November 15, 2017

Chairman Ron Johnson
Homeland Security & Government
Affairs Committee
U.S. Senate
340 Dirksen Senate Office Building
Washington, D.C. 20510

Chairman Trey Gowdy
Oversight & Government Reform Committee
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

RE: Agency Guidance for Congressional Review Act Consideration

Dear Chairmen Johnson and Gowdy,

On behalf of the Associated General Contractors of America, I urge you to utilize the Congressional Review Act (CRA) to repeal unnecessary, unworkable, unreasonable and unfounded federal agency policies and guidance.

The CRA allows Congress to overturn a federal agency rule. The definition of a "rule" subject to the CRA is broad with limited exception. As such, some agency actions—e.g., guidance, policy statements, reporting/paperwork requirements—that are not subject to notice and comment rulemaking under the Administrative Procedures Act may still be considered a rule under the CRA and are suitable for repeal. On October 19, 2017, the U.S. Government Accountability Office (GAO) confirmed that agency guidance "is a general statement of policy and is a rule under the CRA."

Federal agencies' failure to meet the procedural requirements of the CRA likely means that their guidance going back to the enactment of the statute in 1996 could be considered for repeal. The limited congressional review period of 60 legislative or session days commences upon a federal agency's submission of a report on the guidance to each House of Congress and the Comptroller General. Given that federal agencies have largely misinterpreted the broad definition of a "rule" under the CRA, many—if not all— agencies have failed to submit such reports for their guidance and policy documents. As a result, the 60 day time limit for congressional review has never tolled.

As such, please find below and enclosed the three federal agency policy and guidance documents that adversely impact the construction industry, fall within the confines of the CRA's requirements, and merit CRA consideration:

- U.S. Occupational Safety & Health Administration's Multi-Employer Citation Policy;
- U.S. General Services Administration's Bid Preference Guidance for Project Labor Agreements; and
- U.S. Department of Justice's Guidance on Individual Accountability for Corporate Wrongdoing (also known as the Yates Memo).

These agency guidance and policies excluded, AGC strongly cautions Congress to use the CRA very carefully for such policies. The CRA is a blunt tool. Once used, an agency may not reissue a rule in substantially the same form or a new rule that is substantially the same, unless specifically authorized by Congress.

Agency guidance often serves to provide more clear and concise information to the regulated community and the regulators on how regulations will be enforced. Hamstringing an agency's ability to issue guidance could lead to serious confusion within industry and a proliferation of inconsistent enforcement interpretations within the various offices of a single agency. Even guidance that may be considered overly burdensome can sometimes be better than no guidance at all, because it provides industry with certainty.

AGC and its members appreciates your continuing efforts to cut regulatory red tape. We look forward to further discussing how to do so using the CRA as explained above, or through other legislatively available means.

Sincerely,

James V Christianson

Jimmy Christianson
Regulatory Counsel
Associated General Contractors of America

Encl.

cc: House Speaker Paul Ryan
Senate Majority Leader Mitch McConnell

- **Record Type:** Instruction
- **Directive Number:** CPL 02-00-124
- **Old Directive Number:** CPL 2-0.124
- **Title:** Multi-Employer Citation Policy.
- **Information Date:** 12/10/1999

OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 2-0.124	**EFFECTIVE DATE:** December 10, 1999
SUBJECT: Multi-Employer Citation Policy	

ABSTRACT

Purpose: To Clarify the Agency's multi-employer citation policy

Scope: OSHA-wide

References: OSHA Instruction CPL 2.103 (the FIRM)

Suspensions: Chapter III, Paragraph C. 6. of the FIRM is suspended and replaced by this directive

State Impact: This Instruction describes a Federal Program Change. Notification of State intent is required, but adoption is not.

Action Offices: National, Regional, and Area Offices

Originating Office: Directorate of Compliance Programs

Contact: Carl Sall (202) 693-2345
Directorate of Construction
N3468 FPB
200 Constitution Ave., NW
Washington, DC 20210

By and Under the Authority of
R. Davis Layne
Deputy Assistant Secretary, OSHA

TABLE OF CONTENTS

I. Purpose. This Directive clarifies the Agency's multi-employer citation policy and suspends Chapter III. C. 6. of OSHA's Field Inspection Reference Manual (FIRM).

