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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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January 17, 2013

Mr. Christopher T. Brackett
USACE District, Louisville
600 Dr. Martin Luther King, Jr. Place, Room 821
Louisville, KY 40202-2230
Sent via e-mail to christopher.t.brackett@usace.army.mil

RE: Louisville District Corps of Engineers Soliciting Comments on the Potential Use of Project Labor Agreements (PLAs) at Fort Campbell, KY; Solicitation Number: W912QR-13-PLA-BARKLEYSCHOOL

Dear Mr. Brackett,

On behalf of The Associated General Contractors of America ("AGC"), I thank the U.S. Army Corps of Engineers Louisville District ("USACE") for soliciting input from the construction community regarding on the potential use of project labor agreements ("PLAs") for the elementary school project at Fort Campbell, Kentucky. In a letter sent to Ms. Lisa Roseberry of your office dated November 1, 2010, 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 Louisville District Design/Construction boundaries of the USACE. In addition, please also find enclosed a copy of a letter dated December 10, 2010, to Mr. David M. Deleranko at the USACE Fort Worth District also detailing AGC's concerns on this issue, as the questions in this sources sought notice address projects within the Fort Worth District area. We submit the present letter to reinforce the comments made in our earlier letters and to provide you with updated data and with information specific to the Fort Campbell area.

For reasons discussed in the enclosed letter, AGC strongly opposes government mandates for PLA use and holds 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 areas of Fort Campbell in particular, is performed on an open shop basis. According to BLS, union representation in the U.S. construction industry was just 14.9 percent in 2011. While construction-specific data are not readily attainable for the Fort Campbell area, only 3.2 percent of workers across all private industries in the Nashville-Davidson-Murfreesboro, TN Metropolitan Statistical Area were covered by a collective bargaining agreement in 2011, and a mere 3.0 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 January 16, 2013, 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.

As further noted in our earlier letters, labor-management instability is rarely a problem in such open-shop areas. To our knowledge, the Fort Campbell 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 is unaware of project-specific PLA use in the immediate area. However, AGC is aware of the Tennessee Valley Administration's ("TVA") master site agreement, which is like a standard PLA administered by a standing owner-labor committee for use on all TVA projects. For more information about local, project-specific PLA use in the Fort Campbell area, AGC defers to the local knowledge of its Kentucky and Tennessee Chapters: the AGC of Kentucky Inc (http://www.agcky.org/), the AGC of Western Kentucky (http://www.agcwky.org/), the AGC of Tennessee (http://www.tnagc.org/), the AGC of East Tennessee (http://www.agcetn.org/), and the Mississippi Valley Branch-AGC (http://www.mvagc.org/). Once again, if a PLA would be appropriate for the project under consideration, the selected general contractor could execute a PLA on its own accord. AGC further points out that Tennessee in 2011 enacted a state law that prohibits state and local government agencies from using state funds on project with a PLA mandate.

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 December 2012 was 13.5 percent. U.S. construction employment stands at 5.564 million, a dramatic decline of 2.1 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 Fort Campbell 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 Kentucky and Tennessee Chapters for more information.

In summary, for the reasons discussed above and in our November 1, 2010, and December 10, 2010, letters, AGC continues to oppose government mandates for PLAs and urges you to refrain from imposing such a mandate on the elementary school construction project or any other projects at Fort Campbell. 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.

November 1, 2010

Lisa Roseberry
U.S. Army Corps of Engineers, Louisville District
600 Dr. Martin Luther King, Jr. Place, Room 821
Louisville, KY 40202-2230

Submitted via electronic mail to lisa.a.roseberry@usace.army.mil

RE: Labor Market Survey for SOF Battalion Command, Phase 5 and Ft. Campbell, KY, Solicitation Number W9128A-PLA11R0006

Dear Ms. Roseberry:

The Associated General Contractors of America (AGC) thanks you for soliciting input from the construction community regarding the potential use of project labor agreements (PLAs) on large-scale construction projects (exceeding $25 million) within the Ft. Campbell, KY, area by the U.S. Army Corps of Engineers Louisville District (USACE). We provide the following comments in response to the questions posed in your solicitation.

