procurement—in particular large-scale construction contracts. Specifically, agencies are encouraged to consider requiring the use of a project labor agreement in large-scale construction projects, if use of such an agreement will advance the interest of the Federal Government in achieving economy and efficiency. Consistent with the express terms of the E.O., including section 5, which states that the order "does not require an executive agency to use a project labor agreement on any construction project," the final rule preserves the flexibility agencies need to evaluate whether a project labor agreement is appropriate for a given construction project. Simply put, the use of project labor agreements by Federal agencies is voluntary. As explained in the preamble to the notice of proposed rulemaking, GSA, DoD, and NASA estimate about 30 project labor agreements will be formed per year (**Federal Register** at 74 FR 33955, July 14, 2009). Based on this estimate, GSA, DoD, and NASA expect that any increased construction costs associated with the use of project labor agreements under the rule will be less than the $100 million threshold for a major rule.

Furthermore, this is not rulemaking (such as is promulgated, for example, by the Environmental Protection Agency) that will impose mandatory standards that may result in higher costs on entities, without any reimbursement. These are acquisition regulations. Applying for a Government contract is a voluntary act. In addition, as further explained in the Regulatory Flexibilty Analysis section below, bids on a project for which a project labor agreement is required may include anticipated costs associated with a contractor's compliance with project labor agreement requirements. These costs would be included in the price of the contract awarded to the successful bidder.

E. Regulatory Flexibility Analysis.

Many respondents commented on the Regulatory Flexibility Act and the perceived impact on small businesses.

1. Violation of the Regulatory Flexibility Act.

Comments: Many respondents stated that the failure to perform an Initial Regulatory Flexibility Analysis violated the Regulatory Flexibility Act. One respondent further objected that the findings lack the level of quality that would permit their dissemination and use as the basis of the policy that GSA, DoD, and NASA are proposing to set through this rulemaking, as required by section 515 of the Data Quality Act (Pub. L. 106–554). One respondent criticized GSA, DoD, and NASA for failing to certify that the rule would not have a substantial adverse economic impact on a significant number of small entities.

Some respondents took issue with the statement in the **Federal Register** preamble to the proposed rule that this rule is not expected to have a significant impact on a substantial number of small entities. These respondents pointed out that many small entities perform work as subcontractors on projects whose total cost exceeds $25 million. One respondent cited comments of individual prime contractors that have performed contracts in the $25 million plus range as to the percentage of awards to small business subcontractors, the majority of whom are non-union. This respondent cited a particular example in which a prime contractor subcontracted to small businesses more than 50 percent of the dollar value of prime construction contracts that exceed $25 million. The respondent stated that these numbers are typical of many other association members.

Many respondents stated that the rule will have a substantial harmful economic impact. Specifically, they stated that:

- The impact on all subcontracts on such projects, no matter how small, will be harmful due primarily to discrimination against non-union subcontractors and increased costs.
- The project labor agreement will increase the costs of the small non-union subcontractor by at least 25 percent or more.
- The project labor agreement requirement will impact "even small employers who will likely have no labor relations staff who can navigate a project labor agreement."
- Small businesses will be put out of business because they will not be able to afford the costs associated with this rule.
- Use of project labor agreements will make it more difficult for small non-union businesses to compete.

Response: Consistent with the requirements of the Regulatory Flexibility Act, GSA, DoD, and NASA are committed to performing analyses and identifying alternatives, whenever feasible, to mitigate the impact of acquisition rules on small businesses and regularly work with the Small Business Administration to this end. As explained below, GSA, DoD, and NASA believe that amendments made to the final rule allow agencies to fashion requirements as appropriate to meet their procurement needs and ameliorate concerns about the impact of a project labor agreement on particular contractors and subcontractors, including small businesses.

GSA, DoD, and NASA do not certify that a rule will not have a significant

economic impact on a substantial number of small entities until after receipt and analysis of public comments on a rule.

GSA, DoD, and NASA did not perform an Initial Regulatory Flexibility Analysis on this rule, because GSA, DoD, and NASA did not expect that the rule would have a significant economic impact on a substantial number of small entities for the reasons stated in the **Federal Register** preamble to the proposed rule, namely that the rule is discretionary in nature and the its application is tied to large scale construction projects over $25 million that are likely to be performed by large businesses. It is only the prime contractor that negotiates the project labor agreement and submits the project labor agreement to the Government.

