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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



August 13, 2009

FAR Secretariat (VPR)
1800 F Street, NW
Room 4041
Attn: Hada Flowers
Washington, DC 20405

Re: FAR Case 2009–005, Use of Project Labor Agreements for Federal Construction Projects

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the proposed rule concerning Use of Project Labor Agreements for Federal Construction Projects issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereinafter the “FAR Councils”) on July 14, 2009. In short, the proposed rule would implement Executive Order 13502 (hereinafter the E.O.), which encourages federal departments and agencies to consider requiring the use of project labor agreements (PLAs) for federal construction projects where the total cost to the government is more than \$25 million.

AGC is the leading association for the construction industry. 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 perform construction services 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. Unlike many associations in the industry, AGC proudly represents both union and open-shop construction contractors.

AGC’s Position on Project Labor Agreements

At the outset, AGC wishes to explain its overall position on PLAs. AGC neither supports nor opposes PLAs *per se*. What AGC strongly opposes is *government-mandated* PLAs on any publicly funded construction project. 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 workers covered by the agreement, 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 to enter into such an agreement under the National Labor Relations Act.

Accordingly, AGC is disappointed that the Administration, via the E.O., 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). However, AGC commends the Administration for its express statement that the E.O. “does not require an executive agency to use a project labor agreement on any construction project” and for leaving agencies with a choice of whether or not to require a PLA on a project-by-project basis.

AGC’s Comments on the Proposed Rule

Turning to the specifics of the proposed rule, AGC offers the following comments.

The Proposed Rule Fails to Substantiate the Asserted Rationales for PLA Mandates.

While the Administration’s efforts to improve efficiencies in government contracting are a worthy cause, the government makes an untenable assumption in the Policy section of the proposed rule: that somehow the use of government-mandated PLAs is “a tool...to promote economy and efficiency in Federal procurement.” The preamble to the proposed rule claims that use of a mandatory PLA on a federal construction project would serve as a mechanism to provide “structure and stability to large-scale construction projects thereby promoting the efficient and expeditious completion of Federal construction projects.” However, neither the proposed rule nor our industry’s experience demonstrate how such mandates provide such value to federal owners, construction contractors, construction employees, or American taxpayers.

In fact, while case studies have been conducted with varying results, AGC is not aware of any documentation or analysis demonstrating that past mandates for PLAs have consistently lowered the cost, increased efficiency, or improved the quality of construction of public projects. In its 1998 study titled “Project Labor Agreements: The Extent of Their Use and Related Information,” the Government Accounting Office (GAO) reported that it could not document the alleged benefits of past PLA mandates on federal construction projects and that it doubted such benefits could ever be documented. GAO concluded that it would be difficult to find difficult projects similar enough to compare and, even if such projects were found, it would be difficult to demonstrate conclusively that any performance differences were due to the use of the PLA versus other factors.

In the face of this paucity of reliable evidence that PLA mandates promote economy and efficiency in federal procurement is the argument that such mandates actually drive up costs. One way that they may do this is by limiting competition. While the proposed rule, on its face, does not restrain competition or favor union contractors in the competitive bidding process, it does so in effect. Government-mandated PLAs typically require 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. Many firms, particularly those not historically signatory to a union labor agreement, will be unwilling or unable to make those changes. 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."

Even if the changes in business practices required by a government-mandated PLA do not deter potential bidders, the PLA can also drive up costs in a more direct manner, as the successful bidders pass along the added costs incurred in changing their business practices to the contracting agency. For example, PLAs typically require contributions to union pension and health and welfare funds, even though the benefit plans' eligibility and vesting rules usually prevent open-shop employees from ever receiving the benefits of their employers' contributions to the funds. To maintain benefits for its regular employees, open-shop contractors must contribute to both the union benefit funds and to their own benefit plans, causing employment costs to skyrocket.

These added burdens go beyond what is already required of federal contractors under the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act. These statutes set minimum standards for wages, benefits, and labor practices based on prevailing practices, leaving the parties to a PLA free to negotiate only *higher* rates and more stringent practices. AGC believes that the appropriate mechanism for public owners to ensure that its contractors' employees are fairly compensated and that all contractors compete on an equal basis is through the requirement that the contractor pay prevailing wages in accordance with these laws, rather than through the imposition of a PLA.

