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H.R. 735, AND PROJECT LABOR AGREEMENTS, RESTORING COMPETITION AND NEUTRALITY TO GOVERNMENT CONSTRUCTION

HEARING

BEFORE THE

SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

H.R. 735

TO PRESERVE OPEN COMPETITION AND FEDERAL GOVERNMENT NEUTRALITY TOWARDS THE LABOR RELATIONS OF FEDERAL GOVERNMENT CONTRACTORS ON FEDERAL AND FEDERALLY FUNDED CONSTRUCTION PROJECTS

JUNE 3, 2011

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H.R. 735, AND PROJECT LABOR AGREEMENTS, RESTORING COMPETITION AND NEUTRALITY TO GOVERNMENT CONSTRUCTION

FRIDAY, JUNE 3, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. James Lankford (chairman of the subcommittee) presiding.

Present: Representatives Lankford, Kelly, Walberg, Labrador, Connolly, and Murphy.

Staff present: John Cuaderes, deputy staff director; Richard Beutel, senior counsel; Christopher Hixon, deputy chief counsel, oversight; Robert Borden, general counsel; Jeff Solsby, senior communications advisor; Ali Ahmad, deputy press secretary; Jeff Wease, deputy CIO; Molly Boyl, parliamentarian; Adam Fromm, director of Member liaison and floor operations; Ryan Little, manager of floor operations; Cheyenne Steel, press assistant; Nadia Zahran, staff assistant; Linda Good, chief clerk; Laura Rush, deputy chief clerk; Dave Rapallo, minority staff director; Suzanne Sachsman Grooms, minority chief counsel; Donald Sherman, minority counsel; Ronald Allen, minority staff assistant; Lucinda Lessley, minority policy director; Ashley Ettienne, minority director of communications; Jennifer Hoffman, minority press secretary; Jaron Bourke, minority director of administration; and Carla Hultberg, minority chief clerk.

Mr. LANKFORD. The committee will come to order. This is a hearing on H.R. 735, the Project Labor Agreements Restoring Competition Neutrality to Government Construction Projects.

The Oversight Committee mission statement we read at every one of our committee meetings, let me just go ahead and read it. We exist to secure two fundamental principles: First, Americans have a right to know that the money Washington takes from them is well spent; and, second, Americans deserve an efficient, effective government that works for them. Our duty on the oversight and government reform committee is to protect these rights. Our solemn responsibility is to hold government accountable to taxpayers because taxpayers have a right to know what they get from their government. We work tirelessly in partnership with citizen watch-

dogs to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy.

This is the mission of the Oversight and Government Reform Committee.

I have an opening statement. I am going to submit it for the record for the sake of our time today. I will also allow any Members to have 7 days to submit opening statements and any extraneous material for the record.

[The text of H.R. 735 follows:]

I

112TH CONGRESS
1ST SESSION

H. R. 735

To preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 16, 2011

Mr. SULLIVAN (for himself, Mr. WILSON of South Carolina, Mr. HARPER, Mr. LAMBORN, Mr. SESSIONS, Mr. PAUL, Mrs. BLACKBURN, Mr. WESTMORELAND, Mr. MULVANEY, Mr. WALBERG, Mr. CHAFFETZ, Mr. ROONEY, Mr. THOMPSON of Pennsylvania, Mr. GOHMERT, Mr. FLORES, Mr. PITTS, Mr. TIPTON, Mr. FRANKS of Arizona, Mr. MILLER of Florida, Mr. PENCE, and Mr. BISHOP of Utah) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

---

A BILL

To preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Government Neutrality
5 in Contracting Act".

SEC. 2. PURPOSES.

It is the purpose of this Act to—

(1) promote and ensure open competition on Federal and federally funded or assisted construction projects;

(2) maintain Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded or assisted construction projects;

(3) reduce construction costs to the Federal Government and to the taxpayers;

(4) expand job opportunities, especially for small and disadvantaged businesses; and

(5) prevent discrimination against Federal Government contractors or their employees based upon labor affiliation or the lack thereof, thereby promoting the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects.

SEC. 3. PRESERVATION OF OPEN COMPETITION AND FEDERAL GOVERNMENT NEUTRALITY.

(a) PROHIBITION.—

(1) GENERAL RULE.—The head of each executive agency that awards any construction contract after the date of enactment of this Act, or that obligates funds pursuant to such a contract, shall en-

1 sure that the agency, and any construction manager
2 acting on behalf of the Federal Government with re-
3 spect to such contract, in its bid specifications,
4 project agreements, or other controlling documents
5 does not—
6 (A) require or prohibit a bidder, offeror,
7 contractor, or subcontractor from entering into,
8 or adhering to, agreements with 1 or more
9 labor organizations, with respect to that con-
10 struction project or another related construction
11 project; or
12 (B) otherwise discriminate against or give
13 preference to a bidder, offeror, contractor, or
14 subcontractor because such bidder, offeror, con-
15 tractor, or subcontractor—
16 (i) becomes a signatory, or otherwise
17 adheres to, an agreement with 1 or more
18 labor organizations with respect to that
19 construction project or another related
20 construction project; or
21 (ii) refuses to become a signatory, or
22 otherwise adhere to, an agreement with 1
23 or more labor organizations with respect to
24 that construction project or another related
25 construction project.

1 (2) APPLICATION OF PROHIBITION.—The provi-
2 sions of this section shall not apply to contracts
3 awarded prior to the date of enactment of this Act,
4 and subcontracts awarded pursuant to such con-
5 tracts regardless of the date of such subcontracts.
6 (3) RULE OF CONSTRUCTION.—Nothing in
7 paragraph (1) shall be construed to prohibit a con-
8 tractor or subcontractor from voluntarily entering
9 into an agreement described in such paragraph.
10 (b) RECIPIENTS OF GRANTS AND OTHER ASSIST-
11 ANCE.—The head of each executive agency that awards
12 grants, provides financial assistance, or enters into cooper-
13 ative agreements for construction projects after the date
14 of enactment of this Act, shall ensure that—
15 (1) the bid specifications, project agreements,
16 or other controlling documents for such construction
17 projects of a recipient of a grant or financial assist-
18 ance, or by the parties to a cooperative agreement,
19 do not contain any of the requirements or prohibi-
20 tions described in subparagraph (A) or (B) of sub-
21 section (a)(1); or
22 (2) the bid specifications, project agreements,
23 or other controlling documents for such construction
24 projects of a construction manager acting on behalf
25 of a recipient or party described in paragraph (1),

1 do not contain any of the requirements or prohibi-
2 tions described in subparagraph (A) or (B) of sub-
3 section (a)(1).

4 (c) FAILURE TO COMPLY.—If an executive agency,
5 a recipient of a grant or financial assistance from an exec-
6 utive agency, a party to a cooperative agreement with an
7 executive agency, or a construction manager acting on be-
8 half of such an agency, recipient or party, fails to comply
9 with subsection (a) or (b), the head of the executive agency
10 awarding the contract, grant, or assistance, or entering
11 into the agreement, involved shall take such action, con-
12 sistent with law, as the head of the agency determines to
13 be appropriate.

14 (d) EXEMPTIONS.—

15 (1) IN GENERAL.—The head of an executive
16 agency may exempt a particular project, contract,
17 subcontract, grant, or cooperative agreement from
18 the requirements of 1 or more of the provisions of
19 subsections (a) and (b) if the head of such agency
20 determines that special circumstances exist that re-
21 quire an exemption in order to avert an imminent
22 threat to public health or safety or to serve the na-
23 tional security.

24 (2) SPECIAL CIRCUMSTANCES.—For purposes
25 of paragraph (1), a finding of "special cir-

1 cumstances'' may not be based on the possibility or
2 existence of a labor dispute concerning contractors
3 or subcontractors that are nonsignatories to, or that
4 otherwise do not adhere to, agreements with 1 or
5 more labor organizations, or labor disputes con-
6 cerning employees on the project who are not mem-
7 bers of, or affiliated with, a labor organization.

8 (3) ADDITIONAL EXEMPTION FOR CERTAIN
9 PROJECTS.—The head of an executive agency, upon
10 application of an awarding authority, a recipient of
11 grants or financial assistance, a party to a coopera-
12 tive agreement, or a construction manager acting on
13 behalf of any of such entities, may exempt a par-
14 ticular project from the requirements of any or all
15 of the provisions of subsection (a) or (b), if the
16 agency head finds—

17 (A) that the awarding authority, recipient
18 of grants or financial assistance, party to a co-
19 operative agreement, or construction manager
20 acting on behalf of any of such entities had
21 issued or was a party to, as of the date of the
22 enactment of this Act, bid specifications, project
23 agreements, agreements with one or more labor
24 organizations, or other controlling documents
25 with respect to that particular project, which

1 contained any of the requirements or prohibi-
2 tions set forth in subsection (a)(1); and
3 (B) that one or more construction con-
4 tracts subject to such requirements or prohibi-
5 tions had been awarded as of the date of the
6 enactment of this Act.
7 (e) FEDERAL ACQUISITION REGULATORY COUN-
8 CIL.—With respect to Federal contracts to which this sec-
9 tion applies, not later than 60 days after the date of enact-
10 ment of this Act, the Federal Acquisition Regulatory
11 Council shall take appropriate action to amend the Fed-
12 eral Acquisition Regulation to implement the provisions of
13 this section.
14 (f) DEFINITIONS.—In this section:
15 (1) CONSTRUCTION CONTRACT.—The term
16 "construction contract" means any contract for the
17 construction, rehabilitation, alteration, conversion,
18 extension, or repair of buildings, highways, or other
19 improvements to real property.
20 (2) EXECUTIVE AGENCY.—The term "executive
21 agency" has the meaning given such term in section
22 105 of title 5, United States Code, except that such
23 term shall not include the Government Account-
24 ability Office.

1 (3) LABOR ORGANIZATION.—The term "labor
2 organization" has the meaning given such term in
3 section 701(d) of the Civil Rights Act of 1964 (42
4 U.S.C. 2000e(d)).

○

Mr. LANKFORD. We will now recognize our very first panel. This is the Honorable John Sullivan, who represents Oklahoma's First District. He is up the turnpike from me personally. He introduced H.R. 735, the Government Neutrality and Contracting Act in February of this year. I am glad to have you, Congressman Sullivan. Thanks for taking time out of your schedule to get a chance to do a statement for us today. You are given and yielded 5 minutes.

STATEMENT OF HON. JOHN SULLIVAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. SULLIVAN. Thank You, Chairman Lankford and Ranking Member Connolly, members of the subcommittee. Thank you for holding this hearing today.

Every day of this Congress has brought us face-to-face with tough decisions on spending cuts, cost-saving proposals, policies that encourage job creation and ways to preserve the American Dream for our posterity. It is clear now, more than ever, that each fiscal decision that Congress makes has an impact on the sustainability of America's prosperity.

I bring to your attention today H.R. 735, the Government Neutrality and Contract Act, which will save jobs, create jobs, and prevent the waste of taxpayer dollars on Federal and federally assisted construction projects by reestablishing fair and open competition.

To begin, a project labor agreement is a contract that typically forces contractors and subcontractors to agree to recognize unions as the representatives of their employees on that job in order to win a construction contract. PLAs typically force contractors to use the union hiring hall and pay fringe benefits into union-managed benefit and pension benefit programs. PLAs also contain clauses that force contractors and employees to obey the restrictive and inefficient work rules and job classifications common in union and collective bargaining agreements but absent in the standard operation of open shop contractors.

While it is technically true that any contractor is welcome to compete on or for projects that require a government-mandated PLA, both general contractors and subcontractors must agree to the terms and conditions of a PLA in order to win a contract. The practical effect of these agreements is to discourage competition from contractors opposed to the terms of the PLA.

In 2001, President George Bush issued Executive Order 13202 and 13208 to maintain government neutrality in Federal contracting. These Executive orders prohibited the government from requiring contractors to adhere to PLAs as a condition of winning Federal or federally funded construction contracts. Because President Bush's Executive order was about maintaining neutrality, a contractor could also voluntarily enter into a PLA if they felt it could make their business competitive and deliver the best product to the government. However, in 2009, President Obama issued Executive Order 13502, encouraging Federal agencies to require union-favoring PLAs on Federal construction projects exceeding $25 million in total costs. While President Obama's Executive order does not mandate PLAs on all Federal construction contracts, it does nothing to preserve the neutrality that government should

maintain. Rather, it exposes Federal procurement officials to intense political pressure from special interest groups, politicians, and political appointees to require PLAs.

As I and other panelists place the facts before you, you will see how this dangerous path—this is a dangerous path. Government-mandated PLAs are not only discriminatory, but they are also hurtful to a struggling industry that is already facing unemployment above 17 percent. For example, yesterday The Wall Street Journal reported on a $70 million highway construction contract in New York funded at least 80 percent by the Federal Highway Administration that has been scrutinized for the decision to subject it to a PLA. While 27 percent of New York's private construction work force is unionized, that means that the employers of 73 percent of New York's construction work force who have been facing steep jobs losses over the past few years are discouraged from bidding on this project. Unfortunately, limiting competition comes at taxpayer expense. The article mentions that the PLA cost taxpayers an additional $4½ million because the lowest responsible bidder, a merit shop contractor, was thrown off the project in favor of a union contractor because the merit shop contractor would not sign a PLA.

Executive Order 13502 states its purpose is to promote efficiency. However, there is little evidence to suggest PLAs promote efficiency in Federal contributing. There were no examples of inefficiencies during the Bush years when PLA mandates were restricted. I am aware of anecdotal evidence on recent Federal construction projects demonstrating an increase in the construction costs that may not provide corresponding benefits to taxpayers or construction owners. For instance, the U.S. General Service Administration renovation project of Lafayette Federal Building in Washington, DC, was awarded to a Federal contractor without a PLA at a $52.3 million cost.

However, after the contractor agreed to a PLA for the project by the GSA, the contractor added $3.3 million to the cost of the project. The added $3.3 million isn't the result of increased material costs, revised blueprints, or a more aggressive completion deadline. The contract was awarded to the same contractor with the same proposal. And the only difference was the PLA. There are just two examples—these are just two examples, but there is no doubt that there are many more stories reflecting the true colors of government-mandated PLAs.

When mandated by public officials, these agreements unfairly discourage competition from 87 percent of the entire U.S. private construction work force, effectually raise the employment rate of the industry, cost the government billions more in construction costs, and do nothing to increase the efficiency of Federal construction projects.

There is a solution. H.R. 735, the Government Neutrality in Contracting Act, will prohibit executive agencies and recipients of Federal funds from requiring contractors to agree to PLAs as a condition of winning a Federal construction contract. Contractors are free to enter into PLAs if they want to, but the government is removed from that decisionmaking process. If enacted, this bill guarantees that all qualified contractors and their skilled work forces,

regardless of labor affiliation, can compete on a level playing field. This expands job opportunities, reduces the costs of government, and prevents discrimination based on labor affiliation. All told, H.R. 735 will ensure that taxpayers get the best possible product at the best possible price.

Once again, thank you, Chairman Lankford, for all you are doing. Thank you, Ranking Member Connolly, and all the members of the subcommittee. Thank you very much. I appreciate this opportunity to address your committee.

Mr. LANKFORD. Thank you, Congressman Sullivan, for taking time out of your schedule today to come over and testify.

Mr. LANKFORD. Many of you may or may not know that we have a vote that is coming very soon, and there is already debate on the floor, which was originally unscheduled during this time period. So I appreciate you coming over.

We will take a short recess to allow the clerks to set up for the second panel real quick and look forward to get a chance to introduce our second witnesses. Thank you.

[Recess.]

Mr. LANKFORD. We will now welcome our second panel. The Honorable Daniel Gordon is the administrator for the Federal Procurement Policy, the Office and Management and Budget. Very grateful to have you here, Mr. Gordon.

For clarification of everyone that is here, Mr. Gordon and I talked 3 days ago actually about his schedule today; that he has to get away for a flight by 11. At that time I told him we don't have votes scheduled so we should be just fine. Now we have votes scheduled this morning. So when votes interrupt us, I still will allow Mr. Gordon to catch that flight and get out of here. So we are in an accelerated process to get you to that quickly.

Ms. Susan Brita is the Deputy Administrator of the General Services Administration.

Pursuant to the committee rules, all witnesses are sworn in before they testify. So if you would please stand and raise your right hands.

[Witnesses sworn.]

Mr. LANKFORD. Let the record reflect the witnesses all answered in the affirmative.

Mr. CUMMINGS. Mr. Chairman, I have a parliamentary inquiry.

Mr. LANKFORD. Absolutely, sir.

Mr. CUMMINGS. Mr. Chairman, I, too, want to see Mr. Gordon get out of here on time—and I know you will. But my staff has informed me that you, Chairman Issa, and other chairmen of this committee have adopted a new policy for minority witnesses. This policy appears to contradict the rules and the precedent of our committee. We received word of this new policy for the first time from Chairman Issa's staff in an e-mail on May 25th. And here is are what it said: If there is an administration witness, then that witness is designated minority witness. It is up to the chairman to accept an additional witness, but that witness must be recommended within a 24-hour period.

In other words, if you invite someone from the administration, that witness is somehow designated as our witness, although we didn't ask for him.

For this hearing we did not request an administrative witness. You did. We requested Dr. Peter Phillips, an expert in economics of the construction industry, but you refused to allow him to testify. The reason your staff gave was Chairman Issa's new policy. They said we couldn't have our witness because you already invited administrative witnesses.

Here's my inquiry. Has the subcommittee or the full committee formally adopted this policy?

Mr. LANKFORD. That we will have to determine. I will have to get with Chairman Issa and get a chance to talk about that specifically. Part of the issue is well—and I had this conversation with Ranking Member Connolly. Obviously, we have seven people on this panel already as well, two of those being administration officials. And I recommended to him at that time that the minority witness submit something at length for the record so we get a chance to include that as well.

Mr. CUMMINGS. Well, the only reason I am asking is because I think it sets a dangerous precedent, because quite often, we are opposed to what the administration is doing. And so for people to be designated our witnesses, it just creates a major problem. So I just wanted to know that. We just wanted to know, on what basis did you deny Ranking Member Connolly's request to invite Dr. Phillips to today's hearing. What was the basis of that?

Mr. LANKFORD. The basis was obviously we had seven people already, and two of those being administration officials that we thought would be very supportive and clear to articulate that position as well.

Mr. CUMMINGS. Second parliamentary inquiry. Mr. Chairman, this new policy is not only unfair and unprecedented, but it directly contradicts the rules of the House and the rules of our committee. Committee rule No. 2 provides for "Witnesses from the minority may request"—and it says not the majority—the minority—"The same is true in the rules of the House."

Mr. Chairman, it is on obvious point but you can't just invite people to testify and claim that we invited them. Can you show the Members any basis in the rules for this new misguided policy?

Mr. LANKFORD. Why don't we get a chance to go through this in the following days and I will followup and show a previous record of how this committee has been handled in the past and we will be able to direct that and be able to determine if this is consistent with previous actions of the committee.

Mr. CUMMINGS. Just one other thing. I just want to make it clear, because this is a very dangerous precedent and no previous chairman has ever designated who the minority witnesses would be, regardless of whether they are administrative officials or anyone else. Chairman Issa's new policy is an extreme edict, and I am aware of no other House or Senate committee with a similar policy. This policy also undermines the integrity of our committee by impairing the ability of minority Members to bring balance and additional perspectives to these proceedings. And I ask that you state here to our Members that you categorically reject this policy immediately.

Will you do that, Mr. Chairman?

Mr. LANKFORD. I will not. I want to able to look at the full record of the history of this committee and be able to determine that. I understand what you're saying, but I want to be able to walk through the history of this committee as well.

Mr. CUMMINGS. I understand. Mr. Chairman, I have a motion. Today, I join all the ranking members of this committee in sending a letter to Chairman Issa formally objecting to this new policy and calling on him to abandon it. Here's what the letter says: Apart from these specific objections, we are concerned about the direction of your overall approach. Rather than increasing bipartisan cooperation, as you pledged to do many times, you have adopted this new policy without identifying any legitimate basis or need for it.

This leads to the unfortunate conclusion that you are more interested in holding hearings to advance your own personal political agenda rather than objectively gather facts from a variety of sources to improve public policy.

Mr. Chairman, I ask unanimous consent that this letter be entered into the record.

Mr. LANKFORD. Without objection.

Mr. CUMMINGS. Thank you.

[The information referred to follows:]

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June 3, 2011

The Honorable Darrell E. Issa
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are writing to request that you immediately withdraw your misguided new policy on minority witness requests. This policy was conveyed by your staff via email for the first time on May 25, 2011. The email states:

> It is the policy of the Committee, once the weekly schedule is officially posted, for the Minority to have 24 hours to recommend their witness for the hearing(s) posted. **If there is an Administration witness then that witness is the designated minority witness.** It is up to the Chairman to accept an additional witness but that witness must be recommended within the 24 hour period.[1]

This new policy is unprecedented and undermines the integrity of our Committee by impairing the ability of minority Members to bring balance and perspective to the Committee's proceedings. No previous chairman has ever designated who the minority witness would be, let alone considered an Administration witness of the same party as the minority to be the minority's witness. Your policy is an extreme edict, and we are aware of no other House or Senate Committee with a similar policy.

We have two fundamental objections. First, your new policy is on its face contrary to the Committee's rules, which state that minority witness requests are requested by the minority.[2] It should be obvious that when you invite an individual to testify, that person is not appearing at the

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[1] Email from Majority Staff, House Committee on Oversight and Government Reform, to Minority Staff, House Committee on Oversight and Government Reform (May 25, 2011) (emphasis in original).

[2] House Committee on Oversight and Government Reform, Committee Rule 2 (providing for "witnesses whom the minority may request").

request of the minority. If we have not requested an Administration witness, you may not "designate" an Administration official you invite as a minority witness, unless you are willing to allow the minority to withdraw that invitation as well.

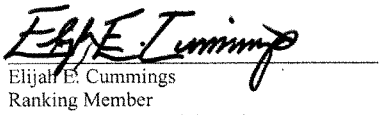
Our second objection is to your new 24-hour rule, which you do not appear to be applying even to your own witnesses. During this Congress, you have complied with the minimum requirements necessary under our Committee rules by providing only a single week's notice prior to Committee hearings. These notices have included nothing more than the title of hearings, with no witnesses identified. It is fundamentally absurd to demand that we identify minority witnesses *before* you have identified witnesses yourself. Yet your new policy does just that.

Apart from these specific objections, we are concerned about the direction of your overall approach. Rather than increasing bipartisan cooperation, as you pledged to do many times, you have adopted this new policy without identifying any legitimate basis or need for it. This leads to the unfortunate conclusion that you are more interested in holding hearings to advance your own personal political agenda rather than objectively gathering facts from a variety of sources to improve public policy.

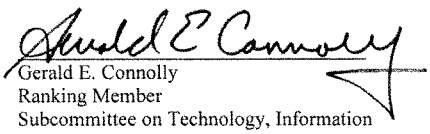
As ranking members, we will reserve the right to request witnesses of our choosing, including individuals who we believe have the ability to enhance the understanding of Committee Members and provide perspectives that are not otherwise represented by the witnesses you invite. We have and will continue to submit minority witness requests to our respective Chairmen, and only those individuals identified and requested as minority witnesses should be considered as such.