II. Scope. OSHA-Wide

III. Suspension. Chapter III. Paragraph C. 6. of the FIRM (CPL 2.103) is suspended and replaced by this Directive.

IV. References. OSHA Instructions:

- CPL 02-00.103; OSHA Field Inspection Reference Manual (FIRM), September 26, 1994.
- ADM 08-0.1C, OSHA Electronic Directive System, December 19,1997.

V. Action Information

A. Responsible Office. Directorate of Construction.

B. Action Offices. National, Regional and Area Offices

C. Information Offices. State Plan Offices, Consultation Project Offices

VI. Federal Program Change. This Directive describes a Federal Program Change for which State adoption is not required. However, the States shall respond via the two-way memorandum to the Regional Office as soon as the State's intent regarding the multi-employer citation policy is known, but no later than 60 calendar days after the date of transmittal from the Directorate of Federal-State Operations.

VII. Force and Effect of Revised Policy. The revised policy provided in this Directive is in full force and effect from the date of its issuance. It is an official Agency policy to be implemented OSHA-wide.

VIII. Changes in Web Version of FIRM. A note will be included at appropriate places in the FIRM as it appears on the Web indicating the suspension of Chapter III paragraph 6. C. and its replacement by this Directive, and a hypertext link will be provided connecting viewers with this Directive.

IX. Background. OSHA's Field Inspection Reference Manual (FIRM) of September 26, 1994 (CPL 2.103), states at Chapter III, paragraph 6. C., the Agency's citation policy for multi-employer worksites. The Agency has determined that this policy needs clarification. This directive describes the revised policy.

A. Continuation of Basic Policy. This revision continues OSHA's existing policy for issuing citations on multi-employer worksites. However, it gives clearer and more detailed guidance than did the earlier description of the policy in the FIRM, including new examples explaining when citations should and should not be issued to exposing, creating, correcting, and controlling employers. These examples, which address common situations and provide general policy guidance, are not intended to be exclusive. In all cases, the decision on whether to issue citations should be based on all of the relevant facts revealed by the inspection or investigation.

B. No Changes in Employer Duties. This revision neither imposes new duties on employers nor detracts from their existing duties under the OSH Act. Those duties continue to arise from the employers' statutory duty to comply with OSHA standards and their duty to exercise reasonable diligence to determine whether violations of those standards exist.

X. Multi-employer Worksite Policy. The following is the multi-employer citation policy:

A. Multi-employer Worksites. On multi-employer worksites (in all industry sectors), more than one employer may be citable for a hazardous condition that violates an OSHA standard. A two-step process must be followed in determining whether more than one employer is to be cited.

1. Step One. The first step is to determine whether the employer is a creating, exposing, correcting, or controlling employer. The definitions in paragraphs (B) - (E) below explain and give examples of each. Remember that an employer may have multiple roles (see paragraph H). Once you determine the role of the employer, go to Step Two to determine if a citation is appropriate (NOTE: only exposing employers can be cited for General Duty Clause violations).

2. Step Two. If the employer falls into one of these categories, it has obligations with respect to OSHA requirements. Step Two is to determine if the employer's actions were sufficient to meet those obligations. The extent of the actions required of employers varies based on which category applies. Note that the extent of the measures that a controlling employer must take to satisfy its duty to exercise reasonable care to prevent and detect violations is less than what is required of an employer with respect to protecting its own employees.

B. The Creating Employer

1. Step 1: Definition: The employer that caused a hazardous condition that violates an OSHA standard.

2. Step 2: Actions Taken: Employers must not create violative conditions. An employer that does so is citable even if the only employees exposed are those of other employers at the site.

a. **Example 1**: Employer Host operates a factory. It contracts with Company S to service machinery. Host fails to cover drums of a chemical despite S's repeated requests that it do so. This results in airborne levels of the chemical that exceed the Permissible Exposure Limit.

Analysis: **Step 1**: Host is a creating employer because it caused employees of S to be exposed to the air contaminant above the PEL. **Step 2**: Host failed to implement measures to prevent the accumulation of the air contaminant. It could have met its OSHA obligation by implementing the simple engineering control of covering the drums. Having failed to implement a feasible engineering control to meet the PEL, Host is citable

for the hazard.

b. **Example 2:** Employer M hoists materials onto Floor 8, damaging perimeter guardrails. Neither its own employees nor employees of other employers are exposed to the hazard. It takes effective steps to keep all employees, including those of other employers, away from the unprotected edge and informs the controlling employer of the problem. Employer M lacks authority to fix the guardrails itself.

