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

November 4, 2016

Mr. Kent Tamai
U.S. Army Corps of Engineers, Honolulu District
Bldg. 230
Fort Shafter, HI 96858-5440
Sent via electronic mail to kent.a.tamai@usace.army.mil

RE: PLA Market Survey for $90M Multiple Award Task Order Contract (MATOC) for Design Build and Design Bid Build Construction Services for Work Within the State of Hawaii

Dear Mr. Tamai,

On behalf of The Associated General Contractors of America ("AGC"), I thank the U.S. Army Corps of Engineers ("USACE") for soliciting input from the construction community regarding the potential use of project labor agreements ("PLAs") for $90M multiple award task order contract (MATOC) for design-build and design-bid-build construction services for work within the State of Hawaii ("Hawaiian Projects"). 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 USACE's questions, let me make clear AGC's position on government-mandated PLAs. AGC believes that USACE 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 Hawaiian Projects 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 USACE 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 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 further, please do not hesitate to contact me.

We provide the following comments in response to your questions in reference to the Hawaiian Projects.

1. Do you have knowledge that a PLA has been used in the local area on projects of this kind? If so, please provide supporting documentation?

AGC is aware of PLA use on only four large-scale projects in Hawaii: (1) a PLA executed by Swinerton Builders and the Hawaii Building & Construction Trades Council covering the General Services

Administration's $80-million project for the modernization and renovation of the Prince Jonah Kuhio Kalanianaole Federal Building and U.S. Courthouse in Honolulu; (2) a PLA, executed in 2009, imposed by the City of Honolulu covering a $5.5-billion rail transit project; (3) the Aloha Stabilization Agreement, a PLA voluntarily executed in 2004 by contractor Fluor Federal Services covering a $100 million residential construction project for the U.S. Navy at Ford Island Pearl Harbor; and (4) the Ohana Stabilization Agreement, a PLA voluntarily executed by developer Actus Lend Lease in 2004 covering billions of dollars of construction and renovation work under the U.S. Army's Hawaii Residential Communities Initiative Project over a 50-year period, including seven military installations on Oahua. AGC questions whether any of these projects are comparable to the Hawaiian Projects. For more information about local PLA history, AGC defers to the knowledge of its local Chapter: the General Contractors Association of Hawaii (www.gcahawaii.org).

2. **Are you aware of skilled labor shortages in the area for those crafts that will be needed to complete the referenced project? If so please elaborate and provide supporting documentation where possible.**

AGC does not have adequate data to confidently project the likelihood of a skilled labor shortage in the Hawaiian Projects area at this time and again defers to the local knowledge of the General Contractors Association of Hawaii. Regardless of such data, 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.

3. **Are you aware of time sensitive issues/scheduling requirements that would impact the rate at which the referenced project should be completed? If so, please elaborate and provide supporting documentation where possible.**

While AGC is not in a position to assess scheduling requirements for the project, we do not believe that a PLA mandate on this project would be helpful in meeting any scheduling concerns and might actually hinder completion time. Please see the responses to questions 4-5 below for further explanation.

4. **Identify specific reasons why or how you believe a PLA would advance the Federal Governments interest in achieving economy and efficiency in federal procurement.**
5. **Identify specific reasons why you do not believe a PLA would advance the Federal Governments interest in achieving economy and efficiency in federal procurement.**

AGC believes that a PLA *mandate* would *not* advance the Federal Government's interests in achieving economy and efficiency, which include scheduling issues, in federal procurement. 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 benefits 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 majority of construction in the U.S. in general, and in the State of Hawaii in particular, is performed on an open-shop basis. Across the State of Hawaii, the vast majority—62.4 percent—of workers in the construction industry in 2015 were ***not*** members of a union and 62.4 percent were ***not*** covered by a CBA. (Barry T. Hirsch and David A. Macpherson. 2016. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved October 31, 2016, from http://unionstats.gsu.edu/.) Consequently, AGC believes that PLA mandates in the Hawaiian Projects 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 USACE refrain from mandating the use of a PLA on the Hawaiian Projects and instead leave to contractors the option of using PLAs on a voluntary basis.

6. **Please identify any additional information you believe should be considered on the use of a PLA on the referenced project.**
7. **Please identify any additional information you believe should be considered on the non-use of a PLA on the referenced project.**

For questions 6 and 7, AGC, again, notes that USACE should not mandate the use of a PLA on the execution of any project. Furthermore, the factors discussed above in our response should sufficiently satisfy any reasonable determination as to why a government-mandated PLA does not make sense for the Hawaiian Projects.

In summary, AGC opposes government mandates for PLAs on federal construction projects and urges USACE to refrain from imposing such a mandate on the Hawaiian Projects. For the reasons discussed above, USACE should allow its contractors – the parties that have experience in construction labor relations and that would be directly governed by a PLA – to decide whether a PLA is appropriate for the project and to execute one voluntarily should they deem it appropriate.

We appreciate the opportunity to share our insights with you 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 us.

Sincerely,

Stephen E. Sandherr
Chief Executive Officer