CHARLES L. GRECO, President
MARK KNIGHT, Senior Vice President
ART DANIEL, Vice President
JOSEPH M. STELLA, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
DAVID LUKENS, Chief Operating Officer

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

July 24, 2015

Ms. Georgina Perry
NAVFAC Southwest
2730 McKean Street Building 291
Naval Base San Diego
San Diego, California 92136-5198
Sent via electronic mail to georgina.perry@navy.mil

RE: Y--P499; LITTORAL COMBAT SHIP (LCS) SUPPORT FACILITY AT NAVAL BASE SAN DIEGO, CA; Solicitation Number: N6247316RP499

Dear Ms. Perry,

On behalf of The Associated General Contractors of America ("AGC"), I thank the Naval Engineering Facilities Command Southwest ("NAVFAC") for soliciting input from the construction community regarding the potential use of project labor agreements ("PLAs") for the he design-build construction project, P-499 Littoral Combat Ship (LCS) Support Facility at Naval Base San Diego, CA ("Ship Facility Project"). While AGC is not an interested source, as the largest trade association representing potential offerors on your projects, we are an interested party and wish to offer our input.

Before detailing our answers to NAVFAC's questions, let me make clear AGC's position on government-mandated PLAs. AGC believes that NAVFAC should not mandate the use of a PLA on the execution of any project. AGC neither supports nor opposes contractors' voluntary use of PLAs on the Ship Facility Project or elsewhere, but strongly opposes any government mandate for contractors' use of PLAs. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. AGC believes that neither a public project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. AGC also believes that government mandates for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. If a PLA would benefit the construction of a particular project, the contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. Accordingly, AGC urges NAVFAC to refrain from imposing any PLA mandates on any of its contractors and to defer to the contractor's judgment as to whether a PLA is appropriate for a given project.

We appreciate the opportunity to share our insights with you in the enclosed PLA Inquiry Form and to help advance our common goals of fair competition and of economic and efficient performance of publicly funded construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact me.

Sincerely,

Stephen E. Sandherr
Chief Executive Officer

Enc.

PROJECT LABOR AGREEMENT INQUIRY FORM
NAVAL FACILITIES ENGINEERING COMMAND SOUTHWEST

Project Title: LITTORAL COMBAT SHIP (LCS) SUPPORT FACILITY

Solicitation Number (if applicable): N6247316RP499

Please provide <u>your</u> view on Project Labor Agreements (PLA) for this project:

1. **Would a PLA advance the Federal Government's interests in achieving economy and efficiency for this project? If not, why?**

There are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. While case studies have had varying results, research regarding the impact of PLA use on the economy or efficiency of projects in general is inconclusive. In a 1998 study by the agency then called the Government Accounting Office, the agency reported that it could not document the alleged benefits of past mandates for PLAs on federal projects and that it doubted such benefits could ever be documented due to the difficulty of finding projects similar enough to compare and the difficulty of conclusively demonstrating that performance differences were due to the PLA versus other factors. (U.S. Government Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information*, GAO/GGD-98-82.) The Congressional Research Service reached the same conclusion in a report issued in July 2010. (U.S. Congressional Research Service Report R41310, *Project Labor Agreements*, by Gerald Mayer.)

Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. For example:

- PLAs typically limit open shop contractors' rights to use their current employees to perform work covered by the agreement. Such PLAs usually permit open shop contractors to use only a small "core" of their current craft workers, while the remaining workers needed on the job must be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.
- PLAs frequently require contractors to change the way they would otherwise assign workers, requiring contractors to make sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers competent in more than one skill and perform tasks that cross such boundaries. It can also burden union contractors by requiring them to hire workers from the hiring halls of different unions from their norm and to assign work differently from their norm.
- PLAs typically require contractors to subcontract work only to subcontractors that adopt the PLA. This may prevent a contractor (whether union or open shop) from using on the project highly qualified subcontractors that it normally uses and trusts and that might be the most cost-effective.
- PLAs typically require open-shop contractors to make contributions to union-sponsored fringe benefit funds from which their regular employees will never receive due to time-based vesting and qualification requirements. To continue providing benefits for such employees, such contractors must contribute to both the union benefit funds and to their own benefit plans. This "double contribution" effect significantly increases costs.
- PLAs typically require contractors to pay union-scale wages, which may be higher than the wage rates required by the Secretary of Labor pursuant to the Davis-Bacon Act. They often also require

extra pay for overtime work, travel, subsistence, shift work, holidays, "show-up," and various other premiums beyond what is required by law.