1. Should PLAs be executed on selected large dollar contracts in the Ft. Campbell, KY area?

Whether or not PLAs should be executed on any contracts in the Ft. Campbell, KY, area should be left to the discretion of the contractors awarded the contracts as determined on a project-by-project basis. AGC neither supports nor opposes contractors' voluntary use of PLAs in the Ft. Campbell, KY, area (or elsewhere) but is strongly opposed to any *government mandate* for contractors' use of PLAs in the Ft. Campbell, KY, area. 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 owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, which 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 construction contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would also be the most qualified to negotiate such an agreement. Accordingly, AGC urges USACE to refrain from imposing any PLA mandates on any of its construction 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?

Poor economic conditions and diminished demand for construction services have left many construction workers unemployed. Between September of 2006 and September of this year, employment in the U.S. construction industry dropped 27.5 percent, as 2.1 million workers lost

their jobs. In the State of Kentucky, construction employment in Kentucky in September dropped 9.8 percent from September of 2009 and 29 percent from its peak in March 2000. AGCA, therefore, believes that skilled construction labor is likely to be readily available for upcoming USACE projects in the Ft. Campbell, KY, area.

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

As discussed in the answer to questions 5 and 6 below, AGC 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 AGC believes should be considered in such an assessment, please see the answer to question 7 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 AGC's answer is that no types of projects should be considered. As discussed above, AGC 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 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, AGC 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 three months ago. (U.S. Congressional Research Service Report R41310, Project Labor Agreements, by Gerald Mayer.)

That said, AGC 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 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 and among each of 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). AGC points out that, according to the Union Membership and Coverage Database, which provides estimates of labor data based on statistics compiled from the Current Population Survey, only 14.5 percent of the construction workforce in the State of Kentucky is covered by a CBA and only 3.1 percent in the State of Tennessee. (Barry T. Hirsch and David A. Macpherson (2010). Union Membership and Coverage Database from the CPS. In *Unionstats.com*. Retrieved November 1, 2010, from http://unionstats.gsu.edu/.)

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. 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 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 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, several 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 are able to fulfill the negotiations 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 EO'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 only be required 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 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);
- 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, AGC again recommends that USACE 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 other factors should the Corps consider before deciding to include PLA provisions in a Louisville District contract?

AGC reminds USACE that the Executive Order and FAR Rule expressly do not require any federal agency to use a PLA on any construction project and leave agencies with broad latitude in determining whether and how to use PLAs on their projects. As discussed above, AGC urges USACE to exercise this broad latitude to refrain from imposing any PLA mandates on any of its construction contractors or offerors. We reiterate that 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 a particular project and to execute one voluntarily should they deem it appropriate.

If, however, USACE 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 thorough analysis 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. The analysis should include consideration of the following issues:

- Which firms normally perform the types of construction services involved in the project and are likely to submit a well-qualified proposal for the project? 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? Would a PLA mandate disadvantage local contractors or subcontractors?

- Is there a sufficient number of qualified contractors in the local area of the project willing and able to work on the project if it has a PLA mandate? If not, will USACE or prime contractor have to rely on out-of-town contractors? If so, what impact might this have?

- Is there a set-aside goal on the project 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 is the level of labor surplus or shortage in the local area for each of the crafts needed to complete the project? What percentage of that workforce is represented by a union? What evidence is there that the local union hiring halls will be able to supply the particular labor needed? What other sources of labor or recruitment tools are available?

- What is the recent history of construction-industry strikes, jurisdictional disputes, or other delay-causing labor strife in the local area of the project? 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 in the local area? If PLAs have recently been used in the area, what quantifiable impact (positive or negative) have they had on project cost, timeliness, quality, and other factors?

- 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 USACE project? Would they have an impact on the lawfulness or propriety of a USACE decision to mandate a PLA or to not mandate a PLA?

- Would a PLA mandate provoke a judicial 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?

