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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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February 24, 2015

Mr. David Neal
U.S. Army Corps of Engineers
Omaha District
1616 Capital Avenue
Omaha, Nebraska 68102-4901
Sent via electronic mail to david.w.neal@usace.army.mil

RE: Y--PROJECT LABOR AGREEMENT Market Survey - Intake Diversion Dam, Lower Yellowstone River at Intake, Montana; Solicitation Number: W9128F-15-M-S001

Dear Mr. Neal,

On behalf of The Associated General Contractors of America ("AGC"), I thank the USACE Army Corps of Engineers Omaha District ("USACE") for soliciting input from the construction community regarding the potential use of Project Labor Agreements (PLA) for large scale construction within the area of the Intake Diversion Dam, Lower Yellowstone River at Intake, Montana ("Lower Yellowstone 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. We provide the following comments in response to your questions in reference to the Lower Yellowstone Project.

1. Should PLAs be executed on selected large dollar contracts in the area of the Intake Diversion Dam, Lower Yellowstone River at Intake, Montana?

An assessment of whether a PLA should be executed on selected large dollar contracts in Lower Yellowstone River area at Intake, Montana should be made by the selected general contractor on a project-specific basis, not by USACE. 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 Lower Yellowstone 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 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.

2. Are there concerns by prime contractors on the availability of skilled construction labor?

AGC does not have adequate data to confidently project the likelihood of a skilled labor shortage in the region of the Lower Yellowstone Project at this time. We note, however, that BLS data show that 25,600 construction workers were employed in the State of Montana in December 2014, which is 24 percent lower than the number employed in June 2007, representing a loss of 7,400 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 Montana Contractors Association (<http://www.mtagc.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 USACE continues to have concerns about this issue and to maintain that a PLA would be an effective remedy, AGC suggests that USACE 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.

3. Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?

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 vast majority of construction in Montana—over 90 percent—is performed on an open-shop basis. The Union Membership and Coverage Database – which provides estimates of labor data – shows that in the State of Montana mere 9.2 percent of construction workers were covered by a CBA and just 7.2 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 January 23, 2015, from <http://unionstats.gsu.edu/>.) Consequently, AGC believes that PLA mandates in the Lower Yellowstone Project 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 Lower Yellowstone Project and instead leave to contractors the option of using PLAs on a voluntary basis.

4. What type of project should not be considered for PLA clauses?

As noted in our response to question 1, AGC believes that USACE should not mandate the use of a PLA on the execution of any project. We respectfully refer you to our answer to question 1 for further information.

- 5. What is the time impact to the completion of the contract due to a PLA?**
- 6. What is the cost impact to the bid due to a PLA?**
- 7. What is the time impact of a PLA on a solicitation response?**

For question 5, AGC refers you to our response to question 2. Again, 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.

For questions 6 and 7, AGC is not aware of any cost impact to bid or time impact on a solicitation response due to a PLA. A prime contractor on the particular project is best able to answer these questions. However, AGC would note that contractors and unions generally have collective bargaining agreements before entering into PLAs. CBA negotiations take time and CBAs generally must be renewed. The cost of and length of time for such negotiations would be difficult to calculate and may vary from region to region, contractor to contractor and union to union. In the event a CBA has expired or is under negotiation when a solicitation is put out to bid, the timing of the bid date could negatively impact the ability of contractors to bid a project with a PLA.

8. What other factors should the Corps consider before deciding to include PLA provisions in selected Omaha District Corps of Engineers contracts?

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 Lower Yellowstone Project or any project within the jurisdiction of the Omaha District.

In summary, AGC opposes government mandates for PLAs on federal construction projects and urges USACE to refrain from imposing such a mandate on the Lower Yellowstone Project. 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,

A handwritten signature in black ink, appearing to read "Sgt E SL". The signature is fluid and cursive, with the letters "Sgt" and "SL" being the most prominent.

Stephen E. Sandherr
Chief Executive Officer