Such changes are impractical for many potential contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs). Data from the Bureau of Labor Statistics (BLS), derived from the Current Population Survey (CPS), evidence that the vast majority of construction in California—over 83 percent—is performed on an open-shop basis. The Union Membership and Coverage Database – which provides estimates of labor data based on CPS statistics – reports that a mere 5.9 percent of workers across all private industries in the San Diego-Carlsbad-San Marcos, California Metropolitan Statistical Area, where the Ship Facility Project is located, were covered by a CBA and just 5.1 percent were members of a union in 2014. (Barry T. Hirsch and David A. Macpherson. 2015. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved July 15, 2015, from http://unionstats.gsu.edu/.) Consequently, AGC believes that PLA mandates in the area would likely harm economy and efficiency in federal procurement by both hindering competition and raising project costs.

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiated the terms of the PLA and when the PLA must be submitted to the agency. With regard to who negotiates the PLA, the Federal Acquisition Regulation implementing Executive Order 13502 ("FAR Rule") allows (but does not require or even encourage) agencies to include in the contract solicitation specific PLA terms and conditions. Exercising that option, though, can lead to added costs, particularly when the agency representatives selecting the PLA terms lack sufficient experience and expertise in construction-industry collective bargaining. AGC strongly believes that, if a PLA is to be used, its terms and conditions should be negotiated by the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, that have a vested interest in forging a stable employment relationship and ensuring that the project is complete in an economic and efficient manner, that are authorized to enter into such an agreement under the National Labor Relations Act ("NLRA"), and that typically have the appropriate experience and expertise to conduct such negotiations. Under no circumstances should a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated by the agency or by a contractor (or group of contractors) not employing covered workers on the project.

With regard to the timing of PLA negotiation and submission, the FAR Rule provides agencies with three options. The agency may require submission of an executed PLA: (1) when offers are due, by all offerors; (2) prior to award, by only the apparent successful offeror; or (3) after award, by only the successful offeror. Since issuance of the rule, some agencies have exercised the option to require all offerors on a particular project to negotiate a PLA with one or more unspecified labor organization and to submit an executed PLA with their bids. This practice is highly inefficient and unduly wasteful of both the bidders' and labor organizations' time and resources, not to mention that of the agencies that must review all of the proposals. Furthermore, many contractors interested in submitting an offer—particularly where construction in the project area or of the project type are typically performed by open-shop contractors—have no familiarity with the labor organizations there and have no idea of whom to contact for the required negotiations. In these ways, the PLA mandate is likely to deter many qualified contractors from bidding on the project.

Moreover, the contractors in such a situation cannot control whether they are able to fulfill the negotiation obligation because they have no means to require the labor organizations to negotiate with them. Even if the prospective offeror is able to identify representatives of appropriate labor organizations and attempts to contact them to request negotiations for a PLA, the contractor has no recourse if the labor representatives fail to respond or refuse to negotiate. Absent an established collective bargaining relationship with the contractor under Section 9(a) of the NLRA, unions have no legal obligation to negotiate with any particular contractor and have no legal obligation to negotiate in a good-faith, nondiscriminatory, and timely manner. Thus, requiring offerors to negotiate with another party—a party with which the offeror has no authority to compel

negotiations—effectively grants the other party (i.e., labor organizations here) the power to prevent certain contractors from submitting an acceptable offer. Such a requirement not only enables the labor organizations to determine which contractors can submit an offer (by picking and choosing with which contractors they will negotiate), it also enables them to determine which contractors will submit an attractive offer (by giving a better deal to one contractor over another). Such a requirement contravenes the executive order's directive that mandatory PLAs "allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements" as well as its objective of advancing economy and efficiency in federal procurement.

On the other hand, if the agency requires only the apparent successful bidder to execute a PLA after offers have been considered, or if it requires only the successful bidder to execute a PLA after the contract has been awarded, then cost terms may be too uncertain at the time that offers are considered to elicit reliable proposals. Also, these options again create a serious risk of granting labor organizations excessive bargaining leverage. The agency could be putting the contractor in the untenable position of having to give labor organizations literally anything they may demand or lose the contract. Parties involved in collective bargaining should never be required to reach an agreement but should be required only to engage in good-faith bargaining to impasse, consistent with the mandates of the NLRA.