Analysis: **Step 1:** Employer M is a creating employer because it caused a hazardous condition by damaging the guardrails. **Step 2:** While it lacked the authority to fix the guardrails, it took immediate and effective steps to keep all employees away from the hazard and notified the controlling employer of the hazard. Employer M is not citable since it took effective measures to prevent employee exposure to the fall hazard.

C. The Exposing Employer

1. Step 1: Definition: An employer whose own employees are exposed to the hazard. See Chapter III, section (C)(1)(b) for a discussion of what constitutes exposure.

2. Step 2: Actions taken: If the exposing employer created the violation, it is citable for the violation as a creating employer. If the violation was created by another employer, the exposing employer is citable if it (1) knew of the hazardous condition or failed to exercise reasonable diligence to discover the condition, and (2) failed to take steps consistent with its authority to protect is employees. If the exposing employer has authority to correct the hazard, it must do so. If the exposing employer lacks the authority to correct the hazard, it is citable if it fails to do each of the following: (1) ask the creating and/or controlling employer to correct the hazard; (2) inform its employees of the hazard; and (3) take reasonable alternative protective measures. In extreme circumstances (e.g., imminent danger situations), the exposing employer is citable for failing to remove its employees from the job to avoid the hazard.

   a. **Example 3:** Employer Sub S is responsible for inspecting and cleaning a work area in Plant P around a large, permanent hole at the end of each day. An OSHA standard requires guardrails. There are no guardrails around the hole and Sub S employees do not use personal fall protection, although it would be feasible to do so. Sub S has no authority to install guardrails. However, it did ask Employer P, which operates the plant, to install them. P refused to install guardrails.

   Analysis: **Step 1**: Sub S is an exposing employer because its employees are exposed to the fall hazard. **Step 2**: While Sub S has no authority to install guardrails, it is required to comply with OSHA requirements to the extent feasible. It must take steps to protect its employees and ask the employer that controls the hazard - Employer P - to correct it. Although Sub S asked for guardrails, since the hazard was not corrected, Sub S was responsible for taking reasonable alternative protective steps, such as providing personal fall protection. Because that was not done, Sub S is citable for the violation.

   b. **Example 4:** Unprotected rebar on either side of an access ramp presents an impalement hazard. Sub E, an electrical subcontractor, does not have the authority to cover the rebar. However, several times Sub E asked the general contractor, Employer GC, to cover the rebar. In the meantime, Sub E instructed its employees to use a different access route that avoided most of the uncovered rebar and required them to keep as far from the rebar as possible.

   Analysis: **Step 1**: Since Sub E employees were still exposed to some unprotected rebar, Sub E is an exposing employer. **Step 2**: Sub E made a good faith effort to get the general contractor to correct the hazard and took feasible measures within its control to protect its employees. Sub E is not citable for the rebar hazard.

D. The Correcting Employer

1. Step 1: Definition: An employer who is engaged in a common undertaking, on the same worksite, as the exposing employer and is responsible for correcting a hazard. This usually occurs where an employer is given the responsibility of installing and/or maintaining particular safety/health equipment or devices.

2. Step 2: Actions taken: The correcting employer must exercise reasonable care in preventing and discovering violations and meet its obligations of correcting the hazard.

   a. **Example 5:** Employer C, a carpentry contractor, is hired to erect and maintain guardrails throughout a large, 15-story project. Work is proceeding on all floors. C inspects all floors in the morning and again in the afternoon each day. It also inspects areas where material is delivered to the perimeter once the material vendor is finished delivering material to that area. Other subcontractors are required to report damaged/missing guardrails to the general contractor, who forwards those reports to C. C repairs damaged guardrails immediately after finding them and immediately after they are reported. On this project few instances of damaged guardrails have occurred other than where material has been delivered. Shortly after the afternoon inspection of Floor 6, workers moving equipment accidentally damage a guardrail in one area. No one tells C of the damage and C has not seen it. An OSHA inspection occurs at the beginning of the next day, prior to the morning inspection of Floor 6. None of C's own employees are exposed to the hazard, but other employees are exposed.

   Analysis: Step 1: C is a correcting employer since it is responsible for erecting and maintaining fall protection equipment. **Step 2:** The steps C implemented to discover and correct damaged guardrails were reasonable in light of the amount of activity and size of the project. It exercised reasonable care in preventing and discovering violations; it is not citable for the damaged guardrail since it could not reasonably have known of the violation.