When you were in the minority in 2007, you said this: "In a Democracy whose lifeblood is fueled by the market place of ideas, Committee practices that stifle or preclude full debate should be avoided at all cost."[3] We urge you to heed those words and immediately abandon this unfair and unreasonable policy.

Sincerely,



Elijah E. Cummings
Ranking Member
Committee on Oversight and
Government Reform



Gerald E. Connolly
Ranking Member
Subcommittee on Technology, Information
Policy, Intergovernmental Relations and
Procurement Reform

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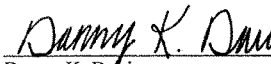
[3] Letter from Ranking Member Darrell E. Issa to Chairman Dennis J. Kucinich (June 8, 2007) (online at http://issa.house.gov/index.php?option=com_content&task =view&id=310&Itemid=28&Itemid=4).

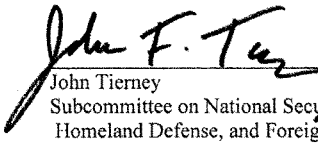
The Honorable Darrell E. Issa
Page 3

Edolphus Towns
Ranking Member
Subcommittee on Government Organization
Efficiency and Financial Management

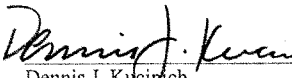
Stephen F. Lynch
Ranking Member
Subcommittee on Federal Workforce,
U.S. Postal Service and Labor Policy



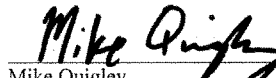
Danny K. Davis
Subcommittee on Health Care, D.C.,
Census, and the National Archives



John Tierney
Subcommittee on National Security,
Homeland Defense, and Foreign Operations



Dennis J. Kucinich
Subcommittee on Regulatory Affairs,
Stimulus Oversight and Government
Spending



Mike Quigley
Subcommittee on TARP, Financial Services
and Bailouts of Public and Private
Programs

Mr. CONNOLLY. Mr. Chairman.

Mr. LANKFORD. By the way, we are very limited in the time that we have. If this is a conversation that we can have after Mr. Gordon has already testified, it would allow him to be able to slip out and be able to hear our witnesses.

Mr. CONNOLLY. I understand. As the ranking member of the subcommittee, I have a further parliamentary inquiry following up on Mr. Cummings' inquiry. Was the chairman suggesting that he believes there is precedent for the majority dictating to the minority who their witnesses would be at a hearing?

Mr. LANKFORD. What the chairman is stating is I want to walk back through the history of this and be able to discover that clearly and so we can all walk through it together and see area by area as we've gone back through history to be able to determine that together.

Mr. CONNOLLY. Would the chairman acknowledge that he was given verbal objection by this ranking member to this proceeding?

Mr. LANKFORD. Yes. We discussed that actually prior to your arrival.

Mr. CONNOLLY. I know that since our witnesses are going to be under oath, they will testify that I have had no communication. The ranking member on the minority of this subcommittee did not request Mr. Gordon or Ms. Brita as witnesses. Would the chairman be aware of that?

Mr. LANKFORD. I would not be. Would you suggest that they would not be good witnesses to be able to speak to this issue?

Mr. CONNOLLY. No. I would suggest they were not my choice, and that the minority has a right under the rules of the House and the rules of this committee to choose its own witnesses. And this hearing is in violation of those rules. And I want to protest that publicly.

I want the administration witnesses to understand that they are being used. And I want that on the record.

Mr. LANKFORD. Without objection.

Mr. Gordon, we would very much be greatful to receive your testimony for 5 minutes.

STATEMENTS OF DANIEL GORDON, ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET; AND SUSAN BRITA, DEPUTY ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION

STATEMENT OF DAN GORDON

Mr. GORDON. Thank you. I will speak briefly, Mr. Chairman.

Chairman Lankford, Ranking Member Connolly, members of the subcommittee, I appreciate the opportunity to appear before you today to discuss issues related to the use of project labor agreements in Federal construction contracts. As the chairman noted, we talked earlier this week. I do have, unfortunately, a very firm travel commitment. I will have to leave at 11 this morning. I am very appreciative of the chairman's and the subcommittee's understanding in this regard.

As an administrator for Federal procurement, I am responsible for overseeing the development of governmentwide contracting

rules and policies and ensuring that those rules and policies promote economy and efficiency in government contracting. This morning I am going to very briefly describe the steps that my office has taken to shape the Federal acquisition regulation, the FAR rule, that implements executive order 13502, which governs the use of PLAs in Federal construction contracts.

Let me first address a possible misperception about what the FAR rule says about the use of PLAs. The FAR rule does not mandate the use of PLAs. Like the Executive order, the FAR rule gives each contracting agency the discretion to decide for itself on a project-by-project basis whether use of a PLA will promote economy and efficiency in that specific construction contract. The FAR rule calls PLAs—and I am quoting from the rule: A tool that agencies may use to promote economy and efficiency in Federal procurement.

In offering PLAs as a tool to the contracting agency, the FAR rule on PLAs is similar to many other provisions of the FAR. For example, the FAR lets contracting agencies decide, based on the specifics of their needs and their circumstances, whether they should purchase through the Federal supply schedule or on the open market, whether they should seek bids with price as the only evaluation criterion or rather run a competitive procurement with other selection factors, such as past performance in addition to price. The FAR doesn't dictate to our acquisition professionals what choices to make, but it gives them the tools to make the choices to tailor a procurement to the individual agency's specific requirement. That toolkit approach and the flexibility that comes with it lie at the very heart of our ability to get the best value for every taxpayer dollar we spend, whether we are buying lawn mowing services for a national park or war planes for the Air Force. And our approach to PLAs is no different.

We have structured the FAR rule to create a process were decisions are made on a case-by-case basis. The FAR rules set out factors that agencies may decide to consider, but it does not dictate those factors or prohibit agencies from considering other factors. As with other FAR rules, though, the PLA rule sets boundaries. Most significantly, the agency can require a PLA for a specific project only, only, if it decides that doing that will advance the government's interest in achieving economy and efficiency in Federal procurement.

Equally important with respect to the content of any PLA created pursuant to the FAR rule, the rule requires that the PLA allow all firms to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements. That mandate ensures that if a agency decides to use a PLA, it is done in a way consistent with the principle of open competition, a bedrock of our Federal procurement system.

We appreciate that taxpayers would not benefit from a rule that mandated the use of PLAs even if they didn't make sense and didn't serve economy and efficiency. However, similarly, taxpayers would not benefit from a rule if agencies were prohibited from taking advantage of opportunities where a PLA could help them achieve or increase efficiency and timeliness. With these thoughts in mind, our office, the Office of Federal Procurement Policy, in-

tends to work with agencies to facilitate the sharing of experiences and best practices for the consideration and appropriate use of project labor agreements in the Federal marketplace.

I am very happy to answer any questions when we come to question time.

Thank you, Mr. Chairman.

Mr. LANKFORD. Thank you, Mr. Gordon.

[The prepared statement of Mr. Gordon follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
www.whitehouse.gov/OMB

STATEMENT OF
THE HONORABLE DANIEL I. GORDON
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY,
INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

June 3, 2011

Chairman Lankford, Ranking Member Connolly, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the government's policies addressing the use of project labor agreements in federal construction contracts . As Administrator for Federal Procurement Policy, I am responsible for overseeing the development of government-wide contracting rules and policies, including those for construction, and ensuring that the contracting rules and policies promote economy and efficiency. Today, I would like to briefly highlight a few key provisions of Executive Order (E.O.) 13502. Then, I will discuss the steps my office, the Office of Federal Procurement Policy (OFPP), has taken to implement the requirements of the E.O. in the Federal Acquisition Regulation (FAR), which governs executive branch procurements, and to ensure that the FAR rules promote economy and efficiency in contracting.

Executive Order 13502

Executive Order 13502 encourages federal agencies to consider requiring the use of project labor agreements on large-scale construction projects, where the total cost to the Government is $25 million or more. 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. Section 1 of the E.O. explains that use of a project labor agreement may promote the efficient and expeditious completion of federal construction projects by providing structure and stability that can help agencies manage challenges to efficient and timely procurement that are posed by large-scale construction contracts. These challenges may include difficulty in predicting labor costs when bidding on contracts, the uncertainty of a steady supply of labor through the life of the contract, and the potential inability to timely resolve disputes that may arise between the multiple employers who are typically working onsite at a single location.

It bears emphasizing that the E.O. leaves to the discretion of each agency the decision of whether use of a project labor agreement will promote economy and efficiency on a given construction contract of $25 million or more and should be required. Section 3 states that these decisions on such larger construction contracts are to be made on a *project-by-project basis*, where the agency determines whether use of such an agreement will advance the government's interest in achieving economy and efficiency, producing labor-management stability, and ensuring compliance with law and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters. Section 5 reinforces the case-

by-case nature of the policy, stating that the E.O. "does not require an executive agency to use a project labor agreement on any construction project . . . ."

FAR implementation

Last April, a new FAR Subpart 22.5 was promulgated to implement E.O. 13502, after careful consideration of public comments on a proposed rule issued in the summer of 2009. In developing these regulations, OFPP worked with the other members of the Federal Acquisition Regulatory Council – namely, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration – as well as several other agencies that undertake large-scale construction projects.

Consistent with the express terms of the E.O., FAR Subpart 22.5 provides guidance and flexibility to allow agencies to make reasoned evaluations about whether a project labor agreement is appropriate for a given construction project. The rule is specifically structured to ensure that project labor agreements are treated as a tool for consideration -- and not a one-size-fits-all solution for every large-scale construction project. The rule provides (1) factors to help agencies in considering whether a project labor agreement would be beneficial, (2) guidance regarding the content of such an agreement, and (3) solicitation provisions and contract clauses to use in construction acquisitions if a decision is made to require a project labor agreement.

Factors. The FAR identifies a number of specific factors that agencies may consider to help them decide, on a case-by-case basis, if the use of a project labor agreement is likely to promote economy and efficiency in the performance of a specific construction project. These factors include whether:

- the project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades;

- there is a shortage of skilled labor in the region in which the construction project will be sited;
- completion of the project will require an extended period of time;
- project labor agreements have been used on comparable projects undertaken by federal, state, municipal or private entities in the geographic area of the project; and
- 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.

These factors reflect the experience of federal agencies, such as the Department of Energy and the Tennessee Valley Authority, other governmental entities, and private sector entities, in analyzing planned construction projects to determine whether a project labor agreement is likely to promote smooth, successful, and timely performance of the construction project. The list is non-exhaustive and agencies have the discretion to pick and choose which, if any, of these enumerated factors, or any other factors they may identify, are appropriate to consider on a particular project, provided that their decision has a reasonable basis, achieves economy and efficiency, and is consistent with law. 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. By doing so, all experiences relevant to a particular project can be fully considered in deciding what is best for the agency in meeting its mission, 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. It is worth noting that OFPP plays no role in agency decision-making associated with individual contract actions, including those associated with construction contracts. By law, these decisions are made by the individual buying agencies.

Content of project labor agreements. The FAR states that all project labor agreements shall fully conform to all statutes, regulations, and Executive Orders. It further prescribes a number of specific requirements that must be in the agreement. For example, 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. Put another way, 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 applies to subcontractors as well. The agreement must also:

- bind all contractors and subcontractors on the construction project through the inclusion of appropriate specifications in all relevant solicitation provisions and contract documents;
- contain guarantees against strikes, lockouts, and similar job disruptions;
- set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the project labor agreement; and
- provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health.

The rule further states that an agency may, as appropriate to advance economy and efficiency in the procurement, 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 in order to receive 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. The preamble explains that "[e]xperiences 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."

Solicitation provisions and clauses. The FAR provides solicitation provisions and contract clauses for incorporation into acquisitions for large-scale construction if an agency decides to require a project labor agreement. Again, the rule provides flexibility through alternative clauses that support various approaches for timing the submission of an executed project labor agreement on a particular project – namely, with the initial offer, after offers are submitted but before award, or after award. This flexibility allows agencies to select the alternative that makes the most sense in advancing the economy and efficiency of a particular project and best fits with their mission.

Conclusion

Each year, the government spends tens of billions of dollars on construction projects. As stewards of the public fisc, it is our responsibility to make sure these resources are spent in the most effective and efficient manner possible. In March, I stated before the Subcommittee on Regulatory Affairs, Stimulus Oversight, and Government Spending – and it bears repeating again today before this Subcommittee – that project labor agreements, like many other procurement

authorities provided to agency contracting offices, are just one tool that may help agencies achieve greater economy and efficiency in particular cases. We believe the structure of the FAR, as described above, will facilitate reasoned analyses and measured actions so that project labor agreements are given meaningful consideration where they can promote economy and efficiency and are not pursued where their use would not be beneficial. OFPP will work with agencies to facilitate the sharing of experiences and best practices for the consideration and appropriate use of project labor agreements in the federal marketplace.

This concludes my remarks. I am happy to answer any questions you may have.

Mr. LANKFORD. Ms. Brita, I would be pleased to be able to receive your testimony for 5 minutes.

STATEMENT OF SUSAN BRITA

Ms. BRITA. Good morning, Chairman Lankford and Ranking Member Connolly, and other members of the subcommittee. Thank you for inviting me here today to discuss GSA's measured business approach to the implementation of project labor agreements in our construction contracts. A PLA is a proven tool to help provide structure and stability to any project, especially on large, complex projects. The private sector uses PLAs for a variety of construction projects similar to those that GSA manages. PLAs are also used at the State and local levels for an array of construction projects varying in size and scope.

PLAs have been used in all 50 States and the District of Columbia. They can help reduce risks associated with wage stability, avoidance of work stoppage, increased labor availability, and project-specific coordination on work rules. PLAs can also include provisions that promote career development through valuable job training for construction workers.

GSA only use PLAs when they promote economy and efficiency in Federal procurement. Executive Order 13502 and the FAR encourage executive agencies to consider requiring contractors to use PLAs on projects totaling at least $25 million. The Executive order does not mandate the agencies, but encourages the consideration of PLAs. Our procurement process provides for the consideration of PLAs. GSA allows a contractor to submit a proposal with a PLA, without a PLA, or you can submit both. We evaluate these proposals on a project-by-project basis. If GSA accepts a PLA proposal, the awardee is required to execute a PLA in accordance with the Executive order and the FAR.

In GSA's contracts, the PLA is an agreement between the contractor and a labor organization rather than between GSA and a labor organization. For our major construction projects, GSA typically selects the proposal representing best value for the government by weighing a number of technical factors against cost. Our PLA recently has been included as one of these technical factors. Proposals with the PLA receive 10 percent of the total possible points for evaluation. We award to contractors who work with labor organizations as well as contractors who do not.

Shortly after the Executive order was signed, GSA received $5½ billion through the American Recovery and Reinvestment Act of 2009. These funds, which we use principally to help modernize and green our federally owned inventory, provided GSA the opportunity to conduct a PLA pilot program. By this pilot program, GSA selected 10 projects with budgets of over a $100 million. The selected projects covered seven States and the District of Columbia. Of these 10 projects, seven ended up with PLAs and three did not. From our comparisons, in most instances there has been no to little difference cost difference.

Our experience in this pilot program has shown us that our bidding process has not hindered competition. In all of our projects, we receive sufficient bids to ensure adequate competition and best value for the American taxpayer. We typically receive between

three and eight offers for these projects. Through the construction of these projects, GSA plans to assess the use of PLAs for future implementation of best practices and update our policies. This pilot program has enabled GSA to obtain real market data regarding the impact of PLAs on competition.

GSA has recently reached out to contractors and union officials to hear their feedback on our pilot projects in order to develop ways to further improve the PLA procurement process. As real estate experts, GSA ensures that we are procuring construction goods and services at best value for the American government on behalf of the American taxpayer. The consideration of PLAs is encouraged because of the benefits associated with them. PLAs can provide wage stability for workers, establish mechanisms for resolving labor disputes and reduce the risk of work strikes and lockouts to ensure projects continue on schedule.

In awarding construction contracts, GSA considers a variety of technical factors, including potential benefits of PLA and weighs them against cost to help determine the winning proposal. By leveraging our experience and expertise, GSA ensures high design and construction excellence at best value for the American taxpayer.

Thank you, Chairman Lankford, and I am here to answer any questions you may have.

[The prepared statement of Ms. Brita follows:]

Good afternoon Chairman Lankford, Ranking Member Connolly, and Members of the Subcommittee. My name is Susan Brita, and I am the Deputy Administrator of the General Services Administration (GSA). Thank you for inviting me here today to discuss GSA's measured business approach to the implementation of Project Labor Agreements (PLA) in our construction contracts.

A PLA is a project-specific collective bargaining agreement that establishes the terms and conditions of employment for a specific construction project. A PLA is a proven private sector tool to provide structure and stability to a project, especially large projects that take many years to complete. The private sector uses PLAs for a variety of construction projects similar to those GSA manages. Additionally, PLAs are used frequently at the state and local level in connection with a wide array of construction projects of varying sizes and scopes. PLAs have been used in all 50 states for a variety of construction projects.[1] GSA only uses PLAs when they promote economy and efficiency in federal procurement.

Upon issuance of the President's Executive Order 13502 to "promote the efficient administration and completion of Federal construction projects," GSA established internal guidance on the consideration of PLAs and pursued ten pilot projects under the American Recovery and Reinvestment Act of 2009 to test their use.

Project Labor Agreement Regulations and Guidance –

Executive Order 13502, which President Obama signed on February 6, 2009, encourages executive agencies to consider requiring contractors to use PLAs on large construction projects, defined as those totaling at least $25 million. The Executive Order does not mandate that Federal agencies require PLAs; rather it states a policy "to encourage federal executive agencies to consider requiring the use" of PLAs on major construction projects in order to promote economy and efficiency in Federal procurement. The order only allows agencies to require PLAs where doing so would "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, produc[e] labor-management stability, and ensur[e] compliance with" federal employment laws. After a lengthy review process, and with hundreds of comments submitted by the public and industry, the Federal Acquisition Regulation was amended to implement the Executive Order. The final FAR rule, FAR Case 2009-005, was published in the Federal Register April 13, 2010 and became effective May 13, 2010.

Prior to the final rule, GSA issued interim guidance for PLA consideration in accordance with the Executive Order. Upon issuance of the final FAR rule, GSA revised its guidance accordingly. This procurement instructional bulletin provides guidance on creating solicitations and evaluating proposals related to PLAs on a project-by-project basis. GSA allows contractors to submit a proposal subject to the PLA requirements in the contract, a proposal not subject to the requirements in the contract or both. If GSA accepts a PLA proposal, the awardee is required to execute a PLA in accordance with

[1] As cited in the preamble to the final FAR rule FAR Case 2009-005

the Executive Order and the FAR. In GSA's contracts, the PLA is an agreement between the contractor and the labor organization, and GSA is not a party to the agreement.

Awarding Construction Contracts with Project Labor Agreements –

In selecting a contractor for award, GSA uses the "best value" method of award, which takes into consideration both cost and technical qualifications. While cost is always considered, the value of using well-qualified contractors who are able to perform the contract efficiently and effectively is also part of the decision process. GSA weighs numerous technical factors to evaluate a contract proposal. The inclusion of a PLA is one of these factors. Contractor submissions that include a PLA receive a 10 percent increase in their technical evaluation for submitting a proposal subject to the PLA requirements. This allows us to recognize the value of the potential benefits of a PLA to the project, including reduced project risks associated with wage stability, avoidance of work stoppages, increased labor availability, and project-specific coordination of work rules.

By using our optional bidding process, GSA does not discriminate against contractors. GSA awards to contractors who work with labor organizations, as well as contractors who work without such organizations.

The viability of a PLA on a given project is evidenced by the relative cost of the PLA proposals (if any) submitted. If a market is not suitable for a PLA, GSA believes that offerors will not submit PLA proposals or the proposals will include an elevated cost, which may take them out of the competitive range.

GSA's Implementation of Project Labor Agreements –

GSA is the Federal government's real property expert, managing a real estate portfolio of more than 1,500 owned buildings. We manage and execute an average of $1.5 billion capital construction program annually. After President Obama signed the Executive Order for PLAs, GSA was also allocated $5.5 billion through the American Recovery and Reinvestment Act of 2009 (Recovery Act) to help construct new facilities and modernize our federally owned inventory, transforming many of our buildings into high-performance green buildings.

During the implementation of our Recovery Act Spend Plan, GSA conducted a pilot program with Recovery Act projects to consider the use of a PLA. For this pilot program, GSA selected projects with budgets of more than $100 million. Ten projects met this criterion and were selected for the pilot. Of these ten projects, seven have PLAs and three do not. Our experience in this pilot program has shown us that our bidding process has not hindered competition.

The following projects were included in the pilot program:

- 50 United Nations Plaza in San Francisco, California (signed PLA)
- A.J. Celebrezze Federal Building in Cleveland, Ohio (signed PLA)
- Byron Rogers Courthouse in Denver, Colorado (no PLA)
- Edith Green-Wendell Wyatt Federal Building in Portland, Oregon (signed PLA)
- GSA Headquarters Building in Washington, DC (no PLA)
- Lafayette Federal Building in Washington, DC (signed PLA)
- Nogales West Land Port of Entry in Nogales, Arizona (no PLA)
- Peter Rodino Federal Building in Newark, New Jersey (signed PLA)
- Prince Jonah Kuhio Kalanianaole Federal Building and Courthouse in Honolulu, Hawaii (signed PLA)
- Department of Homeland Security at the St. Elizabeths Campus in Washington, DC (signed PLA for 1 of the 3 contracts)

Through the construction of these projects, GSA plans to assess the use of PLAs for future implementation of best practices and updates to our policies. This pilot program has enabled GSA to obtain real market data regarding the impact of PLAs on competition. GSA has recently reached out to contractors and union officials to hear their feedback on our pilot projects in order to develop ways to further improve our PLA procurement process.

These pilot projects represent the first projects for which GSA had considered the use of PLAs; however, it is important to note that contractors have, of their own volition, entered into PLAs in certain instances where it makes sense.

Conclusion –

As real estate experts, GSA ensures that we are procuring construction goods and services at the best value for the Government on behalf of American taxpayers. Consideration of the use of PLAs is encouraged because of the benefits that they may bring. PLAs can provide wage stability for workers, establish mechanisms for resolving labor disputes, and reduce the risks of work strikes and lockouts to ensure the project continues on schedule.

In awarding construction contracts, GSA considers a variety of technical factors, including the potential benefits from a PLA, and weighs them against cost, to help determine the winning proposal. By leveraging our experience and expertise, GSA ensures high design and construction excellence at the best value to the American taxpayers.

Chairman Lankford, Ranking Member Connolly, this concludes my prepared statement, and I am pleased to be here today to discuss GSA's measured business approach to the implementation of PLAs. I will be pleased to answer any questions that you or any other Members of the Subcommittee may have.

Mr. LANKFORD. Thank you, Ms. Brita. I now yield myself 5 minutes for initial questioning.