Yet 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 itself and can lead to costly delays. In its 1993 decision in the Boston Harbor case (*Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190), the U.S. Supreme Court held that the NLRA does not preclude a state agency from including a PLA requirement in the bid specification for a public project when the agency is acting in a proprietary rather than a regulatory capacity. While the decision is often cited by proponents of government-mandated PLAs as establishing unqualified legal authority for government-mandated PLAs, it did not do so. Rather, the decision left many federal and nonfederal legal issues open to challenge in any given case involving a government- mandated PLA, including, but not necessarily limited to the following:

- Whether the PLA mandate violates the construction industry provisions of the NLRA permitting only employers "engaged primarily in the building and construction industry" to enter into pre-hire CBAs;
- Whether the PLA mandate is preempted by the NLRA because the government was acting in a regulatory rather than proprietary manner;
- Whether the government-mandated PLA has a disproportionately adverse impact on minority and women business enterprises in violation of Title VI of the 1964 Civil Rights Act, or its state or local counterparts;
- Whether the government-mandated PLA contains provisions requiring contributions to fringe benefit plans or participation in apprenticeship programs in violation of the Employee Retirement Income Security Act (ERISA); and
- Whether the PLA mandate violates the Competition in Contracting Act, Armed Services Procurement Act, Small Business Act, Federal Acquisition Regulation, or other federal procurement laws.

Given the uncertainty of cost savings and potential for cost increases as described above, not to mention the delays that can be caused by litigation and the like, AGC recommends that the NAVFAC refrain from mandating the use of a PLA on the Ship Facility Project and instead leave to contractors the option of using PLAs on a voluntary basis.

2. What is your position on whether or not a PLA would result in producing labor-management stability?

PLAs can advance labor-management stability in certain situations where there is a significant risk of union jurisdictional disputes or work stoppages, by establishing uniform work rules, dispute-resolution mechanisms, and no-strike provisions. However, such risks are typically not present where work is normally performed open shop. As a matter of historical fact, work disruptions like strikes, lockouts, and jurisdictional disputes rarely occur on projects that are not performed under CBAs. As discussed above, the Commonwealth of Virginia is virtually completely non-union; and, to our knowledge, there is no significant history of labor-management strife in the area. However, for more knowledge of local labor relations, AGC suggests that NAVFAC contact the local AGC Chapter in the region, the AGC of San Diego Chapter (www.agcsd.org). Accordingly, AGC cannot see how a PLA preference or mandate would advance labor-management stability there.

AGC further points out that job disruptions can occur even in the presence of a PLA with guarantees against strikes, lockouts, and the like. AGC is aware of several incidents of work stoppages impeding the progress of projects covered by a PLA containing a no-strike provision. In some cases, the PLA-covered workers directly violated the provision. One example is the multi-project strike the New York City Council of Carpenters lead that impacted up to 20 construction sites citywide, despite PLA agreements in place at 12 of those projects—including the $20 billion Hudson Yards redevelopment project and $2.75 billion World Trade Center 3 project—in July 2015. Another example is the wildcat strike staged by the Carpenters union at the $2.4 billion San Francisco International Airport expansion project in 1999. In other cases, the PLA-covered workers honored the provision, but the project was hindered by strikes at related facilities or at unrelated worksites in the area. This happened in the summer of 2010, when three major Illinois Tollway projects covered by PLAs were nearly brought to a halt because contractors could not obtain needed materials and equipment, as drivers honored picket lines outside asphalt plants, concrete-mix facilities, and quarries as part of an area-wide strike.

As such, AGC does not believe that a PLA mandate is needed to advance labor management stability on projects there. Again, if a PLA would be helpful in this regard, the general contractor awarded the contract would be the first to recognize that fact and to choose to use a PLA voluntarily.