E. The Controlling Employer

1. Step 1: Definition: An employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them. Control can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice. Descriptions and examples of different kinds of controlling employers are given below.

2. Step 2: Actions Taken: A controlling employer must exercise reasonable care to prevent and detect violations on the site. The extent of the measures that a controlling employer must implement to satisfy this duty of reasonable care is less than what is required of an employer with respect to protecting its own employees. This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of trade expertise as the employer it has hired.

3. Factors Relating to Reasonable Care Standard. Factors that affect how frequently and closely a controlling employer must inspect to meet its standard of reasonable care include:

   a. The scale of the project;

   b. The nature and pace of the work, including the frequency with which the number or types of hazards change as the work progresses;

   c. How much the controlling employer knows both about the safety history and safety practices of the employer it controls and about that employer's level of expertise.

   d. More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance. Greater inspection frequency may also be needed, especially at the beginning of the project, if the controlling employer had never before worked

with this other employer and does not know its compliance history.

e. Less frequent inspections may be appropriate where the controlling employer sees strong indications that the other employer has implemented effective safety and health efforts. The most important indicator of an effective safety and health effort by the other employer is a consistently high level of compliance. Other indicators include the use of an effective, graduated system of enforcement for non-compliance with safety and health requirements coupled with regular jobsite safety meetings and safety training.

4. Evaluating Reasonable Care. In evaluating whether a controlling employer has exercised reasonable care in preventing and discovering violations, consider questions such as whether the controlling employer:

a. Conducted periodic inspections of appropriate frequency (frequency should be based on the factors listed in G.3.);

b. Implemented an effective system for promptly correcting hazards;

c. Enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

5. Types of Controlling Employers

a. Control Established by Contract. In this case, **the Employer Has a Specific Contract Right to Control Safety**: To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

(1) **Example 6:** Employer GH contracts with Employer S to do sandblasting at GH's plant. Some of the work is regularly scheduled maintenance and so is general industry work; other parts of the project involve new work and are considered construction. Respiratory protection is required. Further, the contract explicitly requires S to comply with safety and health requirements. Under the contract GH has the right to take various actions against S for failing to meet contract requirements, including the right to have non-compliance corrected by using other workers and back-charging for that work. S is one of two employers under contract with GH at the work site, where a total of five employees work. All work is done within an existing building. The number and types of hazards involved in S's work do not significantly change as the work progresses. Further, GH has worked with S over the course of several years. S provides periodic and other safety and health training and uses a graduated system of enforcement of safety and health rules. S has consistently had a high level of compliance at its previous jobs and at this site. GH monitors S by a combination of weekly inspections, telephone discussions and a weekly review of S's own inspection reports. GH has a system of graduated enforcement that it has applied to S for the few safety and health violations that had been committed by S in the past few years. Further, due to respirator equipment problems S violates respiratory protection requirements two days before GH's next scheduled inspection of S. The next day there is an OSHA inspection. There is no notation of the equipment problems in S's inspection reports to GH and S made no mention of it in its telephone discussions.

Analysis: Step 1: GH is a controlling employer because it has general supervisory authority over the worksite, including contractual authority to correct safety and health violations. **Step 2:** GH has taken reasonable steps to try to make sure that S meets safety and health requirements. Its inspection frequency is appropriate in light of the low number of workers at the site, lack of significant changes in the nature of the work and types of hazards involved, GH's knowledge of S's history of compliance and its effective safety and health efforts on this job. GH has exercised reasonable care and is not citable for this condition.

(2) **Example 7:** Employer GC contracts with Employer P to do painting work. GC has the same contract authority over P as Employer GH had in Example 6. GC has never before worked with P. GC conducts inspections that are sufficiently frequent in light of the factors listed above in (G)(3). Further, during a number of its inspections, GC finds that P has violated fall protection requirements. It points the violations out to P during each inspection but takes no further actions.

Analysis: **Step 1**: GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over P. **Step 2:** GC took adequate steps to meet its obligation to discover violations. However, it failed to take reasonable steps to require P to correct hazards since it lacked a graduated system of enforcement. A citation to GC for the fall protection violations is appropriate.