Mr. Gordon, as I am going through this issue, when a PLA agreement is made, does that change the collective bargaining rights typical for a union when they are coming in? Do they have to set aside some of those rights to enter into a PLA agreement?

Mr. GORDON. Mr. Chairman, unfortunately, I'm not a labor lawyer. I'm a procurement guy. And I'm not sure what the impact would be on individual collective bargaining agreements.

Mr. LANKFORD. When this was made, the shift that occurred in the Executive order, was that because PLAs were being excluded? There was an Executive order done 2 years ago that you said didn't elevate the PLAs, but it encouraged the use of PLAs on it. Was that because PLAs were more efficient but they weren't being selected? I'm trying to figure out the reason that the Executive order is needed. If already PLAs are allowed, if already that is in the process, and what we are talking about today does not exclude PLAs, and say, No, they can't be used, what was the need for the Executive order and how is that bearing out?

Mr. GORDON. Thank you, Mr. Chairman. Under the prior administration, the government was prohibited from requiring the use of PLAs on Federal construction projects. It is true that individual contractors could voluntarily use one. But what we have seen is that in both the private sector and in State and local governments there are situations where PLAs are viewed as helpful. And our view was that same tool should be available to the Federal Government just as it is available, for example, to Toyota when Toyota used project labor agreements and as the Department of Energy has required use of project labor agreements for many decades. We wanted that to be possible for the entire Federal Government. We weren't encouraging their use. We were encouraging agencies to consider whether they should be required.

Mr. LANKFORD. Is there increased points that are given in the benefits for use of a PLA?

Mr. GORDON. I'm not sure what you mean by increased points.

Mr. LANKFORD. In the scoring in trying to determine the benefit of how to select what contractor, are there increased points that are given if they use a PLA?

Mr. GORDON. We have given agencies considerable flexibility in deciding how to implement the FAR rule. What you heard from Ms. Brita was that at GSA, a small percentage of points, it is really only on the technical side that you can get 10 percent extra points. But technical is only one factor. There is also past performance and price. Other agencies aren't taking that approach.

Mr. LANKFORD. The reason for that would be—the 10 extra points was because they saw increased efficiency and such, or what was the reason forgiving the extra points for that?

Mr. GORDON. It would be better to ask Ms. Brita.

Mr. LANKFORD. Let me shift.

Ms. Brita, what was the reason for the extra points on that?

Ms. BRITA. GSA chose to enter into the 10 percent preference. As you know, the Executive order encourages agencies to consider. We are in the construction business and always looking for ways to increase competition and obviously make things more efficient. In the

application of the Executive order, we chose to use the 10 percent point system to meet that encouragement; to encourage people to participate and get involved.

Mr. LANKFORD. When you mention the pilot program, is that the Rider Levett Bucknall report? When you were talking about the pilot program earlier that did the study on PLAs, is that the report you're referring to, the company that did the report?

Ms. BRITA. The pilot program I'm talking about is the 10 projects that we identified that we were going to run the PLA against and see how the 10 projects stack up. The report is a different effort.

Mr. LANKFORD. That report, though, you're familiar with that report?

Ms. BRITA. I am fairly familiar with it.

Mr. LANKFORD. The report I have, I have a draft copy of it, the last revision of that looks like it was January 27, 2010. Our staff has been trying to request this report, obviously, because it is good that you all have done a study. It is the right thing to be able to do on it. We've been trying to get a copy. We were finally able to get a copy at actually 6 p.m. last night. The last draft was actually done January 27, 2010.

I would like to ask unanimous consent that we submit this report for the record.

So agreed.

Mr. LANKFORD. In this report, there are several statements that come out on it in the executive summary even at the beginning of it, it talks to these different cities and these different locations and, for instance, in Cleveland there is a 0.1 percent marginal benefit to PLA; a 0.6 percent benefit in Honolulu; a 0.3 benefit in San Francisco. But then it walks through other cities in the PLA studies and saying in other cities, Portland, OR; Nogales, AZ; Denver, CO; Washington, DC, all had increased costs by using PLAs—some of them as high as 12 percent more expensive. So it is not 0.12 but 12 percent on the other side. 5.8 more expensive in Colorado. And then there is a risk in using PLAs excludes small and minority businesses and may exclude capable merit shop contractors and other factors related to this.

This was a very interesting report to go through last night. My question is: This has been out here for a year and a half and it is still in draft form. At what point is this in its final form and will actually be released to everyone?

Ms. BRITA. Chairman Lankford, the agency made a decision that we would suspend further work on that report and really work toward applying forces market forces——

Mr. LANKFORD. Is that because of the findings of this report? This report does not support what you're saying on the pilot program. This report is fairly discouraging of PLAs. It does find like 0.3 percent benefit in certain cities. But it's very discouraging on the whole of using PLAs.

Ms. BRITA. Well, the report is a draft and it is not final.

Mr. LANKFORD. But it has been draft for a year and a half. How long does it take to finish a report that's inconsistent with the government policy?

Ms. BRITA. Well, we decided to suspend action on that report and move toward the consideration—letting the marketplace determine, with the applicability of PLAs, rather than rely on a report.

Mr. LANKFORD. So the report wasn't consistent with the policy, and so the report is set aside. And we've suspended the report because the policy was inconsistent with it. I'm trying to figure out the why. Was it sloppily done? The findings weren't consistent with other reports that were done. Why was this suspended?

Ms. BRITA. The report was suspended because we wanted to get real market data quickly. And we were moving through our recovery projects. So we felt that it would be a better use of our time and quite frankly, more efficient to try to get real market data quickly by encouraging the use of PLAs in this collection of project. These projects were chosen because we felt they had large cities, small cities, they were major construction. So we thought that would be a better way to gather data quickly, quite frankly, than wait for the report. So we suspended work on the report and went to the actual application of the PLAs in some of our projects.

Mr. LANKFORD. I've exceeded my time. I apologize for that. I would like to yield to Mr. Connolly, the ranking member.

Mr. CONNOLLY. Thank you, Mr. Chairman. Ms. Brita, by the way, I recognize that accent. Boston?

Ms. BRITA. Yes, sir.

Mr. CONNOLLY. Where?

Ms. BRITA. Boston, Hyde Park.

Mr. CONNOLLY. My family lives in West Roxbury. I can talk that way if I have to.

While I've got you, Ms. Brita, who invited you to come to this hearing?

Ms. BRITA. The chairman did.

Mr. CONNOLLY. Did you hear anything from my office or me?

Ms. BRITA. I did not.

Mr. CONNOLLY. So you were not invited by the minority?

Ms. BRITA. No, sir.

Mr. CONNOLLY. You don't consider yourself a minority witness, therefore.

Ms. BRITA. I received a letter from the chairman and I had a conversation with his chief counsel.

Mr. CONNOLLY. Mr. Gordon, same question. Who invited you here?

Mr. GORDON. Same answer, sir.

Mr. CONNOLLY. So you did not hear from me or from my office?

Mr. GORDON. We had, as far as I know, no contact with your office at all.

Mr. CONNOLLY. So as far as you know, you were not invited here by the minority.

Mr. GORDON. That's right, sir.

Mr. CONNOLLY. Let me just say again, sadly, you're both being used, in violation of House rule 11 clause 2(j)(1), which states explicitly: "The minority members of the committee shall be entitled, upon request, to the chair by a majority of them before the completion of the hearing to call witnesses selected by the minority to testify with respect to that measure or matter."

To my knowledge, it's never been customary in the House or the Senate for the majority to determine who the minority witnesses are, let alone to determine on their behalf, by the way, because the administration happens to be of the same party, therefore you are our witnesses. I want you to both know that at least this ranking member, and perhaps I will be joined by the ranking member of the full committee, I'm going to advise the administration to decline all requests by the majority to testify before this subcommittee and the full committee until this matter is resolved. Because for you to testify is to be unwittingly complicit in the violation of House rules and the committee rules and to tread on the rights of the minority. And so I hope you both will take that back to your respective agencies.

I am going to be talking to the White House and to the administration government relations officials. And I would hope that the administration would cooperate with us in a policy of noncooperation until this matter is cleared up. But the minority has rights. And if the majority wishes to actually join on this issue and dare to tell us who our witnesses will be and to designate administration witnesses as our witnesses against our wishes, then we are going to advise that administration to not cooperate with the Members of the majority until our rights are recognized and respected.

With that, I yield to the my the ranking minority member of the full committee.

Mr. CUMMINGS. I thank the gentleman for yielding. I want to associate myself with every syllable of the words of Mr. Connolly.

Administrator Gordon and Deputy Administrator Brita, I appreciate your testimony and views you have provided today. As I stated at the start of the hearing, it is critical that this committee conduct fair and responsible oversight. That is why I am particularly disappointed that Chairman Lankford decided to deny the minority's request for witness, Dr. Peter Phillips, Chair of the Economics Department at the university of Utah, citing a misguided and unprecedented committee policy.

If Dr. Phillips had been allowed to testify in person today, I would have asked him to discuss the credibility of the 2009 study by the Beacon Hill Institute. That study criticizes the use of PLAs on Federal construction projects.

Instead, I directed my staff to put this question to Dr. Phillips in writing, and he has graciously responded in writing. Had the majority been allowed to bring Dr. Phillips forward, he would have told the subcommittee that the Beacon Hill Study, "has not been vetted in any peer-review process and would be unlikely to survive a peer review." Had Dr. Phillips been allowed to present live testimony at this hearing, he would have also questioned, using Beacon Hill's analysis as a basis for the claim that PLAs raise construction costs by reducing competition.

Dr. Phillips would have noted that "Beacon Hill's work suffers from the basic statistical fallacy of spurious correlation." And he would go on to say that, Statistically, one could easily show that pom-poms stunt teenage growth. All you have to do is go to a high school basketball game and put all those holding pom-poms on one side of the room and all the remaining teenagers, who just happen to be the basketball players, on the other. Lo and behold, all those

holding pom-poms have stunted growth compare to the control group. Now this is the witness saying this, Dr. Phillips.

Similarly, Beacon Hill put all the complex jobs on one side and all the simple jobs on the other. Lo and behold, because the simple jobs did not have PLAs and most of the complex jobs did, PLAs cost more money. This sort of simple-minded statistics just does not pass muster."

I just ask you, Ms. Brita, you said you all changed course. Does that have anything to do with, in other words trying, to get a better sample of what you so that you had more accurate information?

Ms. BRITA. We wanted a better sample but we also wanted information quickly, Mr. Cummings, because we were trying to evaluate the value, quite frankly, of PLAs. There's a lot of academic literature out there and we wanted some real today data. We felt we had an opportunity with our recovery projects and the application of PLAs to some of these recovery projects. So we put together a list that we thought was a representative sample of what GSA does in real-time every day and we ran the PLAs against these projects. So it was really an effort to gain information quickly and to do an evaluation and to really come to some conclusion—more conclusions about what the value of PLAs in Federal construction projects as related to GSA.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Yield back.

Mr. LANKFORD. With that, I yield to Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman. In light of the fact that we have these witnesses in front of us, I guess we might make best use. So thank you for being here.

Ms. Brita, your list of PLA, non-PLA projects identified the GSA headquarters building as a "no PLA." Wasn't that awarded originally as a PLA project? And what happened to the PLA?

Ms. BRITA. Yes, sir. It was originally awarded as a PLA project. The contractor was unable to finalize the arrangements with the various labor units and so the contract was amended to take the PLA out of the requirements of the contract. The arrangement is between the contractor and the various labor unions, not GSA, and when the contract was unable to finalize those agreements, we just amended the contract and took it out; took that requirement out.

Mr. WALBERG. How much time then did the contractor have to waste trying to negotiate PLA with unions on this project at GSA's intense instance you allowed the project to go forward on a non-PLA basis?

Ms. BRITA. Let me just check. About 45 days, Mr. Walberg.

Mr. WALBERG. Forty-five days.

Ms. BRITA. Yes, sir. That is the standard time to negotiate these kinds of things after award.

Mr. WALBERG. That is significant, especially when tax dollars are being wasted.

I would, in deference to the chairman of the committee, yield back time.

Mr. LANKFORD. Thank you, Mr. Walberg. I just have a quick question. I would be honored to be able to yield back if you would like to have that time as well.

The Beacon Hill report that was being referenced by Mr. Cummings just a moment ago was not the report I was referencing, and I hope I didn't allude to a different report. It is your report, the GSA report, is the one that I was referencing that was done by Rider Levett Bucknall, but is actually a GSA-sponsored report and it's GSA details. So I'm not familiar with the report that he was mentioning before on that.

So I wanted to be able to clarify that this is a different report. This is specifically a GSA-sponsored report that outlines that project labor agreements can cause small and minority businesses to be excluded, and that it also shows significant cost differences in multiple municipalities.

Now I would be one to say PLAs should be in the toolbox. This is not anti-PLA to say they're in the toolbox. We're just questioning why there's an encouragement to use them when the GSA's own study says it often causes cost increased, based on this study.

Ms. BRITA. Mr. Chairman, I will repeat again, the study is still in draft form. It's not finalized. It has never been formally presented. It hasn't been finalized and we are relying on the real-time data to address those very issues about whether it is exclusionary, whether it's inclusionary, whether we have minority participation, women participation. We believed that getting real-time data with contracts that we are currently engaged in was a better approach and, quite frankly, better use of time because we will get information quicker.

Mr. LANKFORD. Do you have any idea what the cost of this report is that has been set aside—of forming a report like this?

Ms. BRITA. I can get back to you and submit that information for the record.

Mr. LANKFORD. Thank you. I would much appreciate that, just to be able to know if we suspended report because it wasn't consistent with the original Executive order to be able to get different sets of data on it, I would be interested to know what the cost of this report was that does not support the PLAs versus the cost of now finding data that does support PLAs on it.

Ms. BRITA. I will submit that for the record.

Mr. LANKFORD. Thank you. I yield back my time.

Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman. Let me ask a question again, Ms. Brita. Why did the GSA agree to a $3.3 million change order in the Lafayette Building in Washington, DC, just to implement the PLA?

Ms. BRITA. Mr. Walberg, the project team, led by the contract officer, felt that in order—because it was a complex project, multiphased project, expensive, very difficult location, that the implementation of a PLA was in the best use of the taxpayer dollars. It would keep the project on schedule, provide stable labor force, and the decision was made to amend the contract to include the PLA.

Mr. WALBERG. Was this the finding in the consultant study that you set aside related not only to the GSA headquarters, but also to the Lafayette Building?

Ms. BRITA. I'm unfamiliar with the finding, Mr. Walberg. I don't understand. Was there a finding in the report?

Mr. WALBERG. It appears that in the study, you examined the issues of the Lafayette Building, the GSA headquarters at 1800 F Street, the projects, and both had PLA implementation at an additional cost. And my concern is here this additional cost was taxpayer expenditures based upon change of findings and seeing that it would cost more. And you're saying it is only as a result of the technology, the ability, the complexity of the problem?

Ms. BRITA. Yes, I believe that the project team made the decision certainly independent of the report. I'm not even sure the project team was aware of the report. They made the decision because they felt, given the nature of the project—and it is a very complex, expensive, multi-phased project—that the application of a PLA to this particular project would ultimately be in the best interest of the project and serve best value for the taxpayer. That was a decision made by the project team, led by the contract office.

Mr. WALBERG. I guess I continue to express some of the same concern that when we have studies that are showing significant problems with PLAs, that we are willing to use the additional cost at taxpayers' expense.

I yield back my time.

Mr. LANKFORD. Thank you. I apologize for having some issues with the clock. We have reset the clock. That should be about 5½ minutes total in that colloquy.

I recognize Mr. Cummings, the ranking member of the full committee.

Mr. CUMMINGS. Thank you very much. Let me say this to Ms. Brita. In my 15, almost 16 years in this Congress, there is one agency that I have a tremendous amount of admiration for accuracy and doing the job right and doing it independently and that is GSA. I don't want any of the employees at GSA looking at this and questioning whether we believe in what you do. I just want to say that with the strongest words that I can muster out of this body. And I want to thank you all for what you do every day.

But I want to go back. I understand what the chairman was saying—Chairman Lankford was saying with regard to the Beacon Hill report. I know he knows I wasn't trying to imply that. This is the very reason why we wanted to have our witness. The Beacon Hill report will be discussed extensively within the next panel. But we have no way to rebut it because we weren't able to call our witness. That is the problem. That is what I was trying to get to. So, Mr. Zack, I have to do this. We have to do this to try to get our side's opinion in on this hearing.

Let me go back to regarding H.R. 735, the legislation we are considering today. This is what I asked Dr. Phillips; I am continuing to ask what he would have testified to. Dr. Phillips would have explained with regard to this legislation that we just heard about, "PLAs are precisely the market instrument capable of setting and adjusting work rules to the specific needs of particular projects. Robbing the government of PLA contracts robs the government of the ability to address this issue that critics claim is salient."

Again, I say to the chairman I am disappointed that we did not have the opportunity to hear directly from Dr. Phillips. By denying the minority its choice of witnesses you have denied the committee,

and by that I mean the committee of the whole, the balance to conduct meaningful oversight.

I ask unanimous consent that the letter from Dr. Phillips with written responses to my questions be placed in the record.

Mr. LANKFORD. Without objection.

[The information referred to follows:]

Testimony of Peter Philips
Professor and Chair, Economics Department, University of Utah

Before the House Committee on Oversight and Government Reform's Subcommittee on Technology, Information Policy, Intergovernmental Relations, and Procurement Reform, June 3, 2011

Project labor agreements (PLAs) are market contracts for the procurement of construction services used by owners in both the public and private sector. However, PLAs are primarily a private sector tool. For instance, 72 percent of all PLAs in California are private sector agreements.[1]

When the government or private owner comes to the market with a large amount of real, tangible work, that owner is in a position to demand concessions. These concession might include wage discounts or access to apprenticeship training or local hire provisions or minority training or new safety procedures or new work rules or a host of other possibilities that might be on the owner's wish list.

PLAs make no sense in local areas where unions have nothing that the public or private owner wants. But if the government wants priority access to skilled union labor or the investment of union apprenticeship funds in minority training or the use of union hiring halls to facilitate local hire or the transitioning of returning veterans into construction careers or the implementation of project-specific work rules or the application of new drug testing policies or any other union asset or concession useful to a specific project or government purpose, PLAs are the market contract of choice to harvest these benefits in exchange for access to the work the government controls.

Allowing contractors on public works to use PLAs but prohibiting the government from doing so takes the government's interests out of the game. For instance, the government may be interested in local, veteran or minority hire or the development of construction careers for disadvantaged workers while the contractor conceivably could care less.

Disallowing the government from using PLAs, robs the taxpayer of the ability to harvest the full value of their tax dollars, takes the government out of the picture and confers the value of an asset the government owns to the general contractor.

PLAs need not give the unions or union contractors sole access to the owner's work. In the public sector, PLAs permit nonunion contractors to bid on the work. Government PLAs typically permit nonunion contractors to bring key workers onto the project independent of union hiring halls. PLAs can set aside some work for minority contractors; and some of the work can be set outside the PLA. PLAs are flexible and creative labor procurement contracts that bend to the needs of specific projects.

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[1] Kimberly Johnston-Dodds , Constructing California: A Review of Project Labor Agreements, California Research Bureau, California State Library, 2001, p. 1; http://www.library.ca.gov/crb/01/10/01-010.pdf

Critics of PLAs on federal projects claim that PLAs raise construction costs by reducing the number of bidders on these projects. Their basis for this claim is surveys of nonunion contractors' intentions.[2] This has four weaknesses: intentions are not actions; no actual project was under consideration; survey respondents may not be the relevant contractors for federal projects; and the surveyors failed to ask union contractors their intentions.

In contrast, in a controlled study of real bids involving real contractors bidding on real school construction projects in the Bay Area, I found that there was no statistically significant difference in the number of bids after one school district adopted a PLA compared not only to before that district had a PLA, but also compared to the adjoining district which did not have a PLA.[3]

Furthermore, in a study of over 8000 bid openings, I found that on large projects such as those that a PLA might cover, 3 or 4 bidders were sufficient to deliver a competitive price and that the loss of additional bidders had negligible effect on bidding outcomes.[4]

Critics also allege that PLAs raise costs because unions have onerous work rules. This ignores the fact that PLAs are precisely the market instrument capable of setting and adjusting work rules to the specific needs of particular projects. Robbing the government of PLA contracts robs the government of the ability to address this issue that critics claim is salient.

Critics also argue that PLAs raise costs because nonunion contractors must pay double both into their own health insurance program and also into union health programs. However, this argument ignores the fact that only 12 percent of nonunion workers have their health insurance paid fully by their nonunion contractor, and 65 percent receive no health insurance whatsoever from their nonunion contractor.[5] PLAs expand health insurance coverage on federal projects with negligible double premium problems.

In sum: PLAs allow the government to harvest the full value of the asset they own: namely specific work. They should be used when the government has substantial work on offer and construction unions have something the government wants. To deny government access to this tool prevents the government from representing itself in its own best interest when circumstances warrant.

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[2] David G. Tuerck, PhD, Sarah Glassman, MSEP, Paul Bachman, MSIE, Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem, THE BEACON HILL INSTITUTE AT SUFFOLK UNIVERSITY, AUGUST 2009, p. 18. (All of the following PLA criticisms discussed below are reprised in this report).

[3] Dale Belman, PhD, Matthew Bodah, PhD and Peter Philips, PhD, Project Labor Agreements, ELECTRI International, The Foundation for Electrical Construction, 2007, Chapter 4, "Bidding and Costs" pp. 35-37. http://en.wikipedia.org/wiki/Project_Labor_Agreement

[4] Sheng Li, Joshua R. Folger and Peter W. Philips, "Analysis of the Impacts of the Number of Bidders Upon Bid Values," Public Works Management and Policy, January 2008 vol. 12 no. 3 503-514 http://pwm.sagepub.com/content/12/3/503.abstract

[5] Jaewhan Kim and Peter Philips, "Health Insurance and Worker Retention in the Construction Industry," Journal of Labor Research, Table 3, Sample means for key variables for union/nonunion workers in the 2001 panel, http://www.springerlink.com/content/60656065515x8463/

Mr. CUMMINGS. I might also add that I would have preferred to have him here so he could put up his hand and swear to tell the truth, too. But this is how we have to do it.

Deputy Administrator Brita, as a branch of government responsible for both levying taxes and authorizing how the Federal Government spends American tax dollars, it is incumbent upon every Member of Congress to ensure that the American people get the maximum value for every tax dollar spent. In Commissioner Peck's testimony before the OGR Subcommittee on regulatory affairs on this same topic in March, he stated that, "GSA only uses PLAs when they promote economy and efficiency in Federal procurement: Can you explain the process that GSA uses when determining whether or not to use a PLA in a construction project?

Ms. BRITA. Yes. Mr. Cummings, when GSA enters into a process to acquire a new Federal building, they use a process called best value and source selection. And the source selection panel is put together that evaluates all proposals, generally divided into two sections: The cost piece and a technical evaluation piece. The technical evaluation section of a proposal has several elements to it—past performance, experience, quality of personnel. We've added a PLA. All of those are evaluated against cost. First, the technical piece is looked at. Every proposal gets a score. Then they match it against the cost and they try to determine—the source selection panel determines the best value, which is a match of cost, plus all the technical qualities that are associated with the proposal. That is the process that the agency uses now.