AGC further urges USACE (if it rejects our primary recommendation) 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 USACE rejects this recommendation as well and decides to require negotiation of a PLA, then AGC 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 conclusion, AGC continues to oppose government mandates for PLAs on federal construction projects and offers the preceding comments to assist USACE in its consideration of the use of PLAs on large-scale construction projects in the Ft. Campbell, KY, area. We appreciate the opportunity to share our insights with USACE 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
Associated General Contractors of America

cc: Colonel Keith A. Landry, Commander, Louisville District, USACE
Robin Baldwin, HQUSACE
Gregory Noonan, HQUSACE
Richard Vincent, AGC of Kentucky
Michael Gerescher, AGC Western Kentucky
William Young, AGC of Tennessee

STEPHEN E. SANDHERR, Chief Executive Officer

AGC of America
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December 10, 2010

Mr. David M. Deleranko
U.S. Army Engineer District Fort Worth
ATTN: CESWF-CT-C (Rm 2A19)
819 Taylor Street
Fort Worth, Texas 76102-0300
Submitted via electronic mail to david.m.deleranko@usace.army.mil

RE: Potential Use of Project Labor Agreements on Large-Scale Federal Construction Projects in the Fort Worth District Boundaries; Solicitation Number W9126G-09-D-00XX-RFP03

Dear Mr. Deleranko:

The Associated General Contractors of America (AGCA) thanks you for soliciting input from the construction community regarding the potential use of project labor agreements (PLAs) on large-scale construction projects (exceeding $25 million) within the Fort Worth District Design/Construction boundaries of the U.S. Army Corps of Engineers (USACE). We provide the following comments in response to the questions presented in your solicitation.

a. Should PLA's be executed on selected large dollar contracts within the Fort Worth District boundaries? What other factors should the Corps of Engineers consider before deciding to include PLA provisions in a Fort Worth District contract? What type of project should or should not be considered for the utilization of a PLA?

Whether or not PLAs should be executed on any contracts within the Fort Worth District boundaries 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 within the Fort Worth District boundaries (or elsewhere) but strongly opposes any *government mandate* for contractors' use of PLAs within the Fort Worth District boundaries. AGCA 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. AGCA believes that neither a public owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, which 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 also be the most qualified to negotiate such an agreement. Accordingly, AGCA urges USACE to refrain from imposing any PLA mandates on any of its construction

contractors and to defer to the contractor's judgment as to whether a PLA is appropriate for a given project. This principle applies across all types of projects.

b. Is the use of PLAs effective in achieving economy and efficiency in Federal procurement? What is the estimated relative cost impact, or any other economies or efficiencies derived by the Federal Government, if using PLAs? Will a PLA impact the cost of submitting an offer?

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. 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 just five months ago. (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 and among each of 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). This describes the vast majority of construction firms based in the area of the Fort Worth Boundaries, not to mention the large majority of construction firms across the country. According to the Bureau of Labor Statistics, only 15 percent of workers employed in the construction industry in the U.S. in 2009 were represented by a union. The percentage is substantially smaller in the states within the Fort Worth District boundaries: according to the Union Membership and Coverage Database, which provides estimates of labor data based on statistics compiled from the Current Population Survey, only 4.4 percent of workers employed in construction in 2009 in the State of Texas were covered by a CBA, and only 3.8 percent in the Dallas-Fort Worth-Arlington, Texas, metropolitan area. (Barry T. Hirsch and David A. Macpherson. 2010. Union Membership and Coverage Database from the CPS. In *Unionstats.com*. Retrieved December 9, 2010, from http://unionstats.gsu.edu/.) Consequently, AGCA believes that PLA mandates in those areas 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 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 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 are able to fulfill the negotiations 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 EO'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.

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 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);
- 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 USACE 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.

c. Is the use of PLAs effective in producing labor-management stability? Have labor disputes or other labor issues contributed to project delays in the local area?

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 absent 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. The vast majority of construction work in the Fort Worth District Boundaries area is performed on an open-shop basis, as noted above, and AGCA is unaware of any significant project delays resulting from labor disputes in the area in recent years. Rather, the area, overall, seems to enjoy a considerable level of labor-management stability.

Furthermore, AGCA wishes to point out that job disruptions can occur even in the presence of a PLA with guarantees against strikes, lockouts, and the like. AGCA 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 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 just this past summer, 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.