(3) **Example 8**: Employer GC contracts with Sub E, an electrical subcontractor. GC has full contract authority over Sub E, as in Example 6. Sub E installs an electric panel box exposed to the weather and implements an assured equipment grounding conductor program, as required under the contract. It fails to connect a grounding wire inside the box to one of the outlets. This incomplete ground is not apparent from a visual inspection. Further, GC inspects the site with a frequency appropriate for the site in light of the factors discussed above in (G)(3). It saw the panel box but did not test the outlets to determine if they were all grounded because Sub E represents that it is doing all of the required tests on all receptacles. GC knows that Sub E has implemented an effective safety and health program. From previous experience it also knows Sub E is familiar with the applicable safety requirements and is technically competent. GC had asked Sub E if the electrical equipment is OK for use and was assured that it is.

Analysis: Step 1: GC is a controlling employer since it has general supervisory authority over the site, including a contractual right of control over Sub E. **Step 2:** GC exercised reasonable care. It had determined that Sub E had technical expertise, safety knowledge and had implemented safe work practices. It conducted inspections with appropriate frequency. It also made some basic inquiries into the safety of the electrical equipment. Under these circumstances GC was not obligated to test the outlets itself to determine if they were all grounded. It is not citable for the grounding violation.

b. Control Established by a Combination of Other Contract Rights: Where there is no explicit contract provision granting the right to control safety, or where the contract says the employer does not have such a right, an employer may still be a controlling employer. The ability of an employer to control safety in this circumstance can result from a combination of contractual rights that, together, give it broad responsibility at the site involving almost all aspects of the job. Its responsibility is broad enough so that its contractual authority necessarily involves safety. The authority to resolve disputes between subcontractors, set schedules and determine construction sequencing are particularly significant because they are likely to affect safety. (NOTE: citations should only be issued in this type of case after consulting with the Regional Solicitor's office).

(1) **Example 9**: Construction manager M is contractually obligated to: set schedules and construction sequencing, require subcontractors to meet contract specifications, negotiate with trades, resolve disputes between subcontractors, direct work and make purchasing decisions, which affect safety. However, the contract states that M does not have a right to require compliance with safety and health requirements. Further, Subcontractor S asks M to alter the schedule so that S would not have to start work until Subcontractor G has completed installing guardrails. M is contractually responsible for deciding whether to approve S's request.

Analysis: **Step 1:** Even though its contract states that M does not have authority over safety, the combination of rights actually given in the contract provides broad responsibility over the site and results in the ability of M to direct actions that necessarily affect safety. For example, M's contractual obligation to determine whether to approve S's request to alter the schedule has direct safety implications. M's decision relates directly to whether S's employees will be protected from a fall hazard. M is a controlling employer. **Step 2:** In this example, if M refused to alter the schedule, it would be citable for the fall hazard violation.

(2) **Example 10**: Employer ML's contractual authority is limited to reporting on subcontractors' contract compliance to owner/developer O and making contract payments. Although it reports on the extent to which the subcontractors are complying with safety and health infractions to O, ML does not exercise any control over safety at the site.

Analysis: **Step 1:** ML is not a controlling employer because these contractual rights are insufficient to confer control over the subcontractors and ML did not exercise control over safety. Reporting safety and health infractions to another entity does not, by itself (or in combination with these very limited contract rights), constitute an exercise of control over safety. **Step 2:** Since it is not a controlling employer it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

c. Architects and Engineers: Architects, engineers, and other entities are controlling employers only if the breadth of their involvement in a construction project is sufficient to bring them within the parameters discussed above.

(1) **Example 11:** Architect A contracts with owner O to prepare contract drawings and specifications, inspect the work, report to O on contract compliance, and to certify completion of work. A has no authority or means to enforce compliance, no authority to approve/reject work and does not exercise any other authority at the site, although it does call the general contractor's attention to observed hazards noted during its inspections.

Analysis: Step 1: A's responsibilities are very limited in light of the numerous other administrative responsibilities necessary to complete the project. It is little more than a supplier of architectural services and conduit of information to O. Its responsibilities are insufficient to confer control over the subcontractors and it did not exercise control over safety. The responsibilities it does have are insufficient to make it a controlling employer. Merely pointing out safety violations did not make it a controlling employer. NOTE: In a circumstance such as this it is likely that broad control over the project rests with another entity. **Step 2:** Since A is not a controlling employer it had no duty under the OSH Act to exercise reasonable care with respect to enforcing the subcontractors' compliance with safety; there is therefore no need to go to Step 2.