Another cost that can result from government mandates for PLAs is the high cost of litigation, as such mandates have frequently led to litigation, which is expensive in and of itself and can lead to costly delays.

The proposed rule also fails to substantiate the claim that "project labor agreements may help agencies manage workforce challenges that arise in connection with large-scale construction contracts...[which] typically involve multiple employers at a single location."

According to the proposed rule:

The E.O. explains that a “lack of coordination among various employers, or uncertainties about the terms and conditions of employment of various groups of workers, can create friction and disputes in the absence of an agreed-upon resolution and mechanism.” The use of project labor agreements may “prevent these problems from developing by providing structure and stability to large-scale construction projects thereby promoting the efficient and expeditious completion of Federal construction contracts.” A project labor agreement may help an agency manage these problems by providing an agreed-upon resolution mechanism that promotes the efficient and expeditious completion of Federal construction projects.

However, while a PLA can establish uniform standards and dispute-resolution mechanisms that may help avoid or solve some such workforce problems, a government-mandated PLA could also exacerbate such problems. First, a government-mandated PLA potentially could be the cause of these new frictions, disputes, and confusion by forcing a new labor framework onto previously non-union employees or by forcibly altering the prior agreed-upon status quo of union-contractor employees. This change from the status quo has the potential to create as many problems as it purportedly solves simply by being an external structure inserted by mandate. Furthermore, strikes and other work stoppages, as a matter of fact, rarely occur on projects not covered by collective bargaining agreements.

In addition, a PLA does not guarantee freedom from the effects of strikes and work stoppages. It does not (and cannot, because of its nature) prohibit off-site strikes or work stoppages at related facilities (such as a fabrication or material yard) which could then impede progress on the PLA-covered project.

Moreover, if a PLA is needed on a particular project to avoid jobsite friction or other causes of delay or expense, it is the construction contractors working on the project who will be the first to recognize that need and to negotiate such agreements. The FAR and the broader federal policies strongly favoring open competition for federal contracts are more than enough to ensure that PLAs are put into place when and where they are most likely to serve the public interest.

Despite the assertion made in the summary of the proposed rule that a PLA would “promote economy and efficiency in Federal procurement,” the potential for a government-mandated PLA to raise project costs, create inefficiencies, restrain competition, and be vulnerable to legal challenge when the terms of the agreement are not negotiated by the employers and employees directly performing work covered by the agreement or their collective bargaining agents – the proper parties to negotiate such an agreement – should not be underestimated.

The Final Rule Should Require Contracting Agencies to Conduct a Thorough, Fact-Based Analysis as a Condition Precedent to Requiring a PLA.

As indicated above, AGC commends the Administration for stopping short of requiring contracting agencies to impose PLAs on their contractors. AGC believes that government agencies should never force a PLA, even on a project-by-project basis (an important modifier found in the E.O. but omitted in the proposed rule), and that the discretion of whether a PLA is used should be left to the employers and employees working on the project (and their collective bargaining agents) rather than to the contracting agency. However, if the Administration insists on allowing contracting agencies to impose PLAs, then AGC urges the FAR Councils to require the agencies to conduct a thorough analysis of uniform, fact-based criteria to determine that a PLA mandate is appropriate before it may impose such a mandate.

The E.O. and proposed rule set forth “general requirements” allowing agencies to require a PLA where the use of such an agreement will: (1) advance the federal government’s interest in (a) achieving economy and efficiency in federal procurement, (b) producing labor-management stability, and (c) ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and, (2) be consistent with law. Contracting agencies should not be left to simply assume that a PLA mandate would meet these general requirements. Rather, contracting officers should be required to make objective determinations, based on empirical evidence, on a project-by-project basis that a PLA mandate would advance each of the government's interests *better than* without the mandate.