The Data Quality Act is more commonly applied to significant information disseminated by Government agencies such as statistical information (*e.g.*, National Weather Service or Bureau of Labor Statistics); information about health, safety, and environmental risks that they collect from regulated entities; or findings of scientific research or technical information that Government agencies create or obtain in the course of developing regulations, often involving scientific, engineering, and economic analysis (for example, an analysis of the risk to health to support a change to clean air or water standards). Although neither the law nor the OMB Guidance are limited to "important" information, the OMB guidance states that the more important the information, the higher the quality standards to which it should be held. The OMB Guidance also states that agencies should apply the guidelines in a "common-sense and workable" manner. In this case, the information provided was not the basis for the proposed rule (which is based on the E.O.), but was only used in the decision of whether to prepare and submit an Initial Regulatory Flexibility Analysis.

As stated in the preamble to the proposed rule, according to the Federal Procurement Data System, in FY 2008 300 large-scale construction contracts, totaling $31,685,574,596 were awarded. Of these, 17 were made to small businesses, totaling $591,269,508 (average of $34,780,558 per contract). The small business size standard for general building and heavy construction contractors is $33.5 million. Most prime contractors for such projects are large businesses, but the majority of the subcontractors under these large-scale contracts will be small businesses. Since the publication of the proposed rule, GSA, DoD, and NASA have updated averages, to include FY 2009 information: The 2 year average is a total of 246 contracts per year, with 14 of the prime contractors being small businesses. However, GSA, DoD, and NASA continue to maintain the estimate made in the proposed rule of about 30 project labor agreements per year (that would now be 12.2 percent of all large-scale construction contracts).

The impact on non-union small businesses is not likely to be as much as feared by many of the respondents. GSA, DoD, and NASA reviewed a major project by the Massachusetts Water Resource Authority, which used a project labor agreement. Of the 257 subcontractors, 102 were reportedly open shop subcontractors (nearly 40 percent).

The rule clearly states that all contractors and subcontractors must be allowed to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. It is not up to the small business subcontractor to negotiate a project labor agreement; it only needs to sign on to the project labor agreement negotiated by the prime contractors. When a prime contractor makes an offer to perform work on a fixed-price construction contract, the contractor includes amounts to cover the costs it expects to incur, including anticipated costs of complying with project labor agreement requirements, plus profit in its offered price. Subcontractors also include their anticipated costs in their offered price. The anticipated costs, therefore, would be included in the payment by the Government of the prime contract fixed price.

GSA, DoD, and NASA cannot determine in the abstract what the effects of a particular project labor agreement will be on all the affected parties. However, GSA, DoD, and NASA have amended the final rule to permit agencies to include requirements as the agency deems necessary to satisfy its procurement needs. GSA, DoD, and NASA have also clarified that an agency may specify the terms and conditions of the project labor agreement, as appropriate to advance economy and efficiency. These flexibilities, which are consistent with the discretion anticipated in the E.O. ensure that agencies will have the opportunity to bring their relevant experiences to bear on circumstances particular to a project and take appropriate steps to ameliorate impact on contractors and subcontractors, including small businesses.

2. Suggested remedies.

Comment: One respondent recommended that the final rule establish a threshold below which any qualified bidder can participate, regardless of the bidder's agreement, or lack of agreement, to a project labor agreement. Many respondents requested that the proposed rule should be rescinded so that a regulatory flexibility analysis can be performed.

Response: The project labor agreement requires all construction subcontractors to follow the same rules; it would defeat the purpose of the project labor agreement to exempt subcontractors below a given threshold.

It is not necessary to rescind the proposed rule, because GSA, DoD, and NASA do not believe this final rule will have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act based on the responses provided above.

3. Request for separate submission from small entities.

Comments: One respondent was under the impression that the **Federal Register** preamble to the proposed rule required filing of separate comments with regard to Regulatory Flexibility Analysis. The respondent stated that there is no basis for the requirement to file such comments separately and objected to this process.

Another respondent raised the same issues as the other respondent, and also stated that GSA, DoD, and NASA are obliged to consider comments from all entities, not just small entities; and assumed that the reference to section 5 U.S.C. 610 must be in error.

Response: The statement that GSA, DoD, and NASA will consider comments from small entities on affected subparts in accordance with 5 U.S.C. 610 was not intended to affect the response by entities with regard to the impact of this particular rule on small entities. 5 U.S.C. 610 addresses the periodic review of existing rules. The intent of the **Federal Register** statement was to gather separate information from small entities with regard to the impact on small businesses of any existing regulations in parts 2, 17, 22, 36, and 52—*i.e.*, not the current proposed rule. This request was supposed to be separate from, and in addition to, the request for comments on the regulatory flexibility impact of the proposed rule.

F. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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*. The rule clearly states that all contractors and subcontractors must be allowed to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. It is not up to the small business subcontractor to negotiate a project labor agreement; it only needs to sign on to the project labor agreement negotiated by the prime contractor. Also, as explained in the Regulatory Flexibility Analysis section, above, when a prime contractor makes an offer to perform work on a fixed-price construction contract, the contractor includes amounts to cover the costs it expects to incur, including anticipated costs of complying with project labor agreement requirements, plus profit in its offered price. Subcontractors also include their anticipated costs in their offered price. The anticipated costs, therefore, would be included in the payment by the Government of the prime contract fixed price.

GSA, DoD, and NASA cannot determine in the abstract what the effects of a particular project labor agreement will be on all the affected parties, but have sought to structure the rule to maximize an agency's ability to use its discretion to identify when using project labor agreements promotes economy and efficiency. Such circumstances should typically benefit both the Government and contractors, such as by providing mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health, and setting forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement.

G. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule contains information collection requirements. Accordingly, the Regulatory Secretariat received the preapproval for a new information collection, OMB Control No. 9000–0175, concerning use of project labor agreements for Federal construction projects, to the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.* Public comments concerning this request were invited through a subsequent **Federal Register** notice that was published in the **Federal Register** at 75 FR 13765, March 23, 2010.

Comments on the proposed information collection requirement:

One respondent stated that the data is largely arbitrary and capricious and should not be relied upon for any presumed target for expected use of project labor agreements. The respondent expressed the following concerns:

1. The estimate may be used by the Government or outside organizations to establish benchmarks or unsupportable goals for the use of project labor agreements.

2. The estimate appears to be unrealistically low, not based on valid assumptions and methodology.

However, the respondent acknowledges that the collection of the project labor agreements is necessary to determine whether the contractor has achieved the required project labor agreement as stated in the draft solicitation provisions.

Another respondent questioned the estimate that only 10 percent of contracts that meet or exceed the $25M threshold will be determined to be appropriate for a project labor agreement. According to the respondent, every contract exceeding $25M might in fact be covered.

Response: The initial estimates for a new information collection requirement are of necessity just that—estimates. They are based on the best information available, but must rely on the recommendations of Government experts. These numbers are never used to establish benchmarks or goals.

More specifically, with regard to the number of hours per response, not every burden is an information collection requirement. The time associated with negotiating a project labor agreement is a direct result of the E.O., but it is not an information collection requirement. The only information collection requirement imposed by this rule is the requirement to provide a copy of the project labor agreement to the contracting officer. The **Federal Register** preamble to the proposed rule specifically stated that the estimated response time of one hour covered only the time that it would take to submit the information to the Government.

With regard to the number of respondents, we expect that better information will become available through the information that OMB is collecting from the agencies on the use of project labor agreements.

Therefore, GSA, DoD, and NASA have changed the estimated burden hours associated with this information collection requirement, to account for the addition of the new option allowing agencies to require submission of the project labor agreement by all bidders with the offer.

List of Subjects in 48 CFR Parts 2, 7, 17, 22, and 52

Government procurement.

Dated: April 2, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 17, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 17, 22, 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 in paragraph (b)(2) in the third sentence of 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)" in its place.

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.103 by redesignating paragraph (v) as paragraph (w), and adding a new paragraph (v) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(v) Encouraging agency planners to consider the use of a project labor agreement (see subpart 22.5).

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

■ 4. Amend section 17.603 by adding 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

■ 5. Amend section 22.101–1 by revising paragraph (b) to read as follows:

22.101–1 General.

* * * * *

(b)(1) Agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute. To the extent practicable, agencies should

ensure that the parties to the dispute use all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, the National Mediation Board and other appropriate Federal, State, local, or private agencies.

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

* * * * *

■ 6. Add subpart 22.5, consisting of sections 22.501 through 22.505, to read as follows:

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

Sec.

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

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 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.

(a) 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.

(b) An agency may, if appropriate, require that every contractor and subcontractor engaged in construction on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations if the agency decides that the use of project labor agreements will—

(1) 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

(2) Be consistent with law.