There is virtually no Federal agency now that goes straight to low bid. They have found that is just a waste of taxpayer dollars. You're buying junk with taxpayer dollars. You don't get best value. You have things that fall apart, whether it's a Federal building or an Air Force fighter. You really get what you pay for. And we try at the agency, the way we handle our procurements now, is to put that panel together, break proposals into your technical section and a price section and wed the two of them at the end of the evaluation period.

Mr. CUMMINGS. So does that go to efficiency and effectiveness in trying to make sure we get the best value for our dollar?

Ms. BRITA. Yes, particularly in real estate. There is an old saying in real estate that time wounds all deals. Once you start a real estate process, you need to keep it going. Once you stall, money, particularly on the part of the developer whose borrowed money from a bank, the bank doesn't care. They are going to be charging your daily rate on interest on the loan that you've incurred to build this project. So it is very important that we look for ways to keep projects going. Once you make the decision, a lot of work is done prior to actually signing that contract. About a third of all the work associated with these project is done prior to the contract. We want to make sure once it's signed we have a process in place to keep that project going forward because it's extremely expensive when it stalls.

And so we are always looking for ways. That is why the PLAs are an attractive tool for GSA, because the contractor makes it is his responsibility to ensure that the labor is there, to make sure that there are no work stoppages, to coordinate—one of the big

problems is coordinating work schedules; making sure that harmonizing the work week—between the various labor groups there's a harmonized work week so that everyone is working at the same time.

Mr. CUMMINGS. Ms. Brita, thank you very much. I just want you to know that what you just said, the reason for PLAs, seem to be pretty consistent with our motto for this committee. Every time we meet, the read this: We exist to secure two fundamental principles—first, Americans have the right to know that the money Washington takes from them is well spent. By the way, this is written by Mr. Issa. And second, Americans deserve an efficient and effective government that works for them. Our duty on the Oversight and Government Reform Committee is to protect these rights. I just wanted you know that what you just said, the use of PLAs seems to be consistent with the goals of this committee. And I want to thank you for your testimony.

Mr. LANKFORD. Thank you. I yield 5 minutes to Mr. Kelly.

Mr. KELLY. Thank you, Mr. Chairman. I would like to thank both witnesses for being here. Mr. Gordon, I have been with you before, and I appreciate you taking time to be with us. Also Ms. Brita. You just said something about real estate. Time wounds all deals.

Ms. BRITA. That is a little saying, time wounds all deals. When you start a real estate deal, it is very important.

Mr. KELLY. I understand that. But there is another saying that's been out there, and it's: If it ain't broke, don't fix it. And I'm trying to understand—and believe me, I'm not coming here representing Republicans, and I hope that this panel isn't about Republicans versus the Democrats. It's about us representing the American people and making sure that as stewards of their hard-earned money that we are doing the best thing possible.

I don't see where the PLAs at all fit in. And the troubling thing, the RLB report is something that was commissioned by the GSA. So I would assume that in your RFP you were very specific at to what is that you wanted RLB to find out for you. Having come from the private sector, where I have done a lot of RFPs, I have to tell you a 10 percent bonus doesn't level the playing field. That totally tilts it. As a person who's done many bids, to see that in there and say, "OK. Fine." Maybe that would at the end of the day make a difference. It's a huge difference.

I do wonder about these things, just as a representative of the taxpayers and the citizens of the United States. Where is it that we are going with these programs? I know the President came up with this just weeks after being put in office. Is there any instance anywhere where there are specific instances showing where there are these labor stoppages or abuses or why the PLA was installed? I see it as exclusionary. I don't see it as increasing the field of bidders. I see it as narrowing it down and actually being exclusionary to those 87 percent of people who could bid on this project that will not be able to do it because they don't back cab union labor. And I have nothing against unions, by the way. I represent a lot of union people. I have no problem with that. What I have a problem with is jobs. And jobs are important to anybody, whether you're a union member or you're a private citizen. We've got to get people back to work.

So the PLA and this report is very troublesome to me. It's been there for a year and a half. If the RFP was put out by the GSA, then your office—maybe not you—your agency—knew exactly what it was looking for. It seems to me the information they got back is not consistent with what they were looking to find. And so if it doesn't match my argument, we'll set it aside and say it's irrelevant. You can back-shelf that to say it's still in draft form.

But in a year and a half, I've got to tell you, as an automobile dealer, if I had to wait for a year and a half on any bid that I put out, I would say the landscape has probably changed dramatically in a year and a half. So if you could just briefly comment on that, I would appreciate that.

Ms. BRITA. Mr. Kelly, I just wanted to make one point. The 10 percent is really not a bonus. It's not something that is added over and above the 100 points. It is part of the 100 points.

Mr. KELLY. Say that again. If you could repeat that.

Ms. BRITA. I think you used the word the 10 percent or the 10 points is, "a bonus." It's really not in addition to the 100 points that one would normally——

Mr. KELLY. Why is it in there?

Ms. BRITA. It's part of the hundred. It's part of the technical——

Mr. KELLY. But it's a 10-point advantage if you——

Ms. BRITA. It's a 10-point preference that the contractor can choose to take advantage of or not.

Mr. KELLY. As a guy that's been out in the real world, that's a heavy cover charge. So if that's part of what the proposal is, that's not really trying to get to the best price. That's changing the scope of who it is that is able to bid.

Listen, I can tell you—and I mean this sincerely—being in the private sector all my life, you set those types of parameters, you are setting them to get one type of a bidder to get the award. I've watched it happen. I've lost out on too many bids where there was exclusionary language in there; and it makes it impossible for an independent bidder to sometimes get in the door, get their foot in the door. And that's the purpose of RFPs. They are supposed to be consistent. This tilts it.

Ms. BRITA. Mr. Kelly, one of the reasons that we are doing this pilot program is to address those very issues. To date, we have not seen a great variance, quite frankly, between those that bid and those that don't bit bid when we have the PLA involved. But when we finish the report, we will be able to, with much more definition, get at those very issues that you are talking about. The agency does not believe that PLAs are exclusionary. In fact, we think it opens the labor market up because it includes union as well as nonunion workers. So we take a different—it's a tool that the agency can use and that the contractors take advantage of. It's a contractor choice.

Mr. KELLY. Well, let me ask you this: You say it opens the market up. What was excluding the market from being open before?

Ms. BRITA. This is just encouraging—nothing was—this just makes the process more attractive——

Mr. KELLY. See, I differ with you there in that. There is language set in there that it is exclusionary. That is not including a wider universe of bidders. What you are doing is you are favoring one

bidder over another. Ma'am, please, I have done bids all my life. When you put language in a bid that gives a 10-point—whether it's out of 100 points or whatever it is—advantage, that is exclusionary; and that is discouraging all bidders from the entire universe to bid on it. I have been involved in it too many times, and I have been excluded because I refused to be a partner in that type of thing. So I would just suggest to you that while you may be saying that it opens the universe to other bidders, it absolutely does not. It is exclusionary.

Mr. GORDON. May I say a couple of words, Mr. Kelly?

Mr. KELLY. Absolutely.

Mr. GORDON. We in OMB are watching what agencies are doing. We are giving agencies discretion, but we are very sensitive to the point you raised. We want to be sure that this is not an exclusionary process. We want to be sure that PLAs are viewed as only a tool. I think it's noteworthy in the GSA work that among the 10, there were instances where the bidder offering a PLA won. There were instances where the bidders offering the PLAs did not win. This was not tilted one way or another. As I understand it—and I don't think the few points—and by the way, it's really less than 10, because cost is separate from that whole point scheme. I don't think that there are instances, at least not many instances, where those few points made any difference in who won or who didn't win.

Mr. KELLY. And I understand where you are coming from. But I have to tell you, in the private world, when you are spending your own money, that's a huge difference. And only in this time do these matters become insignificant. Now you are using the 10 instances that you looked at. But you refuse to look at the report that was drafted a year and a half ago in saying, well, there's not enough information in there yet.

However, we did have 10 other studies that we find really don't speak to what it is that we are talking about. And I am telling you, as a taxpayer and as a person watching taxpayer funds, this is not the right road to go on.

Mr. WALBERG [presiding]. I thank the gentleman. The time has expired and I would ask deference from Mr. Gordon and Mr. Brita, if you would be able to stay around a little longer. Our chairman has left to vote. He will be back to continue the hearing. We have 9 seconds to get to our vote right now, and then we will come back.

Mr. GORDON. We will stay until 11 o'clock. Thank you, sir.

Mr. WALBERG. Thank you. We will stand in recess.

[Recess.]

Mr. LANKFORD [presiding]. Thank you for allowing us in the quick recess there to be able to go and vote.

Mr. Gordon, we are going to make your time after all. I would like to be able to yield 5 minutes to Mr. Murphy.

Mr. MURPHY. Thank you very much, Mr. Chairman, and I thank the witnesses for coming back to join us for just another brief—a few brief questions.

Let me just begin by associating myself with the remarks of Ranking Member Connolly on the subcommittee and Ranking Member Cummings. I get that this committee has often been used over the years to advance the majority party's political purposes

and their agenda. I think we've gone too far here, I think, in violating House rules, in violating basic concepts of fairness, across the line. And I think what you have seen across the country is an unfortunate willingness on behalf of those who would try to use their new-found political power to try to undermine organized labor and collective bargaining rights, to unfortunately cross that line over again, and over again, whether it's in Wisconsin with the collective bargaining law that was ruled unconstitutional by the courts, or here today.

And I hope in the future that, though committee is certainly going to be used occasionally to advance the political imperatives of the majority party, that the other side gets a chance to put their best evidence on.

Mr. LANKFORD. Would the gentleman yield?

Mr. MURPHY. I would yield.

Mr. LANKFORD. If we are able to provide for the record moments in the past when this committee only had administration witnesses, when the roles were reversed and the Republicans were in the minority and were only allowed administration officials under the Bush administration, would that be acceptable?

Mr. MURPHY. If you would like to put that on the record?

Mr. LANKFORD. We will submit that for the record in the days to come. Thank you.

Mr. MURPHY. Let me direct a question to Mr. Gordon. Mr. Gordon, in October of last year, myself and dozens of other Members of Congress sent a letter to you requesting information on the Executive order that we're talking about today. In particular, we were interested in some direction that you had sent to agencies to report back on how the Executive order had been complied with, how many agencies had used PLAs, and to do so on a quarterly basis. We sent this letter over in October and have not gotten a response since.

But I would be interested to know from you as to the feedback and response you've gotten from agencies in now the year or so since the Executive order and then the guidance requiring the quarterly reports back was issued.

Mr. GORDON. Congressman Murphy, thank you for the question. I apologize that you haven't yet gotten a response. My understanding is the response is close to being on its way to you. I will tell you that for the most part, we have seen few instances of PLAs being used in construction projects. That is consistent with our guidance. What we've said to agencies is, you need to do this carefully. You need to be sure that the use of a PLA in a particular project and those specific facts will serve economy and efficiency.

It is not unusual in the procurement system, as I'm sure you know, that when we have a new tool available—and this is essentially a new tool for our contracting officer—it takes a while for us to figure out where it makes the most sense, how to use it. I think that a cautious, balanced approach makes sense.

The fact is that there are lots of academic studies out there. Some indicate that PLAs save you money, some indicate that you don't. Part of the beauty of what GSA has done is you have real examples, not academic studies, of what's actually happened, and I think that's helpful.

Mr. MURPHY. Have you received reports back? You asked for data on a quarterly basis. Are you receiving that information back?

Mr. GORDON. We are. And as I said, the numbers of PLAs being used is quite low.

Mr. MURPHY. I would appreciate that response as quickly as possible. This was from a group of Republicans and Democrats to show that there is bipartisan support for the use of PLAs, when appropriate. And I think it could be useful for us to have that data shared back.

Mr. GORDON. I will ensure that comes to you expeditiously.

Mr. MURPHY. Let me ask one other question to both of you. I think one of the points that will be made likely by the second panel is that nonunion contractors are discriminated against when a PLA is required. Though they can go out and sign collective bargaining agreement after they are assigned the award, that puts them at a disadvantage versus contractors who are initially union contractors.

Can you talk about that critique? Again, we won't have the opportunity to ask this of any minority witness on the second panel, and I imagine it will be one of the primary criticisms on the second panel. So I would pose it to both of you as to whether or not you have seen a discriminatory nature against nonunion contractors when PLAs have been used.

Mr. GORDON. I could say a few words, and then Ms. Brita is welcome to supplement them. As you know, the Federal Acquisition Regulation rules says that this is not to be used in a discriminatory fashion. We are trying to increase competition. I'm confident that we can do this in a way that will not discriminate.

The fact is that even when project labor agreements are used, very often the subcontractors, for example, are open shops that are not unionized in their work forces, as we noted in the preamble to the Federal Register notice in the rule. But in any event, if a company—if a company feels that an agency is conducting a competition in a way that excludes them and makes it impossible for them to compete, they have an avenue available. They can file a bid protest and they will get an independent review, whether by the Court of Federal Claims or GAO, to consider whether in fact they are being excluded or unfairly discriminated against in that competition.

Ms. BRITA. Mr. Murphy, in the preliminary data that we have, we have not found that there has been any discrimination between union and nonunion workers. And that's based on our just preliminary—these 10 projects, the handful of projects that we are looking at. But the preliminary indications are that it's not there.

Mr. MURPHY. Thank you. Thank you, Mr. Chairman.

Mr. LANKFORD. Thank you. I yield 5 minutes to Mr. Labrador.

Mr. LABRADOR. Mr. Chairman, I yield back.

Mr. LANKFORD. Thanks, Mr. Labrador.

Let me ask you a few questions. Ms. Brita, you referred to the new report that you all are doing, you said it is in a preliminary form. Is it in a draft form as well right now? Is it complete? Is it something that we could have?

Ms. BRITA. Are you talking about the 10 projects?

Mr. LANKFORD. Yes, ma'am.

Ms. BRITA. We are looking at these 10 projects individually. The individual contracts have been signed by for each one of these projects. And I would expect at the end of the contract period—because we want to see how this flows out over the next 3 years as the contract gets put into place.

Mr. LANKFORD. Right. But that report, will that be a complete report? It is currently in draft form? There are 10 isolated pieces.

Ms. BRITA. Right now we are gathering data. I don't know whether we'll do a comprehensive report or whether we'll do 10 individual reports or whether we'll put it all together. But we're gathering data and the form that the final sort of summary or report, as we call it, will take, but we haven't decided how that's going to look. But it will be some sort of summary data and evaluation of the worth of PLAs.

Mr. LANKFORD. When that gets into a draft form that is available to be able to be sent to our committee, I would very much like to request a copy of that. And that would be sent over to us so that draft report could be added to this draft report that's already completed, and get a chance to do a side by side on that.

Mr. Gordon, we're getting very close to your time. I understand that well. In the past, were you aware—and I know that you are not familiar with the very earliest days, obviously, of the Obama administration and some of the transition. I don't believe you were right there, right at the very beginning when the Executive order—do you know if that Executive order was done and was implemented based on the fact that during previous administrations, PLAs were blocked and were not able to be used?

Mr. GORDON. Mr. Chairman, you are quite correct in that I was not in the administration at the time. You probably know I was in the Office of General Counsel at the Government Accountability Office, GAO, and joined the administration only in November 2009 so I'm not in a position to know what happened.

Mr. LANKFORD. I've been trying to process through because, obviously, we want to use PLAs. And I want to reiterate this conversation is not about excluding PLAs; it's just trying to determine why there is an encouragement to use them, other than just that's best competition, to try to provide that neutral playing field to say—my question is, has there been a tendency in the agencies that they didn't want to use PLAs and so there needs to be an aggressive approach to say, no, we encourage you to use them?

Mr. GORDON. Now I understand the question, and I can speak to that, Mr. Chairman. Under the prior administration there was an Executive order that prohibited agencies from saying in this particular project, we need to have a PLA in place. That, they were not allowed to do.

What we wanted to do was say, agencies should be allowed to look project by project and say, here is a project where it would not serve efficiency to have a PLA, but here is a project where it would serve it. That's what we're trying to do. We want that to be available, not to dictate it.

And I should be careful in the words. We are not encouraging the use of PLAs. We are encouraging agencies to consider whether in fact they need to require PLAs in a particular project.

Mr. LANKFORD. But by increasing the point scale on them, as we talked about before, it gives them an immediate advantage to be able to engage and say, we may be a little higher in price, but we're greater in value because there can't be a strike during this time. We're going to offset our collective bargaining agreement with this, that we won't fulfill that to be able to get this project. So it does skewer somewhat, and it concerns me when this draft summary, one of the statements in it says that there is a risk that PLAs will exclude. But having PLA in it, that excludes small and minority businesses.

Mr. GORDON. I understand. And I will be happy to let Ms. Brita speak about GSA. But as a governmentwide matter, I will tell you that there are many factors. I have been dealing with solicitations and procurements for over 20 years now. There are many, many factors that get far more than 10 percent of the points on the technical side: your past performance, your technical approach, your use of small businesses. All right? The amount that you commit to subcontract to small businesses is frequently a factor, and it can frequently have more than 10 percent of the points.

So that in the mix of things, what you are capturing—and there are different ways to do this. GSA has taken one approach and we're evaluating how well that works. But it seems to me you can appreciate that in a best-value context where you may get efficiencies through the use of a project labor agreement, you will want to capture that, just as you typically get more than 10 points for having a good track record, good past performance.

Mr. LANKFORD. I absolutely understand that. And again, there may be great location for a PLA to be the perfect tool, to be able to use that in that toolbox on it. But the last thing we would want to do is to be able to try to put out the word and say this group gets a higher score based on the fact that they are unionized, and discourage other people from engaging in a competitive environment. We want to be able to have a level playing field and a competitive environment so we are getting best value, and as many contractors as possible are bidding for our projects to get the best possible price.

If we are pushing in such a way as to say there is a possibility someone will be excluded, that's what I am beginning to question; and to say, if this report is questioning that from GSA, then I'm also saying, OK, what was the evidence to make the shift when a year after the shift was made, or 2 years after the shift was made, there was an immediate look to say, OK, maybe there is a problem here.

Mr. GORDON. If I could, Mr. Chairman, I would point out that when GAO, my former employer, looked at project labor agreements, I think in 1998, they reported that there was a wide range of views. Some people said they were very helpful. Some people said they were more efficient. They saved costs. They cost costs. The beauty of what GSA has done is it's gotten us real examples; real examples, not theoretical, not hypothetical.

Mr. LANKFORD. Great. I would like to yield one moment for Mr. Murphy.

Mr. MURPHY. Thank you. Just a followup question. The chairman was talking about point-scoring systems in which a PLA bidder

may get more points. Just to clarify, the individual decisions about how bids are structured is up to individual agencies; is that correct?

Mr. GORDON. Absolutely.

Mr. MURPHY. And some agencies may choose to incorporate an increased point system for PLA bids, but that is not required by this Executive order, nor is it required by any other direction from the administration.

Mr. GORDON. You are absolutely correct. What we are doing at this point is letting agencies take different approaches. We may down the road, as we listen to what the agencies are doing, we may come up with best practices. That's what we frequently do, whether we're dealing with the ways of handling organizational conflicts of interest, best value, past performance. We let agencies try different approaches with some guidance. And then as we learn more, we can give more specific guidance.

Mr. MURPHY. Thank you very much.

Mr. LANKFORD. Mr. Gordon and Ms. Brita, thank you so much for joining us here. You are excused and you are going to make your flight on time.

Mr. GORDON. I am very grateful, Mr. Chairman.

Mr. LANKFORD. I am grateful that you all were able to be here. Thank you. We will take a brief moment to be able to recess—to reset for the next panel.

[Recess.]

Mr. LANKFORD. I would like to welcome our third panel. Mr. Maurice Baskin is a partner with the law firm of Venable LLP and represents the Associated Builders and Contractors. Professor David Tuerk is the executive director of the Beacon Hill Institute at Suffolk University. Mr. Kirby Wu is the president at Wu & Associates. And Mr. Mike Kennedy is the general counsel of the Associated General Contractors of America. Pursuant to committee rules, all witnesses are sworn in before they testify. Please rise and raise your right hands.

[Witnesses sworn.]

Mr. LANKFORD. Let the record reflect the witnesses answered in the affirmative. You may be seated.

In order to allow time for discussion, I would like you to limit your testimony to 5 minutes. Obviously we'd have mercy if you go a little over on that so we would allow for your testimony. But we have received your written testimony already and that will be made part of the record.

Mr. Baskin, I want to be able to recognize you for 5 minutes.

STATEMENTS OF MAURICE BASKIN, COUNSEL, ASSOCIATED BUILDERS AND CONTRACTORS, INC.; DAVID TUERK, PROFESSOR AND CHAIRMAN, SUFFOLK UNIVERSITY AND BEACON HILL INSTITUTE; KIRBY WU, PRESIDENT, WU & ASSOCIATES; AND MIKE KENNEDY, COUNSEL, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

STATEMENT OF MAURICE BASKIN

Mr. BASKIN. Good morning, Chairman Lankford, members of the subcommittee. My name is Maurice Baskin. I am a partner in the Washington, DC, law firm of Venable LLP.

Mr. LANKFORD. I'm sorry, Mr. Baskin. Is your microphone on? Can you tell if the light is on?

Mr. BASKIN. How's that? Any better?

Mr. LANKFORD. That's perfect. Thank you.

Mr. BASKIN. Do I need to start over? I've just said good morning.

I am here representing Associated Builders and Contractors, which is the national construction industry trade association representing 23,000 merit shop contractors, employing an estimated 2 million workers. I have previously testified before on the subject of government-mandated PLAs before another subcommittee of this committee, and I have resubmitted that testimony for the record of this proceeding so that I can focus today on the very important bill introduced by Congressman Sullivan, H.R. 735.

This bill is vitally needed to prevent the ongoing waste of taxpayer dollars and corruption of the Federal procurement system that is being caused by the President's Executive Order 13502 and the agency rules that have implemented it.

The President's PLA Executive order discriminates against 87 percent of construction workers and their contractor employers who choose not to belong to or have contracts with labor unions. This order was issued as one of the President's first acts in February 2009, with no meaningful outreach to the construction community, no transparency in its formulation—we heard today that the representatives of the administration still don't know how it came to be—and no factual justification at all for its findings. Most importantly, there were no significant labor problems on any Federal construction projects during the 8 years governed by President Bush's Executive Order 13202, which prevented Federal agencies from requiring or prohibiting PLAs on Federal construction projects or on federally assisted projects.

In the absence of any problems and from the manner in which the Obama order was put into effect, it is clear that the only reason for the PLA Executive order now in place was and is politics.