(2) **Example 12:** Engineering firm E has the same contract authority and functions as in Example 9.

Analysis: **Step 1:** Under the facts in Example 9, E would be considered a controlling employer. **Step 2:** The same type of analysis described in Example 9 for Step 2 would apply here to determine if E should be cited.

d. Control Without Explicit Contractual Authority . Even where an employer has no explicit contract rights with respect to safety, an employer can still be a controlling employer if, in actual practice, it exercises broad control over subcontractors at the site (see Example 9). NOTE: Citations should only be issued in this type of case after consulting with the Regional Solicitor's office.

(1) **Example 13**: Construction manager MM does not have explicit contractual authority to require subcontractors to comply with safety requirements, nor does it explicitly have broad contractual authority at the site. However, it exercises control over most aspects of the subcontractors' work anyway, including aspects that relate to safety.

Analysis: Step 1: MM would be considered a controlling employer since it exercises control over most aspects of the subcontractor's work, including safety aspects. **Step 2:** The same type of analysis on reasonable care described in the examples in (G)(5)(a) would apply to determine if a citation should be issued to this type of controlling employer.

F. Multiple Roles

1. A creating, correcting or controlling employer will often also be an exposing employer. Consider whether the employer is an exposing employer before evaluating its status with respect to these other roles.

2. Exposing, creating and controlling employers can also be correcting employers if they are authorized to correct the hazard.

Directives - Table of Contents

GSA

GSA Public Buildings Service

PBS Procurement Instructional Bulletin 11-05

AUG 0 2 2011

MEMORANDUM FOR: PUBLIC BUILDINGS SERVICE
REGIONAL COMMISSIONERS
REGIONAL PROCUREMENT OFFICERS

FROM: BOBBY J. DAVIS
ACTING DEPUTY ASSISTANT COMMISSIONER
OFFICE OF ACQUISITION MANAGEMENT – PGQ

SUBJECT: Guidance on the Use of Project Labor Agreements in Construction Project greater than $25,000,000

1. Purpose

The purpose of this procurement instructional bulletin (PIB) is to issue new policy with regard to GSA's implementation of the Executive Order (EO) 13502 and FAR 22.5, Use of Project Labor Agreements for Federal Construction Projects. PIB 10-04, Rev 1, dated September 24, 2010 is cancelled. This PIB incorporates the class deviation for FAR provision 52.222-33 Alternate 1, Notice of Requirement for Project Labor Agreement and FAR clause 52.222-34, Project Labor Agreement, received by PBS on July 11, 2011.

2. Background

A Project Labor Agreement (PLA) is a collective bargaining agreement between a contractor, its subcontractors, and labor unions in which the parties define terms of employment for all laborers, union and non-union, to be employed on a specific construction project.

On February 6, 2009, President Obama signed Executive Order (EO) 13502, Use of Project Labor Agreements for Federal Construction Projects, to "promote the efficient administration and completion of Federal construction projects." EO 13502 authorizes federal agencies to require contractors to enter into project labor agreements on construction projects of at least $25M. EO 13502 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.

The final FAR rule, FAR Case 2009-005, was published in the Federal Register April 13, 2010 and became effective May 13, 2010.

3. Effective Date

This bulletin is effective as of date of issuance.

4. Cancellation Date

This PIB will remain in effect until cancelled.

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

5. Applicability
This PIB applies to solicitations for construction projects, including general construction, design build (DB) and construction manager as constructor (CMc), with a value of $25 million or more that are issued on or after the effective date of this PIB. The PIB does not apply to lease construction.

6. Summary
Based on lessons learned this PIB adds instructional notes, deletes additional PLA terms and conditions, and requires, as a condition of award, that the apparent successful offeror submit an executed PLA meeting the minimum requirements of the solicitation.

7. References
Executive Order 13502, Use of Project Labor Agreements for Federal Construction Projects
Federal Acquisition Regulation, Subpart 22.5, Use of Project Labor Agreements for Federal Construction Projects

8. Instructions
Insert the following provisions and clause into solicitations that are subject to this PIB:

8.1 Insert the following language into the synopsis:

Offerors will be invited to submit a proposal subject to PLA requirements (a PLA proposal), a proposal not subject to PLA requirements, or both. If a PLA proposal is accepted by GSA, the apparent successful offeror shall be required, as a pre-condition to award, to execute and deliver to the contracting officer a Project Labor Agreement (PLA) meeting the minimum requirements of the Solicitation.

