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STATEMENT OF
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OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT
AND GOVERNMENT SPENDING
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

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Chairman Jordan, Ranking Member Kucinich, and members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss the implementation of Executive Order (E.O.) 13502 through the regulation governing 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 the E.O. 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. 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. As the E.O. states, our policy is to encourage agencies to *consider* the use of project labor agreements, but not to require

such use by agencies. Neither the E.O. nor the FAR makes any mandates to compel use of project labor agreements. We don't believe that taxpayers would benefit from a rule that mandates their use regardless of circumstances. Similarly, however, taxpayers would not benefit if agencies ignored legitimate opportunities that could have been identified through reasoned analysis to achieve greater economy and efficiency in a large-scale construction project, such as by reducing challenges to timely completion of the project and thereby keeping costs down by having an agreed-upon resolution mechanism in place to address labor disputes.

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.

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Daniel I. Gordon was confirmed as the Administrator for Federal Procurement Policy on November 21, 2009. As the Administrator, Mr. Gordon is responsible for developing and implementing acquisition policies supporting over $500 billion in federal spending annually. Prior to joining the OFPP, he spent seventeen years at the Government Accountability Office (GAO) and served as Assistant General Counsel in the Legal Services Division and Managing Associate General Counsel in the Procurement Law Division before being appointed Deputy General Counsel in 2006 and Acting General Counsel in April 2009.

Before joining GAO, Mr. Gordon worked in private practice handling acquisition-related matters. Mr. Gordon holds a B.A. from Brandeis University, an M.Phil. from Oxford University, and a J.D. from Harvard Law School. He has also studied in Paris, France; Marburg, Germany; and Tel Aviv, Israel.

Before joining OFPP, Mr. Gordon served as a member of the adjunct faculty at the George Washington University Law School and is the author of articles on procurement law and the bid protest process at GAO.