Having heard or read the testimony of representatives from the Office of Management and Budget and the GSA at now two congressional hearings, we have yet to hear them identify any factual basis in the form of market research or identified labor problems previously existing on Federal construction projects that justifies the Federal Government's new restriction on competition through PLA mandates. We heard today that it's a process and that it's open to competition, but as the Members rightly pointed out, there is a preference. The thumb is on the scale. It is now being tilted, if not mandated, in favor of these PLAs; and it is impacting com-

petition. They are doing a pilot program, a pilot program that is ongoing in nature. Apparently it's continuing to this day on every GSA project. That's a peculiar definition of "pilot," while they are supposedly gathering market research data which is contrary to the way that all other procurements have been done in the past. GSA has adopted apparently a "build first and ask questions later" policy which is contrary to settled procurement principles.

At the same time, many academic studies—and we're going to hear more about that later—and research by the government's own consultants, as has already been pointed out, have established that government-mandated PLAs increase the cost to taxpayers, reduce the number of potential bidders, and particularly the number of subcontractors to those bidders who are merit shop. They do nothing to improve the quality, safety, timeliness, or overall efficiency of government construction projects.

Only Congress can effectively stop the political favoritism in contract awards that is wasting taxpayer dollars and corrupting the Federal procurement process. And that is what H.R. 735, the Government Neutrality in Contracting Act, will do. H.R. 735 will simply reinforce the existing Federal mandate in favor of full and open competition in all Federal procurements with specific reference to PLAs. The bill will prohibit Federal agencies once and for all from awarding construction projects based on the improper consideration of whether the contractors are willing to enter into labor agreements. Until this Executive order, that had not been the rule of law in this country under Federal procurement principles.

As the bill states, agencies shall neither require nor prohibit contractors from adopting PLAs as a condition of being awarded the work, nor discriminate on that basis.

The bill is neutral. I can't emphasize that enough. It's neutral on the subject of PLAs. It simply keeps the government out of the process. It closely tracks the Bush Executive orders that were upheld by the Court of Appeals for the D.C. Circuit in the Alba case. So there is clearly no basis for a legal challenge to H.R. 735, and it avoids interfering with Federal labor laws because it specifically says that nothing will be construed to prohibit a contractor or a subcontractor from voluntarily entering into a PLA on their own. If they're so great, let the market show it, and let them come forward and prove it, without it being tilted or mandated by the Federal Government.

We applaud your efforts to promote H.R. 735. And I will be happy to answer questions after the other speakers.

Mr. LANKFORD. Thank you Mr. Baskin.

[The prepared statement of Mr. Baskin follows:]

TESTIMONY OF MAURICE BASKIN, ESQ.

BEFORE THE HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE
SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

JUNE 3, 2011

Good morning Chairman Lankford, Ranking Member Connolly and members of the subcommittee. My name is Maurice Baskin. I am a partner in the Washington, D.C., law firm of Venable LLP. I have written widely about project labor agreements,[1] known as PLAs, and I have been involved in many of the lawsuits and bid protests filed against government-mandated PLAs in recent years.

I appear before you today on behalf of Associated Builders and Contractors (ABC). ABC is a national construction industry trade association representing 23,000 merit shop contractors, employing an estimated two million workers. ABC's membership is bound by a shared commitment to the merit shop philosophy. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts to the lowest responsible bidder through an open and competitive bidding process.

I previously testified on the subject of government-mandated PLAs before the Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending. In that testimony, I explained why President Obama's Executive Order 13502 and the subsequent Federal Acquisition Regulatory (FAR) Council rule implementing that order violate the Competition in Contracting Act, 40 U.S.C. 253(a)(1).[2] The executive order discriminates against the 87 percent of construction workers and their contractor employers who choose not to belong to or have contracts with labor unions. Executive Order 13502 and

[1] *See*, Baskin, **Government-Mandated Project Labor Agreements: The Public Record of Poor Performance (2011 Edition)** available at www.abc.org/plastudies

[2] I have provided this subcommittee with a copy of my March 16, 2011 testimony before the Regulatory Affairs, Stimulus Oversight and Government Spending subcommittee, as well as supplemental testimony submitted to committee staff March 23, 2011 and would like to insert these documents into this hearing's official record.

related regulations improperly encourage federal agencies to restrict competition only to the minority of contractors that are willing to enter into union agreements (or that already have entered into them) as a condition of being awarded federal construction work.

Having heard or read the testimony of representatives from the Office of Management and Budget and General Services Administration at two congressional hearings and in other forums, I have yet to hear them identify any factual basis—in the form of market research or identified labor problems previously existing on federal construction projects—that justifies the federal government's restriction on competition through PLA mandates. At the same time, numerous academic studies and research by the government's own consultants have established that government-mandated PLAs increase the costs to taxpayers, reduce the number of potential bidders, and do nothing to improve the quality, safety, timeliness or overall efficiency of government construction projects. Indeed, the federal government's own market researchers have reported that there is no justification for imposing PLAs on federal construction projects in almost all construction markets. Yet the administration is proceeding with its discriminatory, and we believe unlawful, PLA mandates or preferences on projects all over the country.

ABC members have been successful in slowing down the implementation of Executive Order 13502 with a series of successful bid protests at the Government Accountability Office (such as the case in which Mr. Wu participated last year), and we are contemplating court action in the near future. But it is clear to us that only Congress can bring a timely halt to the political favoritism in contract awards that is being promoted by the administration in the guise of Executive Order 13502. So the focus of my testimony today is on the need for immediate passage of H.R. 735, the Government Neutrality in Contracting Act.

H.R. 735 will reinforce the existing federal mandate in favor of full and open competition in all federal

procurements, with specific reference to PLAs. The bill will prohibit federal agencies once and for all from awarding construction projects based on the willingness or unwillingness of contractors to enter into labor agreements. As the bill states, agencies shall neither require nor prohibit contractors from adopting PLAs as a condition of being awarded federal construction work, nor discriminate on that basis. That is all the bill does, and it is long overdue.

There can be no question as to the constitutionality or legality of H.R. 735. The bill tracks almost word for word Executive Orders 13202 and 13208, which President George W. Bush signed in 2001. The United States Court of Appeals for the District of Columbia Circuit upheld the Bush Executive Order(s) in the case of *Building and Construction Trades Dept., AFL-CIO v. Allbaugh*, 295 F. 3d 28 (DC. Cir. 2002). It also should be noted that the primary ground for challenging the Bush executive order was that the president acted in derogation of an Act of Congress, namely the National Labor Relations Act. The Court of Appeals rejected that claim even as to the president's order, but the claim of labor law preemption carries no weight against another Act of Congress, such as H.R. 735.

Even if there were a concern about avoiding interference with the regulatory scheme of the NLRA, H.R. 735 sets that issue to rest by expressly disclaiming any intent to interfere with any labor agreement that is authorized or protected by the NLRA. Specifically, Section 3(a)(3) of the bill states: "Nothing in [the bill's prohibitions] shall be construed to prohibit a contractor or subcontractor from voluntarily entering into an agreement described [therein]." Thus, the sole stated purpose or effect of H.R. 735 is to prohibit the government from mandating PLAs or giving preference to them, something that the NLRA says nothing about. As stated in the bill's title, the legislation is confined to the objective of restoring government neutrality to the issue of private contractors' labor relations and maintaining full and open competition in government procurements.

ABC again applauds the efforts of the Oversight and Government Reform Committee to exercise oversight over the administration's wasteful and unlawful push for PLAs on federal and federally assisted construction projects. We urge you to pass H.R. 735 so the federal government will once again adhere to the principles of full and open competition in construction procurements, and bring an end to the administration's gross favoritism toward organized labor's special interest group.

Mr. LANKFORD. Mr. Tuerk.

STATEMENT OF DAVID TUERK

Mr. TUERK. I am David Tuerk, and I am a professor and chairman of economics and executive director of the Beacon Hill Institute at Suffolk University in Boston, which is a Ph.D.-granting institution. I would like to thank Chairman Lankford and members of the subcommittee for inviting me, and I appreciate the opportunity to submit testimony on H.R. 735. My comments are my own and do not represent the opinions of Suffolk University, nor do they represent my support for any organization or private interest that might stand to benefit from the passage of H.R. 735, which I heartily endorse.

I would like to enter into the record studies of project labor agreements that the Beacon Hill Institute has performed under my direction over the last 8 years. Of course we've already heard about those. Among these are studies in which BHI estimated the effects of PLAs on construction costs for school building projects in Massachusetts, Connecticut, and New York. We found that PLAs added 12 to 18 percent to final construction costs in Massachusetts and Connecticut, and 20 percent to final bids for school construction projects in New York.

I suppose we'll get into the comments from Dr. Steel in question and answer. But since he preempted me, I am going to make a point about what he had to say. He accuses us of spurious correlation. Well, I have a buzz word that I could use about his work which is multi-cullinearity. These are the kinds of buzz words that economists typically use when they are criticizing each other's work in an academic study. I'm sorry that he has decided to conduct this conversation in a way that reflects more his outlandish and bizarre characterizations of our work than what we actually did, but we can get back to that later.

In another study, we examine the Federal Government's experience with the Bush-era ban on government-mandated PLAs. This study was aimed at determining how the record of construction projects conducted over this period reflects on President Obama's Executive order, encouraging PLAs on construction projects costing $25 million or more.

President Obama claimed that the order was needed because, "large-scale construction projects posed special challenges to efficient and timely procurement by the Federal Government."

Our study proceeded on the premise that if President Obama is correct about the need to mandate PLAs in order to overcome these, "special challenges," then President Bush's ban on mandatory PLAs should have produced many instances of the delays, strikes, cost overruns, etc., against which PLA advocates frequently warn.

We asked the Associated Builders and Contractors to assist us in getting the needed data from the Federal Government. Using the Freedom of Information Act, ABC wrote to Federal agencies with procurement responsibilities, including OMB and GSA, for information relating to any problems caused by the absence of government-mandated PLAs over the period of the Bush Executive order. The result: No respondent to the ABC letters, including the OMB and

the GSA, could substantiate the occurrence of any delays or cost overruns on Bush-era projects costing $25 million or more that were attributable to the absence of a PLA.

This finding should come as no surprise. The real purpose of a PLA is not to deal with special challenges but to discourage bids from nonunion contractors and to give the PLA unions control over the hiring process. PLAs accomplish this purpose by requiring contractors to follow onerous work rules, to turn away from their own labor force in favor of labor provided by union hiring hall and to pay fringe benefits a second time that they already provide their workers.

Consider in this light the fatuous nature of the argument for PLAs. The argument presupposes that the work will be performed by the very unions that create the conditions under which the predicted delays, jurisdictional disputes, and work stoppages could occur if a PLA is not adopted. The unions that create these conditions are predestined to get work, however, only if the PLA is adopted, and then has the intended effect of discouraging nonunion contractors from bidding.

I have read a number of studies, most commissioned by State and local government agencies, which purport to show that a PLA would save on costs. Typically, however, these studies adopt the same tortuous logic that the unions employ in support of a PLA. The studies show cost saving by assuming away the possibility that a decision not to adopt a PLA might produce lower bids from qualified contractors than a decision to adopt one would produce. However, the best way to avoid cost overruns and delays is to encourage, not to discourage, bids from contractors who are not burdened by the collective bargaining agreements that hobbled the competitiveness of the PLA union workers and their contractors.

According to government data, the fraction of all construction workers who belong to unions fell by 25 percent, from 17½ percent in 2000, to 13.1 percent in 2010. So what we have is a state of affairs in which 13 percent of construction workers are attempting to protect their jobs against the other 87 percent, and then the added cost to taxpayers.

These facts show that the real agenda behind government-mandated PLAs is to shore up the market share of a dwindling minority of construction workers at the expense of the vast majority and taxpayers.

By passing H.R. 735, Congress could take an important step toward rejecting the fatuous reading that lies behind PLA mandates and ending what amounts to a discriminatory and costly handout to a group of special pleaders.

I conclude by pointing out that H.R. 735 is not anti-labor, and in fact it's not even anti-union. I am currently involved in a case where a contractor is suing because its union was excluded from a New York City PLA. PLAs are only about the unions that manage to have the political clout to induce government agencies to require them to form a PLA. Nor has this legislation stripped government of a useful tool for achieving economy in State government. If the tool is a useful one, then contractors are free on their own behalf to adopt the PLA. Nothing is standing in the way of that.

Therefore, I believe that H.R. 735 is clearly in the public interest. And again, I strongly support its adoption. Thank you.

Mr. LANKFORD. Thank you Mr. Tuerk.

[The prepared statement of Mr. Tuerk follows:]

Testimony

Hearing on H.R. 735 and Project Labor Agreements: Restoring Competition and Neutrality to Government Construction Projects

The Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, Committee on Oversight and Government Reform, U.S. House of Representatives

David G. Tuerck
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June 3, 2011

Chairman Lankford and members of the subcommittee, I am Professor and Chairman of Economics and Executive Director of the Beacon Hill Institute at Suffolk University in Boston. I appreciate the opportunity to submit this testimony.

I direct my comments at H.R. 735, "The Government Neutrality in Contracting Act." H.R. 735 effectively nullifies a February 2009 executive order from the Obama administration "encouraging" federal agencies to consider using project labor agreements (PLAs) on construction projects costing $25 million or more. In doing so it reinstates the executive orders, effective during the administration of President George W. Bush, which prohibited federal agencies and recipients of federal assistance from mandating PLAs. I would like to offer my strong support for the bill.

My comments are my own and do not represent the opinions of my employer, Suffolk University. Nor do they represent my support for any organization or private interest that might stand to benefit from the passage of H.R. 735.

In my capacity as Executive Director of the Beacon Hill Institute, I have directed six research projects on government-mandated PLAs, including three that identified the effects of PLA mandates on bids and on construction costs in three states and one that reviewed federal

construction projects under President Bush's Executive Orders 13202 and 13208. I have also authored articles on PLAs for the *Cato Journal* and the *Ripon Forum.* And I have submitted affidavits in support of plaintiffs in two cases involving PLAs, one in Connecticut and the other in New York. The details may be found in my attached resume. I will attempt to bring this experience to bear on the matter before the subcommittee.

PLAs are agreements between construction owners and labor unions under which construction contractors must hire workers through union hiring halls and pay union wages and benefits. In effect, a PLA requires the contractor to sever its connection with its own craft workforce (or almost all of that workforce) and to use tradespeople provided by the unions that are party to the PLA. Even if the contractor is a union contractor, it must hire through the hiring halls of the unions that are signatory to the PLA and, as necessary, deny its own union workers access to the project. And even if the contractor already pays fringe benefits to its own workers, it has to pay fringe benefits, a second time, to the fringe benefit plans of the unions designated in the PLA. This results in a financial windfall for the PLA unions and a financial penalty on the contractor and his employees. Finally, the contractor has to operate under work rules established by the PLA even if it could operate under more efficient work rules were it not required to accept the terms of the PLA.

The adoption of a PLA amounts, in effect, to the conferral of monopoly power on a select group of construction unions over the supply of construction labor. The putative reason for adopting a PLA, as articulated by PLA advocates, is quite different. The PLA is supposed to be something the owner would welcome. But the real reason a PLA is used or mandated by government agencies at the request of union supporters is to discourage bids from contractors who do not want to sign the PLA and/or do not employee a union workforce.

A writer affiliated with the union-leadership school at Cornell University, provides a typical rationalization:

> PLAs provide job stability and prevent costly delays by: 1) providing a uniform contract expiration date so that the project is not affected by the expiration of various local union agreements while the PLA is in effect; ... 2) guaranteeing no-strikes and no-lockouts; 3) providing alternative dispute resolution issues for a range of issues; 4) assuring that

> contractors get immediate access to a pool of well-trained and highly-skilled workers through the union referral procedures during the hiring phases and throughout the life to the project.[1]

"Stability" is a word that PLA advocates like to use as a euphemism for "monopoly." Another popular word is "complexity." One test of whether a PLA is needed is whether "the project is of such complexity that a delay in one area will significantly delay the entire project."[2] I say more about this idea below. But let me first address the no-strikes argument.

This argument is a combination of bluster and thinly-veiled intimidation. In fact, the threat to go on strike if there is no PLA is an empty one. In today's construction industry, it is rare for a union to go on strike when it is already working on a project without a PLA. And if the union isn't performing work on that job, it can hardly go on strike.

That, of course, does not rule out union intimidation. When recently a Boston area hospital hired a nonunion contractor, Boston's Local 103 of the International Brotherhood of Electrical Workers launched a campaign to discredit the hospital's doctors – a tactic that the hospital described as "heavy-handed bullying."[3] There is therefore no doubt that owners who are willing to use nonunion labor for major projects make themselves vulnerable to this kind of bullying. Yet, caving in to bullies is not the kind of thing that government agencies or hospitals can permit themselves to do.

As noted, PLA advocates also claim that PLAs are sometimes needed in order to avoid "costly delays" and jurisdictional disputes. Without a PLA, so it is said, contracts with some unions might expire before a project is completed, and the contracts might expire at different times, making the project vulnerable to disruptions over contract renegotiations. Jurisdictional disputes between unions might arise. And some unions might have negotiated onerous work rules that the PLA could modify. The solution, then, is to enter into a PLA.

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[1] Philip J. Kotler, "Project Labor Agreements in New York State: *In the Public Interest,*" Cornell University ILR School (March 2009) 3.
[2] Ibid., 11.
[3] Bruno Matarazzo Jr., "Hospital job awarded to nonunion electricians," *Daily News*, May 14, 2011, http://www.newburyportnews.com/local/x616689241/Hospital-job-awarded-to-nonunion-electricians (accessed May 30, 2011).

But consider the tortuous reasoning by which PLA advocates reach this conclusion: The builder is supposed to enter into an agreement with the very unions whose agreements with contractors are the source of the problems that the PLA is supposed to correct. In effect, the unions are telling the owners, "Look, unless you do something, you are going to end up with contractors whose agreements with us will bedevil your project going forward. So be smart and work with us to figure out some way to fix these agreements before you put the project out to bid."

That's the real agenda. There is, to be sure, a pretense that the PLA does not prevent contractors who don't use these unions from bidding. But the implication always is that the owner is going to end up, anyway, with contractors who will use labor supplied by the PLA unions. The owner might as well play ball now rather than find out the hard way later what can happen if he does not take pre-emptive action.

There are two flaws in this logic: First, it is not the owner's responsibility to solve problems that arise from contracts negotiated outside its purview by vendors who might want to do business with the owner. It is the owner's responsibility only to get the job done by a qualified contractor at the lowest bid. How the contractor manages to submit the lowest bid is the contractor's responsibility, not the owner's. Second, and fortunately for the owner, there is a simple procedure available for getting contractors to submit low bids. That procedure is to encourage as many qualified contractors as possible to bid, which is to say, to avoid conferring monopoly power on the very unions that are the source of the problems that the PLA is supposed to correct.

Fortunately also for the owner, there are nonunion contractors, and sometimes union contractors, that are eager to bid and that have not acquired the baggage that burdens the contractors whose unions want the PLA. One of the advantages that a nonunion contactor has over its union counterpart is that it can hire workers representing different trades on its own terms without having to fix the problems posed by the union collective bargaining agreements (CBAs). And there might be unions excluded from the PLA that have negotiated CBAs that avoid the very problems the PLA is supposed to fix. Finally, there might be contractors who

operate under work rules that are less burdensome than those that would be in effect under a PLA.

The Cornell University study mentioned above makes much of the argument that, because PLAs put union labor on the job, they also improve the quality of the labor that will be put on the job. The study goes so far as to instruct nonunion contractors as to how they can get better workers by taking advantage of the union hiring hall from which they would have to hire were they to win a job under a PLA.

> Non-union contractors who are signatories to the PLA may be persuaded to sign area agreements once they experience the advantage of systematic and ready access to properly trained, highly skilled workers. Union-trained journey-level workers must meet certain clearly defined standards for competence and contractors with access to this labor pool can then compete for – and more likely successfully perform – jobs requiring a higher degree of worker skill and technical experience.[4]

Thus nonunion contractors are supposed to believe that they are better off dealing with a union monopoly in recruiting workers than they are using their own workforce. The sheer chutzpah of this remark aside, a lawsuit currently under way in New York City illustrates the hypocrisy with which PLA advocates will argue their case.

A union umbrella organization, the Building and Construction Trades Council of Greater New York and Vicinity, has negotiated five PLAs for the purpose of bringing billions of dollars in New York City construction under its control. An electrical contractors association is challenging the legality of the PLAs in court.[5] What makes this case interesting is that the association does not consist of nonunion contractors, but rather contractors who are under a collective bargaining agreement with a union, the United Electrical Workers of America, which was excluded from the PLAs. Here we have government-mandated PLAs that discriminate against not only nonunion contractors but also those union contractors who do not have CBAs with the unions that are party to the PLA. It shows that the real purpose of the New York City PLAs is not to

[4] Kotler, 13.
[5] The Building Contractors Electrical Contractors Association and United Electrical Contractors Association v. The City of New York and The Building and Construction Trades Council of Greater New York and Vicinity, (S.D.N.Y. October 2010).

capitalize on the "ready access to properly trained, highly skilled workers" that comes with hiring union labor, but to exclude a disfavored union from what amounts to a union cartel.

As for the "complexity" issue, it would seem that nonunion contractors would have a cost advantage in bidding for "complex" projects in that they are not burdened by the necessity of having to deal simultaneously with several union hiring halls, each with its own CBA, culture and work-rule history. If a project is truly "complex," it would seem better to deal with a contractor that has its workforce under a single roof.

Thus, the logical solution to the problem is to proceed without a PLA and let the job go to the lowest bidder who is qualified to do the job. If a contractor, union or nonunion, can show convincingly that it can do the job on time for the budgeted amount without a PLA, then the PLA is unneeded. On the other hand, if a PLA is truly needed, then that's because there has been a political decision to proceed without offering nonunion contractors (or contractors who work with disfavored unions) a realistic chance of getting the work. Then, but only then, the PLA can make sense. Which is to say, a PLA can make sense only if the owner takes the existence of a union monopoly as a given and takes cover under the smarmy rhetoric of the pro-PLA flaks.

What about costs? The Cornell study refers to "costly delays." And PLA advocates always claim – and indeed, must ordinarily show – that builders can reduce costs by entering into a PLA.

The problem of estimating the effects of PLAs on construction costs is a daunting one. There are wide variations between construction projects in size, type and complexity. But because government agencies are legally required to show that the adoption of a PLA will reduce construction costs, there is an abundance of government-sponsored studies that address themselves to the question of costs.

I have read many of these government-sponsored studies and have found them all to be useless. Such studies have a common feature: The authors always assume (1) that the project in question will be performed by the very unions that would be signatories to the PLA and (2) that, absent a PLA, the collective bargaining agreements into which those unions have entered

would impose costs that can be reduced or avoided only by entering into the PLA. Having made those, very whopping assumptions, the authors then calculate the cost "savings" that would be made possible if a PLA were adopted, given that the PLA would modify, to the advantage of the owner, certain terms of the existing CBAs and given that the owner would sacrifice that advantage without the PLA.

What the studies fail to consider is that adoption of a PLA does not represent the only option available to the owner for fixing the CBAs that are at the heart of the problem. Another option, as mentioned, is *not* to adopt a PLA and thus to encourage bids from nonunion contractors (and sometimes from union contractors that are not party to the PLA). By *not* adopting a PLA, the owner encourages bids from these other contractors and thus broadens the scope for competitive bidding and cost savings. Insofar as these other contractors have not burdened themselves with the same crazy-quilt array of work rules, contract expiration dates, etc. that burden the PLA-union contractors, they can eliminate the problem by simply submitting the lowest bid.