Accordingly, AGCA cannot see how a PLA mandate would advance labor-management stability in the Fort Worth District boundaries. Again, if a PLA is needed on a particular Forth Worth District project, the general contractor awarded the contract would be the first to know that and to execute on a voluntary basis.

d. Is the use of PLAs conducive to ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards and other relevant matters? Are there instances where these standards have not been met on Federal contracts in the local area? Were PLAs used for those specific contracts?

It is unclear to AGCA 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 – in the Fort Worth District boundaries 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. AGCA questions what elements of a PLA might be superior to the compliance assistance, administration, and enforcement already provided by the 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. AGCA is also unaware of any evidence of rampant employer violations of employment laws within the Fort Worth District boundaries and suggests that, if any exists, then it is the responsibility of the appropriate government enforcement agencies to curb that misconduct.

e. Projects will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades. Do you foresee any work on projects that may result in both the prime contractor and at least one subcontractor or two or more subcontractors employing the same trade?

This is matter best assessed by the prime contractors on a project-by-project basis.

f. Are there concerns by prime contractors on the availability of skilled construction labor? Information may reference current apprenticeship statistics and workforce age demographics.

Poor economic conditions and diminished demand for construction services have left many construction workers unemployed. Approximately 2.1 million workers lost their jobs between August 2006 and October 2010 when employment in the U.S. construction industry dropped by 27 percent. In Texas, construction employment as of October of this year was down 15 percent from its peak in May 2008. AGCA, therefore, believes that skilled construction labor is likely to be readily available for upcoming USACE projects in the Fort Worth District boundaries.

g. Completion of anticipated projects will require extensive performance periods. Will a PLA impact the completion time? What is the anticipated volatility in the labor market for the trades required for the execution of the project? Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?

As discussed in the answer to question (b) above, AGCA is unaware of any reliable evidence that government-mandated PLAs generally enhance the efficiency of a project. This includes helping the project to stay on schedule. The determination of whether use of a PLA would benefit a particular project should be made by the prime contractor on the project, who is best able to assess the conditions and circumstances specific to that project.

The question concerning anticipated volatility in the labor market of "the project" will ultimately depend on the circumstances of the particular project – including the conditions at the time of the project's undertaking and in the specific location of the project within the Fort Worth District boundaries. Again, the assessment is best made by the contractor on a project-specific basis. In general, though, labor-management relations have been very stable in the Fort Worth District boundaries area for many years, as mentioned in the answer to question (c) above.

h. Where have PLAs been used on comparable projects undertaken by Federal, State, Municipal or private entities in the geographic area of this District?

To AGCA's knowledge, PLA use in the Fort Worth District boundaries area is extremely rare. AGCA is unaware of any PLAs executed pursuant to a requirement by a government entity in the area. In fact, AGCA is aware of only two PLAs used in the entire State of Texas over the past 20 years, both of which were for projects owned by private companies: (1) a PLA executed in April of this year for the construction of two nuclear units at the South Texas Project (STP) near Bay City, Texas, being developed by Nuclear Innovation North America LLC; and (2) a PLA executed in June 2003 for the construction of a truck manufacturing facility in San Antonio, Texas, built by Toyota Motor Manufacturing Co. AGCA questions whether those projects are "comparable" to projects that USACE is contemplating in the Fort Worth District boundaries.

i. Will the use of PLAs impact the ability of potential offerors and/or subcontractors to meet the Small Business utilization goals?

For the reasons described in the answer to question (b) above, government mandates for PLAs often have the effect of deterring many potential offerors from bidding on a project, particularly in strong open-shop areas like the Forth Worth District Boundaries. Because small businesses are likely the least able to make the changes and to incur any added costs presented by the government-mandated PLA, a PLA mandate would likely impair the fulfillment of small-business utilization goals.

In summary, AGCA continues to oppose government mandates for PLAs on federal construction projects and urges you to refrain from imposing such mandates on any USACE construction projects within the Fort Worth District boundaries. 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 a particular project and to execute one voluntarily should they deem it appropriate.

We appreciate the opportunity to share our insights with USACE 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,

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Chief Executive Officer

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