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

February 19, 2013

Ms. Kathleen Mayer
USACE District, Albuquerque
Attn: CESPA-CT
4101 Jefferson Plaza NE
Albuquerque, NM 87109-3435
Sent via e-mail to kathleen.mayer@usace.army.mil

RE: FY13 Medical/Dental Clinic Replacement, Cannon Air Force Base (CAFB), Curry County, New Mexico; Solicitation Number: W912PP-13-R-0021

Dear Ms. Mayer,

On behalf of The Associated General Contractors of America ("AGC"), I thank the U.S. Army Corps of Engineers Albuquerque District ("USACE") for soliciting input from the construction community regarding on the potential use of project labor agreements ("PLAs") for a replacement medical and dental clinic within the Clovis Micropolitan Statistical Area, which contains Cannon Air Force Base, NM ("Replacement Medical and Dental Project"). In a letter sent to Ms. Diana Martinez of your office dated December 15, 2011, a copy of which is enclosed, AGC detailed our concerns regarding the potential use of government-mandated PLAs on large-scale construction projects within the Clovis Micropolitan Statistical Area, which contains Cannon Air Force Base, NM. We submit the present letter to reinforce the comments made in our earlier letters and to provide you with updated and additional information.

For reasons discussed in the enclosed letter, AGC strongly opposes government mandates for PLA use and maintains that contracting agencies should allow their 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 a particular project and to execute one voluntarily should they deem it appropriate. As explained in the letter, one reason for that opposition is the fact that such mandates typically require contractors—particularly those not normally signatory to collective bargaining agreements—to institute substantial changes in business practices that are often infeasible or at least impractical. The latest data released from the Bureau of Labor Statistics ("BLS") and the Current Population Survey ("CPS") evidence that the vast majority of construction in the U.S. in general, and in geographic area of Cannon Air Force Base in particular, is performed on an open shop basis. According to BLS, union representation in the U.S. construction industry was just 13.7 percent in 2012. While construction-specific data are not readily attainable for the Cannon Air Force Base area, only 3.8 percent of workers across all private industries in New Mexico were covered by a collective bargaining agreement in 2012, and a mere 2.7 percent were members of a union. (Barry T. Hirsch and David A. Macpherson. 2011. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved February 18, 2013, from http://unionstats.gsu.edu/.) Similarly, in nearby Texas, only 4.2 percent of workers across all private industries were covered by a collective bargaining agreement in 2012, and a meager 3.4 percent were members of a union. *Id.* 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.

As further noted in our earlier letter, labor-management instability is rarely a problem in such open-shop areas. To our knowledge, the Cannon Air Force Base area has no recent history of construction project

delays caused by labor-management disputes. AGC, therefore, 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.

With regard to the use of PLAs on comparable projects in the geographic areas of the subject project, AGC believes that such PLA use is extremely rare. AGC is aware of only one use of a PLA in the broader area in the past decade: a PLA used by the University of New Mexico's Board of Regents on a project for the expansion of a hospital back in 2004. It follows, then, that contractors in the area are not used to working under PLAs and that construction projects there do not require PLA mandates. Once again, if a PLA would be appropriate for either of the project under consideration, the selected general contractor could execute a PLA on its own accord. For more information about local PLA use, AGC defers to the local knowledge of its New Mexico Chapters: The AGC-New Mexico Building Branch (http://www.agc-nm.org/) and Associated Contractors of New Mexico (http://www.aconm.org/).

In response to your question regarding the availability of skilled labor, as noted in our earlier letter and as well-known around the country, the economic crisis of the past few years has had a deleterious impact on the construction industry, leaving literally millions of workers without jobs. According to BLS, the construction industry's unemployment rate in January 2012 was 16.1 percent. U.S. construction employment stands at 5.673 million, a dramatic decline of over 2 million workers from the industry's peak employment in April 2006. These data and others indicate that the U.S. likely has a sufficient pool of unemployed construction workers. However, because construction-specific data for the Cannon Air Force Base area are not available through BLS, AGC would suggest that USACE conduct a thorough analysis of the local skilled labor supply to help answer this question. The Construction Labor Research Council may be a useful resource in conducting such a study. Additionally, AGC would again suggest that USACE contact its New Mexico Chapters for more information.

In summary, for the reasons discussed above and in our December 15, 2011, letter, AGC continues to oppose government mandates for PLAs and urges you to refrain from imposing such a mandate on the Replacement Medical and Dental Project or any other projects at Cannon Air Force Base. As always, we remain available to discuss this matter with you further if we can be of assistance in any way.