The PLA studies put out to rationalize the adoption of a PLA never account for these subtleties. In fact, they are not studies at all but accounting exercises that show, for example, how an owner could save money by entering into a PLA that would limit the number of vacation days that are available to some trades. Such exercises make sense when the owner decides that the best he can do is get the unions he is predestined to work with to limit the number of vacation days. But they make no sense if the owner wants the bidding process to do what it is supposed to do, which is to induce contractors to submit the lowest possible bid in part by getting such matters as vacation days under control thorough their own negotiations with their workforce.

Getting back to costs, there is one way to conduct a legitimate study of cost effects: to select a sample of comparable projects, some performed and some not performed under PLAs, and attempt to measure the cost differences attributable to the PLAs through regression analysis. One can approach this problem by comparing final bid prices or final construction costs. In order to make the comparison, it is necessary to control for factors other than the adoption of a PLA that affect costs. This means comparing projects that are sufficiently similar that it is

possible to separate the effect of a PLA on cost from other effects on cost. School building projects offer a good opportunity to perform this kind of analysis.

The Beacon Hill Institute estimated the effects of PLAs on final construction costs and on final bids for school building projects in Massachusetts, Connecticut and New York. We found that PLAs added 12 percent to 18 percent to final construction costs in Massachusetts and Connecticut and 20 percent to final bids for school construction projects in New York.[6] The findings were robust for alternative regression specifications.

We were able to get statistically significant results from these regressions because of the similarities between school construction projects. In general, however, construction projects are so disparate in size, scope and type that there is no reliable method to determine, on a project-by-project basis, just how adoption of a PLA would affect costs. All we can say, with confidence, is that the cookie-cutter reports put out by government-hired consultants, most of which show that PLAs reduce costs, are not to be taken seriously.

With or without a cost study, PLAs have only one purpose: to discourage competition from nonunion contractors (and, in some instances, union contractors) to the end of shoring up declining union power, along with union-mandated wages and benefits, against competitive pressures.

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[6] Paul Bachman, Darlene C. Chisholm, Jonathan Haughton and David G. Tuerck, *Project Labor Agreements and the Cost of School Construction in Massachusetts* (September 2003) http://www.beaconhill.org/BHIStudies/PLApolicystudy12903.pdf (accessed May 13, 2009); Paul Bachman, Jonathan Haughton and David G. Tuerck, *Project Labor Agreements and the Cost of Public School Construction in Connecticut* (September 2004) http://www.beaconhill.org/BHIStudies/PLA2004/PLAinCT23Nov2004.pdf (accessed May 13, 2009); and Paul Bachman and David G. Tuerck, *Project Labor Agreements and Public Construction Costs in New York State*," (April 2006) http://www.beaconhill.org/BHIStudies/PLA2006/NYPLAReport0605.pdf. See also Paul Bachman and Jonathan Haughton, "Do Project Labor Agreements Raise Construction Costs," *Case Studies in Business, Industry and Government Statistics*, 1(1): 71-79.

President Obama wants us to ignore this logic. His executive order "encouraging" PLAs claimed that "large-scale construction projects pose special challenges to efficient and timely procurement by the Federal Government."[7] But do they?

To test this hypothesis, the Beacon Hill Institute reviewed the experience of the U.S. government under President George W. Bush, who, as mentioned, prohibited government-mandated PLAs from federal and federally-assisted contracts over the course of his administration.[8] The premise of our study was that the Bush years would provide a good laboratory in which to test the claim that PLAs ward off labor strife, delays and such. If federal projects that cost $25 million or more and that were undertaken during the Bush years were plagued by the "special challenges" claimed by President Obama's pro-PLA Executive Order 13502, then there should be evidence of the labor disputes, coordination problems and uncertainties of the kind that the executive order is intended to avoid.

To this end, we asked the Associated Builders and Contractors (ABC) to assist us in getting the needed data from the federal government. Using the Freedom of Information Act (FOIA), ABC wrote to federal agencies with procurement responsibilities, including the Office of Management and Budget (OMB) and the U.S. General Services Administration (GSA), for information relating to their experience with construction contracts over the period 2001-2008. ABC asked for information relating to any problems caused by the absence of government-mandated PLAs over the period of the Bush executive order.

No respondent to the ABC letter, including the OMB and the GSA, could produce evidence of delays or cost overruns on projects worth $25 million or more that were attributable to the absence of a PLA. If there were any such delays or cost overruns, the respondents were unable or unwilling to provide evidence of them. We also surveyed large federal contractors and examined a U.S. government database of federal construction projects to learn what we could

[7] See Office of the Press Secretary, The White House, "Use of Project Labor Agreements for Federal Construction Projects," (February 2009) http://www.whitehouse.gov/the-press-office/executive-order-use-project-labor-agreements-federal-construction-projects (accessed May 30, 2011).
[8] See David G. Tuerck, Sarah Glassman and Paul Bachman, *Project Labor Agreements on Federal Construction Projects: A Costly Solution in Search of a Problem* (August 2009) http://www.beaconhill.org/BHIStudies/PLA2009/PLAFinal090923.pdf.

about the fate of federal construction projects over the same years and found no evidence of non-PLA projects suffering from strikes, delays and other problems that PLAs supposedly prevent. On the basis of these efforts, we concluded that, almost certainly, there were no federal construction projects undertaken during the Bush years that would have been benefitted from Obama's executive order, had it been in place. The "challenges" that Obama cites turn out to be a red herring – a solution in search of a problem. We estimated that, had President Bush's executive order not been in place in 2008, the federal government would have incurred $1.6 billion to $2.6 billion in additional construction costs in that year alone.[9]

So why did President Obama issue his order in the first place? The answer is political, not economic. The labor unions are a key component of the Democratic base, and the labor unions, especially the construction unions, are in trouble.

In my *Cato Journal* article of 2010, I showed that there has been a long-term downward trend in union membership among construction workers and in the union wage premium for construction workers.[10] There I observed that, whereas 87.1 percent of construction workers reportedly belonged to unions in 1947, the percentage belonging to unions was 27.5 percent in 1983 and 15.6 percent in 2008. The wage premium earned by union construction workers fell in tandem from 74.4 percent in 1983 to 51.8 percent in 2008.[11]

The short term trend is different. The decline in construction union membership continues apace. The fraction of all construction workers who belonged to unions fell by 25 percent, from 17.5 percent in 2000 to 13.1 percent in 2010.[12] But there was a halt in the decline in the union wage premium, which rose slightly, from 50.0 percent in 2000 to 51.9 percent in 2010. [13] And

[9]Tuerck, Glassman and Bachman, 24.
[10] The union wage premium equals the percentage by which the union wage exceeds the nonunion wage. Thus the wage premium is 50% if the union wage is $60 per hour and the nonunion wage is $40 per hour.
[11]David G. Tuerck, "Why Project Labor Agreements Are Not in the Public Interest," *Cato Journal* 30, no. 1 (Winter 2010): 46-47.
[12] U.S. Bureau of Labor Statistics, "Table 1: Union affiliation of employed wage and salary workers by occupation and industry," http://www.bls.gov/cps/cpslutabs.htm (accessed May 30, 2011).
[13] Ibid.

this was despite the recent collapse in the economy, which hit construction particularly hard. The 2010 unemployment rate for construction workers was 20.6 percent.[14]

From these data, it is clear that the unions have managed to sustain a hefty wage premium in recent years despite declining membership and adverse market conditions. But their grip on that wage premium is, as they no doubt realize, becoming increasingly weak. How is it possible for 13 percent of construction workers to make 52 percent more than the other 87 percent when 21 percent of them can't find jobs? Questions like this are driving union bosses to ever more desperate tactics. Thus, any Boston owner who dares to use nonunion labor can expect bullying of the kind that the Boston IBEW local likes to display.

Thus also PLAs have become the construction unions' line in the sand. Unless the unions can protect their existing turf, which is to say, their dominance over major public projects, they will suffer further erosion of their wage premium. The unions depend on the prevailing wage laws to protect that premium. The government-determined "prevailing" wage and benefit rates are applicable to tradespeople employed on all federal government jobs greater than $2,000, and state prevailing wage and benefits rates are paid to tradespeople employed on state government jobs in 33 states. But this does not guarantee that the unions will be able to protect their wage premium indefinitely against market realities. Inasmuch as the prevailing wage laws are largely based on the collectively bargained union wage and benefit rates, a steady decline in union participation in construction work will put downward pressure on the prevailing wage and thus also the union wage premium.

This is the 800 pound gorilla that sits in the room whenever government officials decide whether to adopt a PLA or not. Will they or won't they continue to protect the construction union monopoly against the market forces at work?

A recent study published by the Regional Plan Association casts a new light on this matter.[15] The Association, which has offices in New York, New Jersey and Connecticut, describes itself as

[14] U.S. Bureau of Labor Statistics, "Unemployed persons by industry, class of worker and sex," ftp://ftp.bls.gov/pub/special.requests/lf/aat26.txt (accessed May 30, 2011).

"America's oldest and most distinguished independent urban research and advocacy group." As stated on its website:

> RPA prepares long range plans and policies to guide the growth and development of the New York- New Jersey-Connecticut metropolitan region. RPA also provides leadership on national infrastructure, sustainability, and competitiveness concerns. RPA enjoys broad support from the region's and nation's business, philanthropic, civic, and planning communities.[16]

The RPA study begins by opining the steep decline in New York City's construction business over the current recession. Housing starts are down 63 percent. Commercial starts are down 19 percent and would have been down by more but for the World Trade Center rebuilding project. The report also mentions the imminent expiration of many "crucial" construction contracts. The sense of the report is that New York City construction unions should go into the contract renegotiations with a view toward cutting labor costs.[17]

Although the authors warn that the unions are up against stiff competition from nonunion contractors, they also go out of their way to opine any further erosion of the unions' share of the construction market. "While the city's largest and most important developers and contractors wish to continue with union labor because of the advantages it offers in skill, speed, and safety," they write, "nearly all developers and many contractors are considering nonunion options, including open and merit shops."[18]

Why? Because the nonunion contractors offer a huge cost advantage:

> A 10 percent differential between union and nonunion construction is tolerable to union developers and contractors, while the existing 20-30 percent differential is not. If the high differential continues, developers will convert some projects that would have been union in earlier times to merit shop, and will simply not go forward with other projects.[19]

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[15] Julia Vitullo-Martin and Hope Cohen, *Construction Labor Costs in New York City: A Moment of Opportunity* (May 2011) Regional Plan Association.
[16] See the Regional Plan Association's Mission Statement at http://www.rpa.org/mission.html (accessed May 30, 2011).
[17] Vitullo-Martin and Cohen, 1.
[18] Ibid.
[19] Ibid., 2.

"The consensus among developers and contractors—both union and nonunion—is," the authors write, "that the price tag on nonunion labor is between 20 and 30 percent lower than on union labor. Some of the cost differential comes from lower nonunion wages and benefits, but most derives from unproductive union-mandated work rules and practices." [20] The report goes on to cite examples of union featherbedding.

As for PLAs, they are "a solution that didn't work."

> Labor's response to the drop in construction activity was to negotiate a series of PLAs (project labor agreements) with building contractors and with city government.... For management, a PLA offers the opportunity to renegotiate work rules, while securing short-term wage and benefit concessions. Management has been almost universally disappointed with the actual savings achieved—2 to 4 percent rather than the promised 20 percent.[21]

"PLAs," the authors conclude, "should be seen as the negotiating placeholder they are—a temporary means of easing some of the most egregious work-rule practices, but not a long-term solution to the unworkable economics of current labor terms."[22]

This language is damning for PLA advocates. Here we have a mainstream New York City research group simultaneously warning that nonunion labor competes effectively with union labor and that construction owners who expect PLAs to save on costs can expect to be "disappointed." The broader implication is that the unions cannot rely much longer on using gimmicks like PLAs to protect their market power. The tide is shifting. The only question is how much longer it will take politicians to see this reality.

When the construction business was booming, government agencies and politicians sympathetic to the unions could support PLA mandates and rely on professional union sympathizers to give them academic cover. Now that those days are over, it is time for all parties involved to recognize that the case for PLAs never held water to begin with. I therefore urge Congress to pass H.R. 735 and to send that message back to the White House.

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[20] Ibid., 6.
[21] Ibid., 2.
[22] Ibid., 18.

Mr. LANKFORD. Mr. Wu.

STATEMENT OF KIRBY WU

Mr. WU. Good morning, Chairman Lankford, Ranking Member Connolly, and members of the subcommittee. My name is Kirby Wu. I am the president of Wu & Associates located in Cherry Hill, New Jersey. On behalf of the Associated Builders and Contractors and the merit shop contracting community. I would like to thank you for the opportunity to testify before you today in support of the Government Neutrality and Contracting Act, H.R. 735. I hope my testimony sheds some light on how government-mandated project labor agreements harm qualified contractors and employees that want nothing more than to compete on a level playing field to build on-time and on-budget construction projects at the best possible price.

PLA mandates and preferences by Federal agencies result in increased costs for contractors and unnecessary procurement delays and uncertainty and favoritism in the Federal procurement process, and stands as a barrier to growth for businesses and job creation in an industry that's already suffering an unemployment rate of 17.8 percent.

This is why the industry supports legislative remedies like H.R. 735 which restores fairness in Federal contracting and will eliminate waste so the government can build more projects and create more construction jobs.

Wu & Associates is a small-business success story. We have grown into an industry-leading, award-winning general contractor specializing in design-build projects, lead sustainable design, and historic preservation for Federal, State, local, and private clients. Our firm's success depends on the principles of free enterprise and attracting the most qualified, talented personnel and companies for a job, regardless of their labor affiliation.

Over the years we have successfully performed millions of dollars worth of Federal, State, local, and private construction projects without the need to enter into a PLA. The contracting policies of the Federal Government influence the growth and success of small businesses like Wu & Associates, as well as the economic well-being of our employees and their families.

PLA mandates place merit shop competitors at a disadvantage and promotes discrimination based on labor affiliation. PLAs have a practical effect of creating jobs exclusively for unionized construction trades people by forcing union representation or compulsory union membership, inefficient and archaic union work rules, payment of union dues, forced contributions to union pension and benefit plans, and a host of other problems on employees of merit shop contractors like my firm's employees that have freely decided not to join a union.

Injecting PLA mandates into the Federal procurement process discourages competition from qualified contractors like my own who employ 87 percent of the U.S. construction work force. It doesn't take an economic degree to know that less competition from a pool of qualified bidders leads to increased costs for the government and taxpayers. If members of this subcommittee think PLA mandates somehow advance the economy and efficiency in govern-

ment contracting, please take a look at my written testimony which describes in great detail my unfortunate experience with a Federal PLA mandate that resulted in procurement delays, red tape, and needless litigation costs.

In short, in 2010, U.S. Army Corps of Engineers mandated PLA on a project in Camden, New Jersey, in the middle of the bidding process. By doing so, the Corps sent a message to qualified businesses like mine that we were not welcome to build this project unless we agreed to use union labor and follow the terms and conditions of a PLA. This is ironic because we were previously selected as the prequalified contractor to bid this project. After weeks of uncertainty and attempts to get the Corps to reverse the PLA, we were left with no choice but to file a bid protest with the Government Accountability Office against the Corps' illegal and discriminatory mandate. Eventually, in the face of a bid protest, the Corps abandoned their PLA mandate, but they replaced it with an illegal and discriminatory PLA preference that enticed contractors to voluntarily submit a PLA offer by giving them additional credit in their technical evaluation of our offer as part of the best-value procurement process.

We decided not to pursue this contract further because we felt it was not worth investing the additional company resources to prepare a bid and compete against contractors submitting PLA offers in this distorted playing field. This exercise resulted in lost time and money for our small business that we could have invested back into our work force and company. It also resulted in needless procurement delays, exceeding 2 months, as the Corps bid submission deadline was extended a number of times to accommodate the PLA controversy. Remarkably, the contract was eventually awarded to a merit shop general contractor at a bid priced nearly 15 percent below the original $16½ million estimate, without a PLA offer. And today the project is reportedly on time and on budget. The winning contractor would have been discouraged or eliminated from competing if not for our efforts to fight the PLA mandate.

As a taxpayer it is outrageous that the government is wasting tax dollars and denying opportunity to quality businesses and their skilled work forces that cater to just 13.1 percent of the U.S. construction work force.

I ask that the members of the subcommittee support Mr. Sullivan's Government Neutrality in Contracting Act. Contractors, and not Federal procurement officials pressured by special interests, should be the ones deciding whether a PLA is an appropriate tool. Wu & Associates applauds the Oversight and Government Reform Committee for its continued interest in the issue of government-mandated PLAs.

Thank you for the opportunity to testify on behalf of small businesses and the merit shop contracting community. We deserve a fair opportunity to provide the best construction product at the best possible price to the taxpayers.

Mr. LANKFORD. Thank you, Mr. Wu.

[The prepared statement of Mr. Wu follows:]

TESTIMONY OF KIRBY WU, AIA, LEED AP
BEFORE THE HOUSE SUBCOMMITTEE ON TECHNOLOGY, INFORMATION POLICY, INTERGOVERNMENTAL RELATIONS AND PROCUREMENT REFORM

June 3, 2011

Good morning Chairman Lankford, Ranking Member Connolly and members of the subcommittee.

My name is Kirby Wu and I am the president of Wu & Associates, located in Cherry Hill, New Jersey.

On behalf of Associated Builders and Contractors (ABC) and the merit shop contracting community, I would like to thank you for the opportunity to testify before you today in support of the Government Neutrality in Contracting Act (H.R. 735).

I hope my testimony sheds some light on how government-mandated project labor agreements (PLAs) harm qualified contractors and employees that want nothing more than to compete on a level playing field to build on-time and on-budget construction projects at the best possible price.

Unfortunately, as my testimony will demonstrate, PLAs mandated by federal agencies result in increased costs for contractors and unnecessary procurement delays, and inject uncertainty and favoritism in the federal procurement process. These unnecessary PLA mandates stand as a barrier to growth for businesses and job creation in an industry suffering from a national unemployment rate at 17.8 percent.[1]

Wu & Associates Is a Quality Merit Shop Contractor and a Success Story

Incorporated in 1990, Wu & Associates acquired 8(a) certification through the U.S. Small Business Administration in the early 1990s and has since grown into an industry-leading, award-winning general contractor specializing in design-build projects, LEED sustainable design and historic preservation. Wu & Associates is considered a small business under the U.S. Small Business Administration's small

[1] U.S. Bureau of Labor Statistics, *Industries at a Glance: Construction: NAICS 23* http://www.bls.gov/iag/tgs/iag23.htm, accessed 5/26/11

business size standards.[2]

Wu & Associates is not signatory to any union collective bargaining agreements for the work we self-perform. We are a merit shop contractor, meaning we have a history of hiring skilled tradesmen and we subcontract work to qualified and experienced open shop and union subcontractors. Our firm's success depends on the principles of free enterprise and attracting the most qualified and talented personnel and companies for a job, regardless of their labor affiliation. We have successfully performed millions of dollars worth of federal, state, local and private construction projects without the need to enter into a PLA.

My company's commitment to excellence in safety is reflected in our EMR workers' comp rate, which is consistently below industry average[3], and our employees' participation in OSHA 10 and OSHA 30 safety training programs offered by various industry entities.

Wu & Associates' portfolio of clients includes the U.S. Army Corps of Engineers; U.S. Navy; U.S. Department of Interior; U.S. Department of Labor; federal, state and local governments; schools; historic agencies; and private corporations.[4]

In 2010, we performed just under $12 million worth of construction projects as a general contractor and 96 percent of that work was for the federal and state governments.

The Impact of PLA Mandates in Federal Contracting

The contracting policies of the federal government influence the growth and success of small businesses like Wu & Associates, as well as the economic well being of our employees and their families.

Unfortunately, the federal government has been mandating anti-competitive and costly PLAs and instituting discriminatory PLA preferences on federal contracts as a result of President Obama's February 2009 Executive Order 13502 and related regulations. These new rules strongly encourage

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[2] The U.S. Small Business Administration's small business size standard defines a general building and heavy construction contractors as a firm with annual revenue below $33.5 million, http://www.sba.gov/content/summary-size-standards-industry, accessed 5/31/11. Wu & Associates is considered a small business by the SBA as we typically have annual revenues below this threshold.

[3] EMR (Workers' Comp) Rates in NJ: 0.842 (2010), 0.842 (2009), 0.917 (2008). PA: 0.839 (2010), 0.843 (2009), 0.846 (2008). Our OSHA Recordable Incident Rate is 0 for years 2010, 2009 and 2008.

[4] Please see attached "Project Snapshot" document and biography to learn more about Wu & Associates.

federal agencies to *mandate* PLAs on federal construction projects exceeding $25 million in total cost.[5]

Although the order does not mandate PLAs on *every* federal construction project, the executive order was widely opposed and criticized by the contracting community as a handout to union special interests favored by this administration.

Executive Order 13502 has exposed federal procurement officials to intense political pressure from special interest groups, the Obama administration, agency political appointees and members of Congress to mandate PLAs on federal projects even when they are not appropriate.

It has resulted in increased contracting costs, red tape and delays in the procurement process.

PLA Mandates Discourage Competition, Increase Costs and Cater to Special Interests

As members of the subcommittee will hear from testimony, PLAs mandated by government entities have a reputation in the construction industry as anti-competitive schemes designed to give contractors signatory to specific construction trade unions promoting PLAs an unfair competitive advantage against merit shop competitors like myself.

PLAs also have the practical effect of creating jobs exclusively for unionized construction tradespeople by forcing union representation or compulsory union membership, inefficient and archaic union work rules, payment of union dues, forced contributions to union pension and benefit plans, and a host of other problems on merit shop employees that have freely decided not to join a union. It is needless discrimination based on labor affiliation and it hurts merit shop employees as much as it hurts their general contractor and subcontractor employers.

PLA mandates also curtail effective and tested business practices and construction techniques that help contractors deliver superior construction projects.

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[5] President Obama's pro-PLA Executive Order 13502, *Use of Project Labor Agreements for Federal Construction Projects,* was issued Feb. 6, 2009, just a few weeks after he took office. The order immediately repealed President Bush's Executive Orders 13202 and 13208, which prohibited government-mandated PLAs on federal and federally assisted construction projects going back to 2001. The Federal Acquisition Regulatory (FAR) Council issued a proposed rule July 14, 2009 (FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects) implementing the Obama order. The contentious proposed rule was subject to two 30-day public comment periods. The first comment period closed Aug. 14, 2009; it was reopened on Aug. 24, 2009, and closed again on Sept. 23, 2009. On April 13, 2010, the FAR Council issued a final rule, effective May 13, 2010.

Injecting PLA mandates into the federal procurement process discourages competition from qualified contractors like my company and harms merit shop employees, who compose 87 percent of the U.S. construction workforce.[6] Basic economic theory suggests that less competition from a pool of qualified bidders leads to increased costs to the government and taxpayers.