(c) Agencies may also consider the following factors in deciding whether the use of a project labor agreement is appropriate for the construction project:

(1) The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades.

(2) There is a shortage of skilled labor in the region in which the construction project will be sited.

(3) Completion of the project will require an extended period of time.

(4) Project labor agreements have been used on comparable projects undertaken by Federal, State, municipal, or private entities in the geographic area of the project.

(5) A project labor agreement will promote the agency's long term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs.

(6) Any other factors that the agency decides are appropriate.

22.504 General requirements for project labor agreements.

(a) *General.* Project labor agreements established under this subpart shall fully conform to all statutes, regulations, and Executive orders.

(b) *Requirements.* The project labor agreement shall—

(1) Bind all contractors and subcontractors engaged in construction 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) Include any additional requirements as the agency deems necessary to satisfy its needs.

(c) *Terms and conditions.* As appropriate to advance economy and efficiency in the procurement, an agency may specify the terms and conditions of the project labor agreement in the solicitation and require the successful offeror to become a party to a project labor agreement containing these terms and conditions as a condition of receiving a contract award. An agency may seek the views of, confer with, and exchange information with prospective bidders and union representatives as part of the agency's effort to identify appropriate terms and conditions of a project labor agreement for a particular construction project and facilitate agreement on those terms and conditions.

22.505 Solicitation provision and contract clause.

For acquisition of large-scale construction projects, if the agency decides pursuant to this subpart that a project labor agreement will be required, the contracting officer shall—

(a) Insert the provision at 52.222–33, Notice of Requirement for Project Labor Agreement, in all solicitations associated with the construction project.

(1) Use the provision with its Alternate I if the agency decides to require the submission of a project labor agreement from only the apparent successful offeror, prior to contract award.

(2) Use the provision with its Alternate II if an agency allows submission of a project labor agreement after contract award.

(b)(1) Insert the clause at 52.222–34, Project Labor Agreement, in all solicitations and contracts associated with the construction project.

(2) Use the clause with its Alternate I if an agency allows submission of the project labor agreement after contract award.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 7. Add sections 52.222–33 and 52.222–34 to read as follows:

52.222–33 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 (May 2010)

(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 offeror shall negotiate a project labor agreement with one or more labor organizations for the term of the resulting construction contract.

(c) Consistent with applicable law, the project labor agreement reached pursuant to this provision shall—

1) Bind the offeror and all subcontractors engaged in construction 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 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, Executive orders, and agency requirements.

(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 offeror shall submit to the Contracting Officer a copy of the project labor agreement with its offer.

(End of Provision)

Alternate I (May 2010). As prescribed in 22.505(a)(1), substitute the following paragraphs (b) and (e) for paragraphs (b) and (e) of the basic clause.

(b) The apparent successful offeror shall negotiate a project labor agreement with one or more labor organizations for the term of the resulting construction contract.

(e) The apparent successful offeror shall submit to the Contracting Officer a copy of the project labor agreement prior to contract award.

Alternate II (May 2010). As prescribed in 22.505(a)(2), substitute the following paragraph (b) in lieu of paragraphs (b) through (e) of the basic clause:

(b) Consistent with applicable law, if awarded the contract, the offeror shall negotiate a project labor agreement with one or more labor organizations for the term of the resulting construction contract.

52.222–34 Project Labor Agreement.

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

PROJECT LABOR AGREEMENT (May 2010)

(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 52.222–33, 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 with subcontractors engaged in construction on the construction project.

(End of Clause)

Alternate I (May 2010). As prescribed in 22.505(b)(2), substitute the following paragraphs (b) through (f) for paragraphs (b) and (c) of the basic clause:

(b) Consistent with applicable law, the Contractor shall negotiate a project labor agreement with one or more 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) Consistent with applicable law, the project labor agreement reached pursuant to this clause shall—

(1) Bind the Contractor and all subcontractors engaged in construction 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, Executive orders, and agency requirements.

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

(f) *Subcontracts.* The Contractor shall require subcontractors engaged in construction on the construction project to agree to any project labor agreement negotiated by the prime contractor pursuant to this clause, and shall include the substance of paragraphs (d) through (f) of this clause in all subcontracts with subcontractors engaged in construction on the construction project.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0077, Sequence 3]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–41; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of the summary of the rule appearing in Federal Acquisition Circular (FAC) 2005–41 which amends the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding this rule by referring to FAC 2005–41 which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005–41 and the specific FAR case number. For information pertaining to status or