Sincerely,

Stephen E. Sandherr
Chief Executive Officer
The Associated General Contractors of America

STEPHEN E. SANDHERR, Chief Executive Officer

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

December 15, 2011

Ms. Diana Martinez, Contract Specialist
USACE-Albuquerque District, ATTN: Contracting Division
4101 Jefferson Plaza NE
Albuquerque, New Mexico 87109
Submitted via electronic mail to diana.m.martinez@usace.army.mil

RE: Project Labor Agreement Market Survey – Clovis Micropolitan Statistical Area; Solicitation Number W912PP12R0012

Dear Ms. Martinez:

The Associated General Contractors of America (AGCA) thanks the U.S. Army Corps of Engineers Albuquerque District (USACE or the Corps) for soliciting input from the construction community on the potential use of project labor agreements (PLAs) on large-scale construction projects within the Clovis Micropolitan Statistical Area, which contains Cannon Air Force Base, NM. We offer the following comments in response to your questions.

(1) Should PLAs be executed on selected large dollar contracts in the Clovis Micropolitan Statistical Area, which contains Cannon Air Force Base, NM?

Whether or not PLAs should be executed on any USACE contracts in the Clovis Micropolitan Statistical Area ("Clovis MSA") should be left to the discretion of the contractors awarded the contracts as determined on a project-by-project basis. AGCA neither supports nor opposes contractors' voluntary use of PLAs in the Clovis MSA or elsewhere, but is strongly opposed to any government mandate for contractors' use of PLAs. AGCA strongly supports 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. AGCA 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. AGCA 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 construction 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, AGCA 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.

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(2) Are there concerns by Prime contractors on the availability of skilled construction labor?

The U.S. construction industry fell into recession a year and a half before the overall economy and still has not emerged from it. Well over 2 million workers lost their jobs between April 2006 and September 2011, when employment in the U.S. construction industry dropped by 28 percent. The Bureau of Labor Statistics (BLS) reports that the unemployment rate in the industry was 13.7% in October 2011. While this is an improvement from the 17.3% industry unemployment in October 2010 and the alarming 27.1% industry unemployment in February 2010, it is still considerably higher than the 4.5% industry unemployment of October 2006. These data and others indicate that the U.S. currently has an ample pool of unemployed construction workers.

BLS estimates that construction employment in New Mexico declined 9.2% between October 2010 and October 2011 (seasonally adjusted), and over 32% between its peak in June 2007 and October 2011 (seasonally adjusted), a loss of 19,300 jobs. In nearby Texas, construction employment declined by over 13.3% between its peak in May 2008 and October 2011, a loss of 90,600 jobs. AGCA, therefore, believes that skilled construction labor is likely to be readily available for upcoming USACE construction projects in the Clovis MSA.

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

As discussed below, AGCA is unaware of any reliable evidence that government-mandated PLAs generally help a project stay on schedule. The determination of whether use of a PLA would benefit a particular project should be made by the performing general contractor on the project, who is best able to assess the conditions and circumstances specific to that project. For more information about the particular factors that AGCA believes should be considered in such an assessment, please see the answer to question 8 below.

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

If, by "PLA clauses," USACE means project specifications mandating contractor use of a PLA, then AGCA's response is "none." As discussed above, AGCA strongly believes that government agencies should never mandate the use of a PLA; rather, they should leave to contractors the option of using PLAs on a voluntary basis. This principle applies across all types of projects.

(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?

An assessment of the time and cost impact of a PLA should be made by the general contractor on a project-specific basis. Research regarding the impact of PLA use on the economy or efficiency of projects in general is inconclusive. While case studies have had varying results, AGCA is unaware of any reliable study establishing that mandates for PLAs have consistently lowered the cost, increased the efficiency, or improved the quality of construction of public projects. 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 just last year. (U.S. Congressional Research Service Report R41310, Project Labor Agreements, by Gerald Mayer.)

That said, AGCA points out that government mandates for PLAs – even when open to all contractors on their face – 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 the contractors to make sharp distinctions between the construction 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 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.

Such changes are impractical for many potential contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs). As evidenced by data from BLS and the Current Population Survey (CPS), the vast majority of construction in the U.S. in general, and in New Mexico and Texas in particular, is performed on an open-shop basis. According to BLS, union representation in the U.S. construction industry dropped another 5.6% in 2010, to a level of just 13.7%. According to the Union Membership and Coverage Database, which provides estimates of labor data based on CPS statistics, only 8.2% of construction workers in the New Mexico were covered by a CBA in 2010 and a mere 2.7% in Texas. (Barry T. Hirsch and David A. Macpherson. 2011. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved December 15, 2011, from http://unionstats.gsu.edu/.) Consequently, AGCA believes that PLA a mandate in the Clovis Springs MSA would likely harm, rather than help achieve, 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 negotiates the PLA terms 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 and to require the contractors to become a party to a PLA containing those 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. AGCA 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 completed 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 organizations 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 can fulfill the negotiation obligation because they have no means to require 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 or 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). This contravenes Executive Order 13502'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 anything they 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.

Finally, 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 PLA mandate 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 PLA contains provisions requiring contributions to fringe benefit plans or participation in apprenticeship programs in violation of the Employee Retirement Income Security Act (ERISA);
- 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; and
- Whether the PLA mandate violates applicable state or local competitive bidding laws.