If members of this subcommittee think PLA mandates somehow advance the economy and efficiency in government contracting, let me share with you my unfortunate experience with a PLA mandated by the U.S. Army Corps of Engineers (USACE) on a project in Camden, New Jersey, that resulted in procurement delays, red tape and needless litigation costs.

Wu & Associates' Negative Experience with a Federal PLA Mandate

In July 2009, the USACE Louisville District issued a prequalification solicitation for general contractors interested in building an Armed Forces Reserve Center in Camden, New Jersey.[7]

Wu & Associates followed appropriate procurement procedures and the USACE prequalified our firm to bid on this project, meaning the USACE contracting officers certified we possess the experience and track record to act as a general contractor on this job, so they invited us to compete for this contract in Phase 2 of this solicitation under standard procurement procedures.[8]

However, the solicitation was cancelled in February 2010.[9]

On May 14, the day after the pro-PLA Executive Order 13502 regulations were implemented, the USACE issued a pre-solicitation[10] indicating a new solicitation for the Camden, New Jersey, project would be re-issued June 1. But the procurement moved forward without a prequalification process and as a single phase best value procurement, meaning all of the hard work we put into complying with USACE's prequalification procedures in the initial solicitation was a waste.

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[6] *See* U.S. Department of Labor Bureau of Labor Statistics "*Union Members Summary*" (Jan. 2011), where 86.9 percent of the 2010 U.S. private construction workforce does not belong to a union.
[7] Solicitation Number: W912QR-09-R-0076 issued on July 8, 2009. The pre-solicitation was issued on June 24, 2009.
[8] Wu & Associates received a letter dated Nov. 23, 2009, inviting us to proceed to Step 2 of the solicitation, as we had passed the Step 1 prequalification.
[9] Wu & Associates received a letter dated Feb. 23, 2010, notifying us that "the decision was made to cancel this solicitation as of 23 February 2010 due to a site relocation which would change the requirements for this project. Please continue to monitor Federal Business Opportunities website for this project to be re-advertised in the near future."
[10] Solicitation Number: W912QR-10-R-0027, Y--Construction of an Armed Forces Reserve Center (AFRC), Camden, New Jersey, available on FBO.gov here.

Once the new solicitation was issued June 1, Wu & Associates, along with many other prime and subcontractors, spent countless hours and resources preparing bids to be submitted by the July 1 deadline.[11]

The submission deadline was again extended, and on July 1, the USACE issued an amendment mandating contractors to submit a PLA with their offer as a condition of being awarded the contract.[12] The PLA mandate was problematic for merit shop general contractors, subcontractors and their employees for a variety of reasons mentioned earlier in my testimony.

It was especially frustrating because the USACE had already acknowledged that Wu & Associates was capable of building a project of this size and scope in the earlier solicitation that had been cancelled, but now it was telling our firm that we were not qualified unless we agreed to a PLA. In addition, the "target ceiling" for the contract was stated as $16.5 million; well below the $25 million threshold established by President Obama's discriminatory pro-PLA regulations.[13]

After weeks of wasted time and money, uncertainty and unsuccessful attempts by contractors and construction associations to convince USACE contracting officers to remove the PLA mandate, legal recourse was the only option. With the assistance of Mr. Baskin and ABC National, I filed a bid protest with the Government Accountability Office (GAO) against the USACE's illegal and discriminatory PLA mandate on July 20.

In response to the GAO bid protest, the USACE extended the bid submission deadline a number of times[14] and eventually removed the PLA mandate.[15]

However, the ordeal was not over. The USACE's amendment contained language giving illegal and discriminatory preferences and an unfair, unclear bonus to contractors "voluntarily" submitting a PLA

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[11] Amendment #1, issued June 22, 2010, extended the bid due date to July 8, 2010.
[12] Amendment #2, part D, issued July 1, 2010. It also extended the bid due date to July 28 2010.
[13] Amendment #2, section 2.4, "2.4. The target ceiling for contract award is $16,500,000 (excluding OMAR line items) based on funds made available for this project."
[14] Amendment #5, issued July 27, extended the solicitation deadline to Aug. 18. Amendment #6, issued Aug. 12, extended the solicitation deadline to Sept. 8.
[15] The PLA mandate was removed via Amendment #7 issued Aug. 20, and replaced with PLA preference language.

offer.[16]

We did not pursue the contract further because we felt it was not worth the investment of additional company resources. It was a difficult decision, but we felt it would require too much investment from the company to prepare the bid and compete against contractors submitting PLA offers in this distorted playing field. It felt like the government was doing everything possible to steer this work to PLA offerors.

This entire exercise resulted in lost time and money that would have been better spent pursuing other work, buying new construction equipment, hiring more employees and contributing to the growth of the economy. It also resulted in needless procurement delays exceeding two months, as the USACE's bid submission deadline, originally scheduled for July 1, was extended a number of times to Sept. 8.

What is especially remarkable, and frankly proves that a PLA mandate is unnecessary, is that the contract was eventually awarded to a merit shop general contractor at a price of $14.07 million (14.72 percent below the $16.5 million estimate) without a PLA offer.[17] The winning contractor would have been discouraged or eliminated from competing, if not for our efforts to fight the PLA mandate. In the absence of a PLA mandate, today that project is on time and on budget, and has not experienced any strikes, delays, shoddy workmanship or any of the other problems PLA mandates allegedly prevent according to Executive Order 13502 and the standard rhetoric PLA proponents offer to justify these schemes.

Concerns About Expansion of Executive Order 13502 to Federally Assisted Construction

Unfortunately, my story is not uncommon in today's local, state and federal construction marketplace because of the implementation of anti-competitive and costly government-mandated PLAs through political connections instead of sound public policy.

The contracting community is concerned this systematic PLA favoritism could get worse, as Section 7[18]

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[16] From the Aug. 20 Amendment #7, "Offerors submitting a price proposal subject to the PLA requirements in the solicitation shall receive the maximum consideration under the adjectival scale used for this factor. Offerors not submitting a price proposal subject to the PLA requirements in the solicitation shall be considered to meet the minimum requirements and shall receive an evaluation rating of acceptable for this factor."

[17] Project award number W912QR-11-C-0002 for $14,070,917, Nov. 5, 2009.

[18] Section 7 of Executive Order 13502: "The Director of the OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall

of Executive Order 13502 hints at the expansion of the order to federally assisted construction projects. This would inject favoritism and waste into a much larger segment of the construction marketplace[19] and possibly bust already strained state and local budgets. It is possible that private, local and state construction projects receiving just one dollar of federal assistance could be forced to consider or mandate a PLA or discriminatory PLA preference policy as a condition of receiving federal assistance.

As a taxpayer, it is outrageous that governments are wasting tax dollars and denying opportunities to quality businesses and their skilled workforces to cater to just 13.1 percent of the U.S. construction workforce.[20]

Our company and other quality small businesses, general contractors, subcontractors and their skilled employees deserve a fair opportunity to provide the public with the best construction product at the best price.

Restore Fairness and Accountability in Government Contracting with H.R. 735

I ask that the members of this subcommittee support the Government Neutrality in Contracting Act (H.R. 735), introduced by Congressman John Sullivan (R-Okla.), which will prohibit the federal government once and for all from requiring contractors to execute a PLA as a condition of winning federal or federally assisted construction projects.

As was the case during the Bush era of government neutrality in federal contracting, H.R. 735 permits contractors to voluntarily enter into PLAs if they feel such an agreement can make their business competitive and deliver the best product to the government.

More importantly, this legislation will result in more construction jobs, more infrastructure projects, less red tape and an accountable federal government.

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provide the President within 180 days of this order, recommendations about whether broader use of PLAs, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects." Note: To date, there has been no movement on this expansion issue.

[19] In 2010, the federal government put in place $30.8 billion worth of construction projects in contrast to $275.493 billion in state and local construction and $508.24 billion in private construction, according to http://www.census.gov/const/C30/public.pdf

[20] *See* U.S. Department of Labor Bureau of Labor Statistics "*Union Members Summary*" (Jan. 2011), where 13.1 percent of the 2010 U.S. construction workforce belongs to a union and 13.7 percent are represented by a construction union.

Wu & Associates applauds the Oversight and Government Reform Committee for its continued interest in the issue of government-mandated PLAs. Thank you for the opportunity to testify on behalf of small business and the merit shop contracting community.

Mr. LANKFORD. Mr. Kennedy, proceed with your testimony for 5 minutes.

STATEMENT OF MIKE KENNEDY

Mr. KENNEDY. Good morning, Chairman Lankford and members of the subcommittee. My name is Michael Kennedy. I have the privilege of serving as the general counsel of the Associated General Contractors of America. I am here to express the Association's strong support for H.R. 735 and the neutrality that this bill seeks to achieve.

AGC is the leading trade association in the construction industry. It has more than 33,000 members in nearly 100 chapters throughout the United States. Among these members are building, highway, industrial, and utility contractors. While some of them are quite large, most are small and closely held. Many are Federal contractors.

AGC was founded in 1918 and historically a majority of its members have been union contractors. Today such contractors are in a minority, but they remain a large and very important segment of the Association's membership. To this hearing on project labor agreements and H.R. 735, AGC therefore brings a broad perspective.

Before turning to the central subjects of today's hearing, I should explain that the labor unions in the construction industry are unique. Unlike their industrial counterparts, these unions have organized themselves along craft lines. One union represents carpenters, another represents operating engineers, another represents electricians, and so on down the line. Industrial unions represent everyone in the appropriate bargaining unit without regard to any differences in their job classifications.

But construction unions are different. No one of them represents all of the craft workers on a typical construction project. The individual agreements negotiated with each of these unions are similarly limited. Each agreement covers a separate and single craft, but, on the other hand, the typical agreement applies to all of the work that the craft performs in a particular area.

PLAs differ from these area-wide agreements in two ways. PLAs are typically negotiated with several unions and therefore cover several crafts. And as the name suggests, PLAs are limited to individual projects and are not area-wide.

The historical purpose of PLAs, dating back to a time when unions represented nearly 90 percent of all construction workers, was to eliminate inconsistencies in these area-wide agreements that would otherwise apply to particular projects, such as differences in work rules and expiration dates. Then and now, PLAs typically supersede such area-wide agreements.

Over the last 60 years, as the percentage of construction workers that unions represent has fallen below 14 percent, project labor agreements have become less and less relevant. A large majority of today's work is not subject to any agreement with any labor union, and the need to address differences between and among labor agreements has greatly diminished. Open shop contractors are free to coordinate their employment practices entirely on their own ini-

tiative and without changing or superseding any prior agreements with labor unions.

In this new environment, union contractors are more likely to seek PLAs for the purpose of meeting their open shop competition. Without seeking to open or reopen their area-wide agreements, such contractors can seek the more favorable terms or conditions they may need to compete for individual projects.

AGC neither supports nor opposes PLAs per se. The Association takes the position that such agreements are just another of the many tools that contractors—not owners, but contractors—should have at their disposal as they seek to meet their clients' needs.

At the same time, AGC strongly opposes government mandates for PLAs or area-wide agreements or any other labor agreements for publicly funded construction projects. The National Labor Relations Act commits such matters to the discretion of construction employers and their employees. And for a host of reasons, AGC believes that government contracting agencies should follow suit.

As we have already heard, government mandates for PLAs discourage competition. They typically require open shop contractors to make fundamental changes in the way they would approach an upcoming project and to incur costs that such contractors would not otherwise incur.

Such mandates may also trouble union contractors. They also may require union contractors to make significant changes in the way they would approach a project. Indeed, their typical purpose and effect is to deprive union contractors of the opportunity to work under the area-wide agreements that these contractors have already negotiated.

Government mandates can also disrupt the bargaining over area-wide agreements. They invite the construction unions to bypass the contractors for whom their members work and seek to negotiate with what may be inexperienced public officials. They also give unions the leverage to make demands that the unions could not otherwise make.

Beyond that, it remains clear that construction contractors are in the best position to determine whether and, if so, when a PLA will help them meet the government's legitimate interest in having its projects constructed on time, within budget, and to all specifications.

Federal construction contractors have to post performance bonds and to provide a host of contractual guarantees that they will meet their obligations. It follows that these contractors already have ample incentive to consider any PLA or other labor agreement that would make it easier or less expensive for them to perform their work.

In sum, AGC supports H.R. 735. AGC would suggest that the committee make a technical amendment to section 3(d) where the bill authorizes an exemption from its substantive provisions under special circumstances. As currently written, this provision actually tilts the scale against union contractors. But AGC believes that the problem is inadvertent and can be quite easily corrected.

Thank you again. Let me simply repeat that AGC opposes Federal mandates for project labor agreements and supports H.R. 735. Thank you.

Mr. KELLY [presiding]. Thank you.
[The prepared statement of Mr. Kennedy follows:]

Statement of
The Associated General Contractors of America
Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform
Committee on Oversight and Government Reform
United States House of Representatives
June 3, 2011

The Associated General Contractors of America (AGC) is pleased to have this opportunity to explain where and how project labor agreements (PLAs) fit into the larger framework of collective bargaining in the construction industry, how Executive Order 13502 and implementing regulations have threatened to disrupt the federal government's procurement of construction, and why the Federal agencies need not, and should not, require Federal construction contractors to have such agreements.

As the leading association in the construction industry, AGC is in a unique position to bring the highest level of sophistication and experience to the debate over *government mandates* for project labor agreements. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly undertake construction for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration, and other federal departments and agencies. Most are small and closely-held businesses. Among them are both union and open-shop companies, and AGC remains committed to equally representing both.

Project Labor Agreements and the Construction Industry

Collective bargaining agreements in the construction industry are unique. Each one is typically limited to coverage of the men and women working in a specific craft, such as carpentry or masonry, but applies to all of the work in a certain geographic area, such as a set of contiguous counties. Because construction projects are complex and typically require several if not many crafts to construct, multiple agreements with different trades often apply to each project in the area they cover. PLAs are an alternative to these area-wide agreements, and their traditional purpose is to eliminate inconsistencies between and among these other agreements. While limited to a particular project, PLAs typically cover most if not all of the crafts needed to construct that project so that work rules, contract duration, and other terms are uniform across trades.

Over the last sixty years, however, the use of collective bargaining agreements in the construction industry, and the percentage of construction workers represented by a union, has

dramatically declined. In 1947, unions represented 87.1 percent of all construction workers. By 1973, that number had dropped to 40.1 percent. By 1998, it had dropped to 18.4 percent. And by 2010, it had dropped to 13.7 percent. As it dropped, the size and sophistication of the open shop sector of the industry steadily increased; today, open shop contractors can handle even the largest and most complex projects.

In this new environment, union contractors and their counterparts in the building trade unions may resort to PLAs for the different purpose of making these contractors more competitive. Where the area-wide agreements would make it difficult for union contractors to meet their open shop competition but the unions do not want to renegotiate those agreements, the unions may agree to engage in a limited degree of "concession bargaining" to apply to a particular project simply to ensure that their members have work. While motivated more by the competitive pressure on union contractors, and less by the difference among the area-wide agreements that would otherwise apply, these PLAs are also the product of private and voluntary negotiations.

AGC's Position on Project Labor Agreements

AGC neither supports nor opposes PLAs *per se*. What AGC strongly opposes are *government - mandates* for PLAs on any publicly funded construction project. The competitive process for the selection of federal contractors tends to enhance quality and the efficient use of resources. Specifications for a project are distributed to contractors and subcontractors to obtain cost-effective bids and ensure that the bidders fully understand all job requirements. Ordinarily, this process encourages contractors to compete with one another to offer the best possible value that meets the project specifications. To be competitive in this environment, every contractor has significant day-to-day incentives to maintain labor policies with employees that promote productivity and quality, while increasing skill and teamwork. Both federal agencies and contractors greatly benefit from this system.

When the government undertakes construction, considerations other than price and quality can, however, enter the equation. The obligation to serve the public's best interests by obtaining the highest quality construction at the best possible value can sometimes be clouded by partisan political agendas. When the potential for this increases, both Congress and the Executive Branch have a responsibility to remind everyone of the lines between politics and procurement.

Executive Order 13502 encourages Federal agencies to consider using PLAs under certain circumstances. When a Federal agency decides to require execution of a PLA, and to make such execution a condition of contract award or a condition of the contract itself, the government has mandated a PLA. The government has also removed the contractor from the process of establishing and maintaining its own labor relations, potentially increasing project costs, and undermining professionalism in collective bargaining. In the end, *government mandates* for PLAs create an artificial and economically distorted environment for public works construction and ultimately erode the competitive bidding process.

AGC is committed to free and open competition in all public construction markets and believes that publicly financed contracts should be awarded without regard to the labor relations policy of the government contractor. AGC believes that neither a public owner nor its representative

should mandate the use of a project labor agreement that would compel any firm to change its labor policy or practice in order to compete for or to perform work on a publicly financed project. AGC further believes that the proper parties to determine whether to enter into a PLA and to negotiate the terms of a PLA are the employers that employ workers covered by the agreement and the labor organization representing those workers, since those are the parties that form the basis for the employer-employee relationship, have a vested interest in forging a fair and stable employment relationship, and are authorized by the National Labor Relations Act to enter into such an agreement.

Accordingly, AGC is disappointed that the Administration, via the Executive Order, has adopted a policy that encourages "executive agencies to consider *requiring* the use of project labor agreements in connection with large-scale construction projects" (emphasis added). The government does need such requirements to reap the economic or other benefits of any PLAs that make sense. If a PLA would benefit a particular project, the construction contractors otherwise qualified to perform the work would be the first to recognize that fact, and in the absence of any mandate, they would voluntarily enter into such an agreement.

Complications Created by *Government-Mandated* Project Labor Agreements

Such requirements are not merely unneeded. They are, in fact, quite damaging. They distort the purposes of PLAs, restrict competition, and have a number of unintended consequences. Government-mandated PLAs typically require contractors – especially but not exclusively open shop contractors – to make fundamental changes in the way they do business, such as adopting different work rules, hiring practices, and wages and benefits, as well as restraining their ability to use their current employees on the project. These changes increase the contractor's risk profile for the project. Among other things, the typical PLA will require open shop contractors: (1) to pay for benefits that their employees will never see, (2) to carve up the work that one multi-trade worker would normally perform among several different unions members, (3) to limit the universe of subcontractors to which they can turn, and (4) to comply with unfamiliar work rules. Preparing and submitting a bid or proposal for a government contract is an expensive process, and open shop contractors have to weigh that cost against their limited chances for success. The reality is that many make the rational decision to forgo the expense and the risk. Therefore, the effect of government mandates for PLAs is to decrease the number of potential bidders and competition, which leads to increased costs to the government and, ultimately, the taxpayers. This is contrary, both in letter and spirit to the March 4, 2009, Presidential Memorandum to the Heads of Executive Departments and Agencies on Government Contracting which states:

> The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers....When awarding Government contracts, the Federal Government must strive for an open and competitive process.

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiates the PLA terms and when the PLA must be submitted to the agency.

The practice by some contracting agencies of requiring all offerors on a project to negotiate a PLA and submit an executed copy of the agreement with their bids, 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 relationship with the unions there and do not know how to begin to comply with the requirement. What's more, the contractors in such a situation cannot control whether they are able to fulfill the negotiations obligation because they have no means to require labor organizations to negotiate, much less agree, with them.

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. 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, unions will rarely have any obligation to reply. Absent a 9(a) relationship, they have no duty to negotiate, and in no circumstances do they have a duty to actually settle on an agreement. The unions are free to ignore open shop contractors and even the union contractors with whom they merely have pre-hire agreements. The unions are equally free to vary the terms and conditions of the agreements they will sign with different contractors. They have no obligation to offer the same terms and conditions to each and all of them. When and where the government mandates a PLA, the building trade unions have the broad discretion to determine which contractors will qualify to perform the work and even to pick the winner.

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.

Despite the repeated claims that PLAs will "promote economy and efficiency in Federal procurement," it is clear the potential for a government-mandated PLA to raise project costs, create inefficiencies, restrain competition, and be vulnerable to legal challenge should not be underestimated.

The Potentially Harmful Effect of PLAs on Union Contractors

AGC would hasten to add that government mandates for PLAs can also harm union contractors in unique ways. They deprive such contractors of the opportunity to work under the area-wide agreements that these contractors have already succeeded in negotiating. Over half of AGC's 95

chapters negotiate area-wide agreements with the building trade unions, and many of these state-of-the-art agreements already provide the benefits that PLAs are said to provide, such as:

- Common or similar grievance and arbitration procedures;
- Common or similar jurisdictional dispute resolution procedures;
- Common work rules, hours of employment, holidays and shift provisions; and
- No-strike, no-lockout clauses.

Under these circumstances, a PLA is unlikely to offer any economic advantages to the government and may well make matters worse. Government mandates insulate the unions from any economic pressure they would otherwise feel. The unions are free to demand whatever they want, knowing that the contractors have to either meet their demands or disqualify themselves for the work. Either way, union members will get the jobs.

Government mandates can also disrupt the local bargaining over the area-wide agreements. PLAs enable unions to strike the work that PLAs do not cover and still keep their members working. Particularly where inexperienced parties are handling the negotiations, PLAs can introduce wage rates, or reintroduce work rules, that will make it harder for union contractors to compete in the future. Within the union sector of the construction industry, there is considerable concern that government mandates for PLAs will empower the unions to bypass the local bargaining that remains critical to union contractors' future success.

Achieving Economy and Efficiency in Federal Procurement

In May of 1998, the Government Accounting Office (GAO) reported that it could not document any of the alleged benefits of mandating PLAs for federal projects, and expressed great doubt that anyone would ever succeed in doing so (*Project Labor Agreements: The Extent of Their Use and Related Information,* GAO/GGD-98-82). It is therefore far from surprising that President Obama's Executive Order on such agreements stopped well short of making any categorical claims that such agreements will always or necessarily advance the government's interest in economy and efficiency in federal procurement. The Executive Order merely provides that Federal agencies "may" require project labor agreements on a "project-by-project basis" where certain conditions are met.

Nevertheless, AGC believes that the Executive Order goes too far, and AGC urges Congress to prevent federal agencies from ever mandating a PLA. As explained, Federal agencies do not need such mandates to reap the benefits of any PLA that will actually improve economy and efficiency in federal procurement. Their primary effects are to distort the purposes of PLAs, to empower the building trade unions to play a wholly unwarranted role in the selection of federal contractors, to restrict the competition for federal work and to erode the local bargaining that remains critical to union contractors' future success.

But even worse is the confusion that the Executive Order has caused among the Federal agencies.

Federal Agency Execution of Executive Order 13502

The GSA Experience

On April 30, 2010, GSA issued *Procurement Instructional Bulletin 10-04: Guidance on the Use of Project Labor Agreements in Construction Projects Greater than $25,000,000* ("The Bulletin"). AGC has several concerns over the manner in which this bulletin requires GSA's regional offices to implement the Executive Order. Our concerns over the Bulletin are summarized in four key areas:

- GSA has conclusively and unilaterally presumed that project labor agreements reduce project risks on *all* projects over $25 million, directly conflicting with the Executive Order and its requirement for a project-by-project evaluation of the merits of utilizing a PLA;
- GSA exceeded its authority granted by the Executive Order and the FAR rulemaking by granting a 10 percent evaluation preference for projects that include a PLA;
- The Bulletin disregards the Congressional mandate that all projects be subject to full and open competition, except in those rare situations where Congress itself has made an exception; and
- The Bulletin was a significant change in GSA's procurement policy and should have put out for public comment.