With regard to the first prong of the analysis, the agency should have to demonstrate that a PLA mandate would:

- (a) enable the government to save more money and realize efficiencies beyond what it would save or realize as a result of the Competition in Contracting Act, Part 9 of the FAR, and other protections already available;
- (b) improve labor-management stability beyond that provided by the Davis-Bacon Act, the National Labor Relations Act, existing area-wide collective bargaining and jurisdictional agreements that would apply to union contractors working on the project, and other protections already available;
- (c) enhance compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters beyond the compliance assistance, administration, and enforcement of such laws and regulations provided by the Occupational Safety and Health Administration, the Wage and Hour Division, the Office of Labor-Management Standards, the Office of Federal Contract Compliance Programs, the Equal Employment Opportunity Commission, and other agencies already tasked with ensuring such compliance.

With regard to the second prong, the agency should have to conduct a comprehensive legal review to demonstrate that a PLA mandate would not violate any law applicable to the particular

project, including but not limited to the Competition in Contracting Act, the FAR, the National Labor Relations Act, the Employee Retirement Income Security Act, the Small Business Act, and the legislation enabling the agency to undertake the project or authorizing or appropriating funds for the project.

AGC would like to commend the FAR Councils for apparently recognizing the aforementioned potential problems a government-mandated PLA could create by providing in the proposed rule that the government will not participate in the negotiations of any PLA. AGC would like to point out that the term “government” should be clarified to include anyone acting as an agent of the government, including any construction company that would serve under the agency construction management model for the government, but would not directly employ any workers covered by the PLA. AGC further points out that a practice by which the government imposes a specific, pre-determined PLA – such as a standard PLA unilaterally developed by the Building and Construction Trades Department of the AFL-CIO or a PLA used on an unrelated past project – without giving the performing contractors or bidders who will potentially perform work covered by the PLA an opportunity to negotiate terms of the agreement is tantamount to the government participating in the negotiations of the PLA.

After conducting a thorough analysis like that described above, if the agency concludes that a PLA mandate is needed, then the agency should be required to disclose its analysis, in detail, through timely publication in the Federal Register. The FAR Councils should welcome this step, as it may enhance transparency consistent with the goals of the Obama Administration as expressed in the President’s January 21, 2009, memorandum on Transparency and Open Government and elsewhere.

The Administration Should Not Broaden the Application of the Policy to Federally Assisted Contracts or Otherwise

As noted in the proposed rule, the E.O. directs the director of the Office of Management and Budget (OMB) to work with the Secretary of Labor and other officials to provide recommendations to the President on whether to broaden the application of project labor agreements on both construction projects awarded under federal contracts and construction projects receiving federal financial assistance, to promote the economical, efficient, and timely completion of such projects. AGC is deeply concerned about the expansion of a policy that restrains full and open competition as described above and urges the Administration to refrain from such an expansion.

In addition to the restraint on competition, applying this policy to federally assisted construction projects would constitute an unfunded mandate, as the costs of this policy would fall squarely on state and local governments. Furthermore, given the state of the economy and State budget margins being razor thin, those costs would likely be passed to the taxpayers, ultimately slowing the economic recovery.

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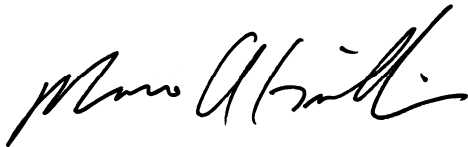
Furthermore, such an expansion would surely lead to an even greater onslaught of litigation. AGC points out that federal agency mandates for PLAs on federally assisted projects during past administrations resulted in lawsuits not only based on the federal statutes mentioned above but on state competitive bid statutes, state constitutions, state right-to-work laws, state executive orders, and other state and local laws.

Conclusion

AGC appreciates the opportunity to comment on the rule that the FAR Councils proposed on July 14, 2009. AGC finds that the proposed rule would change far more than the FAR Councils have acknowledged and that its approach will create complications even greater than the Councils may have contemplated.

Thank you again for considering AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Marco A. Giamberardino". The signature is fluid and cursive, with a large initial "M" and "A".

Marco A. Giamberardino, MPA
Senior Director
Federal and Heavy Construction Division