To avoid such legal challenges, and the cost and delay risks that they would entail, AGCA again recommends that the Corps refrain from mandating the use of a PLA on any project and instead leave to contractors the option of using PLAs on a voluntary basis.

(7) What is the time impact of a PLA on a solicitation response?

If the Corps chooses to exercise the option to require submission of an executed PLA by all offerors when offers are due, it could cause significant delay in response time, as offerors will need time to (a) try to contact union negotiators to schedule negotiations and (b) negotiate with them over the terms of the PLA. These steps could take a significant and unpredictable amount of time, depending on the parties and issues involved.

(8) What other factors should the Corps consider before deciding to include PLA provisions in a U.S. Army Corps of Engineer, Albuquerque District contract?

For the reasons discussed above, AGCA urges the Corps to exercise the broad latitude given to you by Executive Order 13502 and FAR Rule to determine whether and how to use PLAs to refrain from imposing any PLA mandate on any Albuquerque District contract. We reiterate our recommendation to allow your contractors to decide whether a PLA is appropriate for a particular project and to execute one voluntarily should they deem it appropriate. If, however, the Corps chooses to reject our primary recommendation, then we urge you, before imposing a PLA mandate on any project, to conduct, on a project-by-project basis, a scientific study of relevant factual conditions and circumstances to determine whether a PLA mandate would advance each of the government interests set forth in Section 3(a) of the Executive Order more than the interests would be advanced without such a mandate. Such an analysis should include thorough research and analysis of such issues as:

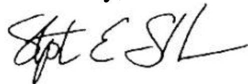
- Which firms normally perform the types of construction services involved in the project and are likely to submit a well-qualified proposal? What proportion of them are union contractors and what proportion are open-shop contractors? What experience do they have in working under a PLA? Are they willing to work under a PLA, or would a PLA mandate deter them from bidding on the project?
- Is there a sufficient number of qualified contractors (including subcontractors) in the local area of the project willing and able to work on the project if it has a PLA mandate? If not, will the Corps or the prime contractor have to rely on out-of-town contractors? If so, what impact might this have?
- Is there a set-aside goal for small, minority, or woman-owned businesses? If so, what proportion of the contractors in the area that would qualify to satisfy the goal are union contractors and what proportion are open-shop contractors? Are these contractors willing and able to work under a PLA?
- What specific crafts are needed for the project and what is the specific level of labor surplus or shortage for each of those crafts in the local area? What percentage of each of those craft workforces is represented by a union? What evidence is there that the local union hiring halls for each craft will be able to supply the particular labor needed? What other sources of labor or recruitment are available?
- What is the recent history of construction-industry strikes, jurisdictional disputes, or other delay-causing labor strife in the local area? If the area is largely open-shop, is a PLA actually needed to prevent such problems? If the area is largely union, would local-area CBAs offer sufficient protection against such problems? Will all of the unions representing the trades needed for the project be willing to execute the PLA? If not, could the PLA create problems for contractors signatory to CBAs with the trades that are not party to the PLA and lead to jurisdictional disputes?
- What is the recent history of PLA use on comparable projects in the local area? If PLAs recently have been used there, what quantifiable impact (positive or negative) have they had on project cost, timeliness, quality, and other factors? Have comparable projects in the area been successfully completed without use of a PLA?
- Will the project be subject to a prevailing wage law? If so, which one(s)? How would the requirements of the law differ from the contractual requirements of the PLA with respect to wages, fringe benefits, and labor practices? How will this affect the cost of the project?

- Would a PLA mandate violate the Competition in Contracting Act, Federal Acquisition Regulation, National Labor Relations Act, Employee Retirement Income Security Act, Small Business Act, or any other applicable procurement or funding legislation?
- Are there any local or state laws requiring, prohibiting, or otherwise governing the use of PLAs in the area of the project? If so, do those laws apply to the present project? Would they have an impact on the lawfulness or propriety of a Corps decision to mandate a PLA or to not mandate a PLA?
- Is a PLA mandate likely to provoke a bid protest or other challenge under federal, state or local laws? Could such a challenge increase the cost of the project or delay its initiation and completion? Would a public hearing be required or appropriate under the relevant procurement laws and regulations?

AGCA further urges the Corps (if rejecting our primary recommendation of imposing no PLA mandate) to provide offerors maximum flexibility by allowing them three options on any project on which a PLA mandate is being considered: (1) to submit a proposal based on performance under a PLA, (2) to submit a proposal based on performance not under a PLA, or (3) to submit two proposals, one based on performance under a PLA and one based on performance not under a PLA. This will enable the agency to better evaluate the likely cost impact of the PLA. If the Corps rejects this recommendation as well and decides to require negotiation of a PLA, then AGCA recommends that the agency refrain from requiring actual agreement and execution of a PLA, and instead require only that the contractor bargain in good faith with one or more labor organizations.

In summary, AGCA opposes government mandates for PLAs on federal construction projects and urges you to refrain from imposing such mandates on any construction projects, including those in the Clovis MSA. We appreciate the opportunity to share our insights with the Corps 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