AGC believes that the GSA's PLA policy runs afoul of the Competition In Contracting Act (CICA) as well as the Federal Acquisition Regulation (FAR). AGC also believes that a PLA preference and PLA mandate may run afoul of other laws as well.

The Army Corps of Engineers Experience

On October 15, 2010, the U.S. Army Corps of Engineers (USACE) issued *Procurement Instruction Letter (PIL) 2011-01, USACE Policy Relating to the Use of Project Labor Agreements for Federal Construction Projects*. The PIL rightly instructs contracting officers to do the following:

- Consider the potential for a PLA on projects only exceeding $25 million;
- Prepare a memorandum documenting justification for the use of a PLA on a project-by-project basis; and
- Require USACE districts to undertake a labor market survey as part of their PLA evaluation process.

AGC believes that the USACE has taken the realities of the construction marketplace in greater account, and recognizes the potential costs as well as benefits of a *government-mandated* PLA.

H.R. 735 –The "Government Neutrality in Contracting Act"

AGC has long supported Representative Sullivan's legislation, which is intended to ensure that construction projects are awarded based on price and quality and not based on the labor practices of a particular contractor. Our analysis tells us that the legislation, if enacted, would in effect nullify President Obama's executive order on government-mandated PLAs.

We offer two suggestions to make this legislation achieve the true neutrality that it clearly seeks:

1) Section 3(d)(2) should be amended to ensure that any exemption from the legislation should not be based on the possibility or existence of a labor dispute concerning either *signatory or* non-signatory contractors, or the employees working on a project.
2) The legislation should also be amended to ensure that the awarding of projects should not affect the lawfulness of otherwise lawful collective bargaining agreements (such as area-wide agreements) authorized by the National Labor Relations Act.

We urge the Committee to take action on this legislation and report it out as soon as possible for full consideration by the House of Representatives.

Concluding Remarks

AGC thanks the Committee for its consideration of our testimony. To reiterate, AGC opposes any Federal policy that would effectively discriminate against either open shop or union contractors in the competition for or performance of publicly funded construction projects. The construction industry is healthiest when both of these sectors thrive, and government procurement is most economical and efficient when contracts are awarded with impartiality and with preferential treatment for none.

Mr. KELLY [presiding.] I want to thank all the witnesses for being here.

Mr. Wu, it's good to see somebody who has spent a little bit of time in Pittsburgh in the room besides myself. I saw your time at Carnegie Mellon.

And Professor Tuerk, I think your background kind of speaks for itself. I don't know that anybody could question what you've done.

Mr. TUERK. Thank you Congressman. I wonder if I could make a correction, though. I inadvertently said Dr. Steel and I meant Dr. Phillips. I have no idea why I said that, but I would like to get the name right.

Mr. KELLY. OK. That's fine. We will note that.

I recognize myself for 5 minutes. And I think this is critical because this hearing today is not about unions or nonunions. It's not about who gets the bid or doesn't get the bid. It's about fairness. And certainly if the President's Executive order is based on something that he thought was unfair—anybody in the panel, is there any instance anywhere that would have caused the President to issue this Executive order? I can't find anything in any of the testimony on any of the witnesses that would suggest that there was a problems that existed in the bidding process. And having done many RFPs myself and looking at it, I tend to feel the other way; that it is extremely exclusionary and it does tilt the playing field.

So if anybody—and Mr. Baskin, Mr. Tuerk, Mr. Wu, Mr. Kennedy, if anybody could offer anything that would perhaps shed some light on why this is in fact issued and why does it have any importance as to what is it we are trying to do if it's about fairness?

Mr. BASKIN. If I can respond first, I may also speak to it. But as indicated and as we've heard from the witnesses earlier, they have no specific labor problems on previous contracts procured under the Bush order. There was no problem. I think it's been referred to as a solution in search of a problem. The only justification for it has to be political because of the way it was implemented, with no outreach and with no identified real-world circumstances in which problems had arisen without PLAs being mandated by the government. It's just totally unnecessary, and contrary to decades of law as well as the Competition in Contracting Act that requires full and open competition on Federal projects.

Mr. KELLY. Professor.

Mr. TUERK. We did all we could to find out if there were any contracts under the Bush administration that suffered for a lack of a PLA and simply couldn't come up with one. It was not only the FOIA letters that ABC sent out, we combed through government data bases, looked over survey results from a national survey, everything we could to find out if there were any, and there simply were not.

And I do remember a campaign speech that President Obama made in which he promised project labor agreements. So again I think that's probably the best explanation for the Executive order.

Mr. WU. Well, Wu & Associates, frankly, we would not bid a project that would have a project labor agreement on it. The previous testimony where the GSA procurement officer stated that there was a 10-point system built into their RFP process would cer-

tainly raise our eyebrows in our office as we look for fair bidding opportunities in the Federal public and State sectors. That would be something that would jump out right away, and it would probably be a project that we would not pursue; because I would agree with you, Mr. Kelly, that on the private-sector side, every dollar matters. To put together a bid in the millions of dollars takes a tremendous amount of time and resources for our company. And if there is the slightest disadvantage going in, it would strongly discourage us from bidding the project.

Mr. KELLY. Mr. Kennedy.

Mr. KENNEDY. I'm not aware of any systemic problems that the Federal Government suffered during the Bush administration as a result of its Executive order. That Executive order made it abundantly clear that construction contractors were free to pursue project labor agreements where contractors, knowing the work they had to do, knowing the commitments that they had to make, believed that a PLA would be in their interest. With that said, I believe we had an era of very open competition. It was healthy for all sides of the industry.

Mr. KELLY. Mr. Wu, just following up on this, because I have done the same thing you have. And when you get these RFPs, you can be excluded from your—your bid can be thrown out if you don't dot all the I's and cross all the T's.

And what has always bothered me, since getting here 5 months ago, is we have a continual parade of people who have actually never done what it is that they're regulating and people who have never actually had to have their own skin in the game, determining how these bids are going to be structured and how they're going to be awarded. And I find that completely troublesome.

Just so the general public knows—because not all of us have the opportunity to do this. When you do submit a bid, 10 points. Critical? Not critical?

Mr. WU. It's absolutely critical. When we are investing thousands and thousands of dollars of our own overhead, project managers, estimators, support staff to put a bid together, a multimillion-dollar bid could take 3 or 4 weeks for our office to put together, working along with our subcontractors as well. We can't afford to invest that time and money into an RFP process where we feel like there's any chance that we would be at a disadvantage because there are other opportunities out there with a disadvantage not present. I could go bid another project.

Mr. KELLY. So the addition of this language does not encourage a wider universe of bidders. It actually does limit those who would take the time. I have friends that it cost them $50,000 to prepare a bid. This is private industry. I can't imagine the hoops they would have to jump through here to get it ready, and knowing at the end of the day if they don't include the PLA language, they're at a 10-point disadvantage right off the bat. So I thank you.

Mr. LANKFORD [presiding]. I recognize Mr. Murphy for 5 minutes of questions.

Mr. MURPHY. Thank you very much, Mr. Chairman. Mr. Chairman, I would like to submit a letter to the record from the president of Toyota, and in it he says this: Toyota has used and required project labor agreements on many of their biggest and most impor-

tant projects. He says that Toyota has consistently employed project labor agreements for our major construction projects, and we could not have been more pleased with the results. To date, approximately 45 million man hours have been invested in the construction of nine automobile truck and component plants in the United States. In each and every instance, these projects were completed on time and on budget and with an exemplary safety record.

Toyota, as well as major American and international companies like Boeing and Wal-Mart, have made the decision to require project labor agreements because they think it's the best business practice for them.

So let me ask this question to each of the panel members. And I just need a yes or no answer. I have only got 5 minutes here. Do you think we should pass legislation as a Congress that would prohibit the requirement of PLAs in private sector construction work? I just need a yes or no answer to that question.

Mr. BASKIN. No. Nobody is asking for that—well, I'm not.

Mr. MURPHY. I'm asking, would you—would you support that?

Mr. BASKIN. No.

Mr. MURPHY. Would you support that legislation?

Mr. TUERK. Certainly not.

Mr. WU. No, I would not.

Mr. KENNEDY. Where a private owner is backing a decision to require a PLA with its own resources and has the flexibility to use delivery systems that are not available in the public sector, I see no reason why the government should step in and interfere with that.

Mr. MURPHY. Thank you, Mr. Kennedy.

So I hear a lot of talk from my Republican friends and from my conservative friends about how the government should run more like a business. But what you are proposing to do here, even in an act that has some nice words about neutrality, is to take away from the Federal Government a tool that a lot of private companies use, which is a decision that they make that a requirement that PLAs be used in construction projects is good for their particular project.

What we're asking here today is for that to be taken away from the Federal Government. And as we've heard over and over and over again, there's nothing mandating that this be used project by project. All the Federal Government does is just encourage a look at whether a PLA would be worthwhile, as many private companies have. So I'm searching here for why we have a double standard, and we're all searching for why we have a panel with only witnesses that are critical of PLAs. So I look to the underlying political motives here.

Mr. Tuerk, you said in your testimony that you are not here out of an anti-union bias, that this isn't about union; this is about the best use of taxpayer dollars.

But Mr. Tuerk, just about 2 months ago, you wrote a piece entitled "Let's Put an End to all Collective Bargaining." And in it you wrote, referring to what was going on in Wisconsin, "The Wisconsin episode is, therefore, just a leading edge of a political movement that could, if conducted skillfully, make it possible to unravel public support for the unions in so dramatic a fashion as to change the

face of American politics. This would indeed be a wonderful thing to behold."

So let me ask you this. Do you stand by this blog post, this article that you wrote in which you called for an end to all collective bargaining?

Mr. TUERK. Well, I most certainly do. But I want to make a distinction here. I am here limiting my remarks to this particular piece of legislation. And the committee is of course free to evaluate my remarks here on the basis of things that I have said elsewhere, like this, for example. But what I'm presenting here are opinions based on research, not just my broader opinions about how collective bargaining fits into 21st century America.

So yes, I think that we're finding out in State after State the harm that collective bargaining has done when it's allowed between government workers and their governments. Even Massachusetts has faced up to the reality and has done something about the excesses of union power within the—among government workers. And yes, I think that collective bargaining is a tool whose time has passed.

Mr. MURPHY. Thank you. And so I'm asking that question because your work hasn't just been criticized by the one author that we cited here. It's been criticized over and over. So I'm trying to figure out why not only we have a panel that seems to be rigged in favor of the legislation that we're debating, but also why we seem to have studies put before us that aren't based in good empirical and statistical requirements. And I look at your public record. I look at the agenda you clearly have to end collective bargaining at large in this country. And I put it together with what seems to be a systemic approach on behalf of the Republican majority and on behalf of proponents of organized labor across this country, whether it be in this committee or in State legislatures across the country, to take away from individuals the ability to collectively bargain and to take away from government the very tool that private companies use on a regular basis; which is, if they believe that it is in the best interest of that particular bid to require a project labor agreement—that's all the Executive order does—and because this seems to be a hearing that is much to do about nothing, I bring to the table a political agenda which seems hidden but incredibly relevant.

With that, I will yield back the balance of my time.

Mr. TUERK. May I respond?

Mr. LANKFORD. Just a moment. I do want to accept, without objection, the Toyota letter into the record that you mentioned earlier, that you requested to have in the record.

[The information referred to follows:]

Nancy Wohlforth, OPEIU

TOYOTA

February 25, 2011

Mr. Mark H. Ayers
President
Building and Construction Trades Department, AFL-CIO
815 16th Street, NW, 6thh Floor
Washington, DC 20006

Dear President Ayers:

As you know, this year marks the 25th Anniversary of the groundbreaking for Toyota's first North American vehicle assembly plant, located in Georgetown, Kentucky. In light of this milestone, I wanted to take a moment to thank the Building and Construction Trades Department of the AFL-CIO for its contribution to Toyota's success in North America. We are extremely proud of the fact that, to this day, representatives from all manner of industries from around the world come to our Georgetown plant to learn how the time-tested experience of Toyota combines with Kentucky ingenuity at this state-of-the-art facility. And for that, we owe a special debt of gratitude to the skilled men and women of America's Building Trades Unions, who constructed not only the Georgetown facility, but each and every one of our assembly plants in the U.S. and Canada.

Our production system has been consistently recognized as a model for the automobile industry, and we're quite proud of how it helps us to make some of the finest automobiles in the world. And for 25 years now, we have been equally proud to have the skills, expertise and productivity of your members deployed on our behalf.

Large-scale construction projects pose unique challenges for corporations such as ours that maintain the highest standards of safety, efficiency and productivity. To address these challenges, Toyota has consistently employed Project Labor Agreements for our major construction projects, and we could not have been more pleased with the results.

To date, approximately 45 million man-hours have been invested in the construction of nine automobile, truck and component plants in the United States and Canada, with another vehicle assembly plant currently under construction in Mississippi. In each and every instance, those projects were completed "on time and on budget," and with an exemplary safety record. And the Mississippi project is proving to be just as admirable. As we approach this 25 year milestone, I

can say without any equivocation that project labor agreements, combined with the pride, performance and professionalism of America's Building Trades Unions have proven to be a valuable tool to meet Toyota's economical and efficient construction process.

Toyota's global market success is attributable to a never-ending pursuit of quality and continuous improvement. And over the course of 25 years, we have found that America's Building Trades Unions share that same commitment to overall excellence.

Thank you, and your members, for your support over the past quarter-century. We look forward to continuing our relationship and to our continued mutual success.

Sincerely,
Tetsuo Agata
President

Mr. LANKFORD. Mr. Tuerk, it is actually my moment for questioning at this time. So, yes, you would be free to be able to respond to that.

Mr. TUERK. First of all, the quality of our statistical work that has nothing to do with anybody's opinions about collective bargaining or political issues. I am not responsible for the invitations that went out for this meeting. Had I had anything to say about it, I would have wanted Dr. Phillips here so I could have rebutted his attack on our works, as bizarre as it is.

Finally, the work that we have done has in fact appeared in a peer-reviewed journal. Our study of Massachusetts was published by an online journal out of Bentley University. So the idea that these numbers that we are coming up with are just made up out of thin air is itself completely wrong. We have a lot at stake. We are a Ph.D.-granting Department of Economics that survives and prospers only by virtue of the integrity of our work. Our work has been out there for years. And if anybody wants to find problems with it, they are free to. Dr. Phillips has tried. His attacks, I think, are wrong. Again, those are the kinds of things that we could argue in another forum.

Mr. LANKFORD. Thank you.

Mr. BASKIN. Mr. Chairman, may I respond to the Congressman's question that was unanswered about why all the members on the panel said that we don't need legislation to prohibit private sector PLAs; and that is because the National Labor Relations Act already has protections about them to say that they must be voluntarily entered into, not coerced, and only by employers in the construction industry. And what we have going on here under the Obama order is a mandate. It is coercion of contractors to private employers on Federal agencies' projects in which the Executive order encourages those agencies to in fact mandate or discriminate in favor of them. And that is what the current laws prohibit. So that is why we don't need a change in those laws.

Mr. MURPHY. Mr. Chairman, the gentleman is responding directly to me. Would you yield?

Mr. LANKFORD. I would yield 1 minute.

Mr. MURPHY. You've used a lot of words here. You used "corruption" several times in your testimony. You have now used "coercion." I think we need to tone down the level of rhetoric here when we're talking about an Executive order that simply asks individual agencies to consider PLAs when appropriate.

I think by any reading of that it's, A, hard to suggest that there's anything that is coercive about that Executive order. And certainly in your testimony in which you suggested that it corrupted the process, I think those are strong words with legal ramifications that you should be very careful about using before the U.S. Congress.

Mr. BASKIN. If I may respond.

Mr. LANKFORD. Yes, you may.

Mr. BASKIN. They are merited, because we have been seeing the Federal procurement process divorced from the rule of law. For decades it was established that labor—backing labor affiliation was irrelevant to responsibility of contractors. And by attaching that to this process, it is rank favoritism. It is not permissible under the

law. And until it stops, we have to say what it is, if anything is to be done about it.

Mr. LANKFORD. Mr. Baskin, are you seeking an advantage in the contracting process by saying that PLAs are a neutral ground? Is that some advantage that you're seeking?

Mr. BASKIN. "Neutrality" is the word.

Mr. LANKFORD. So at this point, based on your testimony before, it is not an issue if you're bidding against someone as a PLA or a non-PLA, union shop, non-union shop. That is irrelevant to you as long as it's a level playing field when you go in to actually do the bidding.

Mr. BASKIN. Yes. ABC has members who have signed union contracts; so does AGC; and many more who have not, because 87 percent of the industry is nonunion. But the merit shop philosophy is: Work should be awarded and performed regardless of labor affiliation. That should have nothing to do with it. May the best, most responsible contractor win, do the best work for the best price. That's all we're looking for. And that's all the Federal taxpayers should be looking for.

Mr. LANKFORD. Thank you.

Mr. Wu, you had mentioned before that you've actually backed out of a contract during the bidding process when you saw the direction it was going; that it was really going to take a PLA contractor to be able to do that. That is obviously anecdotal evidence for you personally. Are there other contractors that you've related with to say, I just don't bid on Federal contracts when they're over $25 million and I know those are the specifications?

Mr. WU. I'm sorry; can you repeat that?

Mr. LANKFORD. Have you spoken to other contractors as well on these contracts that are out there for bid over $25 million that had the PLA encouragement in them, that are also saying, besides yourself, I'm just not going to do that bid, it's not worth the trouble?

Mr. WU. Yes. I encounter contractors all the time on a general contracting level and a subcontracting level that simply will not bid projects if a projects labor agreement is part of the RFP process.

Mr. LANKFORD. So it is your belief that it is reducing the amount of competition in the field.

Mr. WU. I'm very convinced of that. I've seen it in the bidding process. I've seen the amount of bidders that have turned out. I've talked to my own subcontractors as to whether or not they're pursuing PLA projects. And many, if not all of them, have been discouraged.

Mr. LANKFORD. Thank you.

I would like to honor Mr. Cummings with 5 minutes of questions.

Mr. CUMMINGS. Thank you very much.

Mr. Baskin, I want to followup on some questions. I just want to make a statement with regard to something my colleague, Mr. Murphy, said. As a fellow lawyer and one who has represented many people who have been accused wrongfully, and all of us I think have been trained with regard to certain words and the use of them and their legal ramifications, I was kind of surprised that you, of all these witnesses, you're the only one that talked about corruption.

I think we have to be kind of careful with those words. I really do. And I don't say that—it just kind of surprised me. And I don't know the full basis of it. I heard your explanation to Mr. Murphy. But I have to tell you that—you're from Venable? Is that your firm?

Mr. BASKIN. Yes.

Mr. CUMMINGS. I just think that we need to be careful with those words.

Last year, the Ninth Circuit rejected claims that a PLA entered into by LA and Orange Counties violated the due process rights of nonunion contractors. Furthermore, earlier this year the U.S. Supreme Court denied certiorari of a case challenging the seminal Boston Harbor case, where the court upheld the use of PLAs of public projects.

Mr. Tuerk, I found it very interesting that you helped me make my point. You said that you did not like the way Dr. Phillips addressed the issues. And, basically, not putting words in your mouth, but this is the impression I got; it sounds like you're almost wishing he was here so that you could look in his face and say, You're inaccurate. I'm sure you would have preferred that, would you have not?

Mr. TUERK. Yes. I wouldn't embarrass my host. But, yes, if I'm going to be accused of economic malpractice by another academic, I'd like to have him in the room.

Mr. CUMMINGS. Certainly. And we would have, too. That's why I said you made my very point. That's why we—you heard the discussion earlier about how we were concerned on this side that we were not able to call him. And he was anxious to see you. He was anxious to look you in the face and say what he had to say. But we were denied that right.

I also understand that the majority entered into the record instances in which the administration testified, without other witnesses. And that is not surprising. In this subcommittee, the most recent hearing, Administrator Sunstein testified by himself, and the minority did not protest because he was not deemed the minority witness by dictate of the majority.

What is unprecedented is that the minority accept the administration's witness as their own, when the majority has invited them and invited other private sector witnesses. I would like to make that very, very clear. And there are instances where this happened in this way, the way this happened today; that is, the denial of a witness. Under these circumstances, I would like to—I hope the chairman, I know you said you're going to be looking into it, and I look forward to hearing that from you.

And I want to make it clear the reason why we are spending so much time on this is because all of you I think want sunshine. You're talking about a fair process. That's all you all have been talking about—fair process. Somebody, I think it was you, Mr. Baskin, talked about level playing field. Well, guess what? We want a level playing field, too.

And so, Mr. Chairman—we had extensive testimony, Mr. Tuerk, and one of the things—from Dr. Phillips, that is—and I hope that one day, since we have now had two hearings on this issue, and at the rate we're going, I'm sure we'll have more, so perhaps the next time we will have a chance to bring you back, Mr. Tuerk. I

think, Mr. Baskin, you've done two. You're on a roll. And so we will—well, I just want to say one other thing to you, Mr. Tuerk. I think somebody over on the other side said something; they were picking and choosing from the report of the GSA, and one of the things that they did say, and they were talking about cost, they said, "However, these studies"—talking about the sunshine study—"did not address the cost impact of scope, timing, markets, schedule, or quality variables. These variables would contribute to increased cost, thereby reducing the level of cost increases that Beacon Hill argue are all strictly attributed to PLAs." And that is on page 4 of the report.

With that, Mr. Chairman, I would yield back.

Mr. BASKIN. Mr. Chairman, if I may respond to the comment that was directed at me about the use of the word "corruption," because I do want to clarify I'm not accusing the President of committing a crime. What I referred to in my statement—I just went back and checked it—is corruption of the system in the matter of data corrupting a computer system. It refers to a messing up of the system. I certainly stand behind that. And it does involve the element of coercion, which I referred to earlier, when an agency mandates that contractors accept these things as a condition of performing the work.

So I appreciate the opportunity to clarify.

Mr. CUMMINGS. Mr. Chairman, just 10 seconds.

Mr. LANKFORD. Yes, sir.

Mr. CUMMINGS. I want to thank you for clarifying that because it is very, very important. I say it all the time in this committee. I hate for people to come in here and say things, and then it's like left on a wall, not to be erased ever. The press picks that up. The next thing you know, your wife is reading a story that you didn't even mean, saying that "My husband accused the President of the United States of being corrupt." I know that's not what you said. That's why I want to clear these things up. OK.

Mr. BASKIN. Appreciate the opportunity.

Mr. LANKFORD. Thank you. And thank you to all of you for coming. Very grateful for your time in your very busy schedules and for you being able to be here as part of this conversation.

With that, this committee stands adjourned.

[Whereupon, at 11:48 a.m., the subcommittee was adjourned.]

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