3. **If a PLA is implemented on this project, how would it assist with compliance of laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters? If it would not, please explain.**

It is unclear to AGC how a PLA mandate would advance compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, labor and employment laws – on the Ship Facility Project or elsewhere. Contractors are subject to those laws, to the jurisdiction of federal agencies enforcing those laws, and to the legal penalties for noncompliance with those laws regardless of any labor contract. AGC questions what elements of a PLA might be superior to the compliance assistance, administration, and enforcement already provided by the U.S. Department of Labor's Occupational Safety and Health Administration, Wage and Hour Division, Office of Labor-Management Standards, and Office of Federal Contract Compliance Programs, or by the Equal Employment Opportunity Commission, National Labor Relations Board, and other agencies specifically tasked with advancing and enforcing compliance with labor and employment laws. AGC is also unaware of any evidence of rampant employer violations of employment laws in the Ship Facility Project area and suggests that, if any exists, then it is the responsibility of the appropriate government enforcement agencies to curb that misconduct.

4. **Will this project require multiple construction contractors and/or subcontractors that will employ workers in multiple crafts or trades?**

Building construction projects in general, like the Coastal Campus Projects, often require multiple craft/trade subcontractors. However, this question appears to be a leading question for question 7, which addresses

whether there could be a shortage of skilled labor in the region for this construction project. As such, AGC will address that issue here.

AGC does not have adequate data to confidently project the likelihood of a skilled labor shortage in the region of the Coastal Campus Projects at this time. We note, however, that BLS data show that 67,500 construction workers were employed in the San Diego-Carlsbad, California Metropolitan Statistical Area in May 2015, which is 29 percent lower than the number employed in June 2006, representing a loss of 27,600 jobs. This could indicate that the region has a sufficient pool of unemployed construction workers. For more information about local labor supply and demand, AGC again defers to the local knowledge of the AGC of San Diego Chapter (http://www.agcsd.org/).

More importantly, though, AGC questions the relevance of this inquiry in the assessment of the need for a PLA mandate. Should a skilled labor shortage arise, how would a PLA mandate remedy the problem? Is there objective evidence that the local union hiring halls for the specific trades needed for this project will be able to supply the number of workers needed? Is there evidence that they can supply such labor more efficiently or effectively than other labor and recruitment resources that may be available? If there is such evidence, AGC believes that the general contractor on the project would be in the best position to assess that information in light of all other considerations and to determine, on a voluntary basis, whether a PLA would be appropriate for the project.

If NAVFAC continues to have concerns about this issue and to maintain that a PLA would be an effective remedy, AGC suggests that NAVFAC may wish to conduct a thorough analysis of the local skilled labor supply to help answer this question. Alpha Resources (http://www.alpharesources.net) or Industrial Info Resources (www.industrialinfo.com) may be useful resources in conducting such a study.

5. Do you anticipate a shortage of skilled labor in the region for this construction project? If not, why?

AGC is not in a position to answer questions 4 and 5. A prime contractor is best suited to respond.

6. Would a PLA assist or hinder you in recruiting and retaining a skilled workforce for this project?

AGC questions how a PLA mandate would assist contractors in addressing labor supply challenges. Again, if a collective bargaining agreement would be helpful in employee recruitment and retention, the contractor can always enter into one (PLA or otherwise) on a voluntary basis. A PLA mandate is not needed and could be harmful.

7. Do you anticipate skilled labor shortages resulting from competition within the contractor community arising from concurrent large-scale construction contracts in the project vicinity?

Please see AGC's response to question 4.

8. What expected costs, benefits, and/or savings would you anticipate if a PLA is implemented? If no savings are anticipated, please explain.

As noted in AGC's response to question 1, a PLA can increase costs on a project. Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. AGC would again direct NAVFAC to its response in question 1, where AGC delineates ways a PLA could increase project costs.

9. Has your company been awarded any projects using a PLA? If yes, please state project information and a brief overview of the results/benefits of working within a PLA.

AGC is not in a position to answer this question. A prime contractor is best suited to respond.

10. Is there a possibility you would utilize any union workers on this project?

Contractors are best suited to respond this question. However, we wish to raise concerns about this question in general. AGC does not understand the objective in specifically asking about the use of "union workers." The National Labor Relations Act prohibits employers – including construction contractors working for a federal agency – from discrimination in employment based on a worker's affiliation or nonaffiliation with a union. Accordingly, it would be highly inappropriate for the agency to select contractors based in part on the company's use of union workers on the project.

11. Does your company have or support any apprentice programs designed to develop skilled workers? If yes, please describe.

Contractors would be best suited to answer this question.