8.2 Insert in the How to Offer section or elsewhere in the solicitation as appropriate:

Offerors may submit a price proposal subject to the PLA requirements set forth in this solicitation, a price proposal not subject to the PLA requirements set forth in this solicitation, or both. Any price proposal submitted shall clearly identify whether it is subject to such PLA requirements.

8.3 Insert as a Technical Evaluation Factor in the solicitation:

Evaluation Factor #___: Project Labor Agreement

A proposal submitted subject to the PLA requirements set forth in this solicitation will receive full credit under this evaluation factor. A proposal submitted not subject to such PLA requirements will receive no credit under this evaluation factor.

NOTE: If the solicitation does not specify the relative weight of the technical evaluation factors, add PLA into the order of importance and update the source selection plan to reflect a 10% credit. The selection board must evaluate and score proposals subject to PLA requirements with the full 10% credit and evaluate and score proposals not subject to PLA requirements with 0% credit.

NOTE: If the solicitation specifies the relative weight of the technical evaluation factors, assign 10% for the PLA factor. Adjust the relative percentages of other evaluation factors as necessary to ensure total evaluation is equal to 100%.

8.4 Insert in the "Additional Solicitation Provisions" section or elsewhere in the solicitation as appropriate the following introduction and provision:

Project Labor Agreement (PLA)

(a) This Project Labor Agreement section only applies to proposals submitted subject to the PLA requirements of this solicitation.

(b) **52.222-33 Notice of Requirement for Project Labor Agreement (May 2010) Alternate 1 (DEVIATION July 2011)**

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

(b) The apparent successful offeror shall negotiate a project labor agreement with all labor organizations having jurisdiction over the trades involved in the construction of the project. The project labor agreement must be signed by all such labor organizations and cover the entirety of the construction work to be performed during the term of the resulting construction contract.

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

(1) Bind the offeror and all subcontractors engaged in construction on the construction project to comply with the project labor agreement;
(2) Allow the offeror and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
(3) Contain guarantees against strikes, lockouts, and similar job disruptions;
(4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes arising during the term of the project labor agreement;
(5) Provide other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health; and
(6) Fully conform to all statutes, regulations, Executive orders, and agency requirements.

(d) Any project labor agreement reached pursuant to this provision does not change the terms of this contract or provide for any price adjustment by the Government.
(e) The apparent successful offeror shall submit to the Contracting Officer a copy of the project labor agreement prior to contract award.

(c) The requirements of 52.222-33 Alt I are supplemented as follows:

1. The project labor agreement reached pursuant to FAR 52.222-33 Alt I shall supersede the terms of any other collective bargaining agreement that conflict with the terms of such project labor agreement.

2. Within 30 days following receipt of written notification to the apparent successful offeror by the Contracting Officer, the apparent successful offeror shall furnish the Contracting Officer with a copy of an executed project labor agreement that meets the requirements of this Section. If, for any reason, the apparent successful offeror fails to furnish such project labor agreement within the time stated above, the Government may, in its sole discretion, eliminate the proposal from consideration and select the next apparent successful offeror.

8.5 Insert in the Additional Contract Clauses section or elsewhere in the contract (The Agreement Template), as appropriate, the following introduction, contract clause and supplemental language:

Project Labor Agreement (PLA)

(a) This Project Labor Agreement section is binding on the Contractor if the proposal selected for award was subject to project labor agreement requirements. If the proposal selected for award was not subject to project labor agreement requirements, this section is not binding on the Contractor.

(b) **FAR 52.222-34 Project Labor Agreement (May 2010) (DEVIATION July 2011)**

(a) Definitions. As used in this clause—
"Labor organization" means a labor organization as defined in 29 U.S.C. 152(5).
"Project labor agreement" means a pre-hire collective bargaining agreement with the labor organizations having jurisdiction over the trades involved in the construction of the project that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).
(b) The Contractor shall maintain in a current status throughout the life of the contract the project labor agreement entered into prior to the award of this contract in accordance with solicitation provision 52.222-33, Notice of Requirement for Project Labor Agreement.
(c) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts with subcontractors engaged in construction on the construction project. (End of Clause)

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.