May 6, 2014

Ms. Alicia Moore
Contract Specialist
USACE District, Little Rock
700 West Capitol
Little Rock, AR 72201
Sent via email to alicia.m.moore@usace.army.mil

RE: Z--Determination for a PLA for the Design Bid Build, the Repair/Replace Primary Runway Project at Little Rock AFB (LRAFB), AR; Solicitation Number: W9127S14R6001

Dear Ms. Moore,

On behalf of The Associated General Contractors of America ("AGC"), I thank the U.S. Army Corps of Engineers Little Rock District ("USACE") for soliciting input from the construction community regarding the potential use of project labor agreements ("PLAs") for a large-scale construction project at Little Rock AFB, Arkansas ("Little Rock 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 Little Rock Project.

Q1. Do you anticipate a skilled labor shortages resulting from competition within the contractor community arising from concurrent large-scale construction contracts in the project vicinity?

AGC is not in a position to answer this question. We defer to the AGC of Arkansas (http://www.agcar.net/) and to local contractors to provide such local information.

Q2. Are you aware of skilled labor shortages in the area for those crafts that will be needed to complete the referenced project?

AGC is not aware of any skilled labor shortages in the Little Rock Project area and is not in a position to assess which crafts will be needed. AGC would again defer to the knowledge of its local Chapter—the AGC of Arkansas—and prime contractors in the region for such information. For further comment on issues raised by this question, please see the response to number 2 below.

Q3. Are you aware of time sensitive issues/scheduling requirements that would impact the rate at which the reference project should be completed?

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

Q4. Identify specific reasons why or how you believe a PLA would advance the Federal Government's interests in achieving economy and efficiency in federal procurement?

AGC does not believe that a PLA mandate would advance the Federal Government's interests in achieving economy and efficiency in federal procurement. While PLAs, when voluntarily adopted by contractors, can, under certain circumstances, be beneficial, AGC maintains that government *mandates* for PLAs are detrimental. AGC believes that neither a public project owner nor its representative should compel any private 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, as discussed below. 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.

There are no widely published studies establishing that PLA mandates have 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 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 construction in Arkansas is performed on an open-shop basis. According to BLS, in the State of Arkansas, 2.6 percent of construction workers are covered by a CBA and just 2.6 percent are members of a union. Specific to the Little Rock Project area, the Union Membership and Coverage Database—which provides estimates of labor data based on CPS statistics—reports that a mere 1.8 percent of workers across all private industries in the Little Rock-North Little Rock, Arkansas Metropolitan Statistical Area were covered by a CBA in 2013 and just 1.4 percent were members of a union. (Barry T. Hirsch and David A. Macpherson. 2014. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved May 5, 2014, from http://unionstats.gsu.edu/.) Consequently, AGC believes that PLA mandates in the area would likely harm economy and efficiency in federal procurement by both hindering competition and raising project costs.

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

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

Moreover, the contractors in such a situation cannot control whether they are able to fulfill the negotiation obligation because they have no means to require the labor organizations to negotiate with them. Even if the prospective offeror is able to identify representatives of appropriate labor organizations and attempts to contact them to request negotiations for a PLA, the contractor has no recourse if the labor representatives fail to respond or refuse to negotiate. Absent an established collective bargaining relationship with the contractor under Section 9(a) of the NLRA, unions have no legal obligation to negotiate with any particular contractor and have no legal obligation to negotiate in a good-faith, nondiscriminatory, and timely manner. Thus, requiring offerors to negotiate with another party—a party with which the offeror has no authority to compel negotiations—effectively grants the other party (i.e., labor organizations here) the power to prevent certain contractors from submitting an acceptable offer. Such a requirement not only enables the labor organizations to determine which contractors can submit an offer (by picking and choosing with which contractors they will negotiate), it also enables them to determine which contractors will submit an attractive offer (by giving a better deal to one contractor over another). Such a requirement contravenes the executive order's directive that mandatory PLAs "allow all contractors and subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements" as well as its objective of advancing economy and efficiency in federal procurement.

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

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

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

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

Q5. Identify specific reasons why or how you do not believe a PLA would advance the Federal Government's interest in achieving economy and efficiency in federal procurement?

Please see AGC's response to Q4.

Q6. Please identify any additional information you believe should be considered on the use of a PLA on the referenced project.
Q7. Please identify any additional information you believe should be considered on the use of a PLA on the referenced project.

For questions Q6-Q7, please see AGCs responses to your additional questions below.

The following questions are additional questions of interest that may be answered if applicable:

1. **What market share does union labor have in the geographic area for this project or type of construction?**

AGC refers USACE to its response to Q4 above.

2. **Does the local market contain the sufficient number of available skilled workers for this project?**
   - Are the other projects in the vicinity going to limit the pool of skilled labor available for your project?

As is well-known around the country, the economic crisis of the past several years has had a deleterious impact on the construction industry, leaving literally millions of workers without jobs. According BLS, the construction industry's unemployment rate in April 2014 was 9.4 percent, among the highest among all industry-wide averages. U.S. construction employment stands at 6.000 million, a dramatic decline of nearly 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. More specifically to the Little Rock Project, BLS data show that 16,500 mining, logging and construction workers—as data limited to only construction is not available—were employed in the nearby Little Rock-North Little Rock-Conway, AR Metropolitan Statistical Area in March 2014. That figure is down 20 percent from August 2007, representing a loss of 3,600 jobs.

As the industry begins to rebound across the country, concerns about the possibility of worker departure from the construction employment market for jobs in other industries and about potential skilled labor shortages have begun to surface. However, AGC is not aware of any actual shortage of this kind in the Little Rock Project area to date.

Furthermore, should a skilled labor shortage arise, AGC questions how a PLA mandate would 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.

For more information about the local projects and local labor supply and demand, AGC again defers to the local knowledge of the AGC of Arkansas.

3. **What investments have been made to support registered apprenticeship programs?**

AGC is not in a position to answer questions 3-4. We defer to the AGC of Arkansas (http://www.agcar.net/) and to local contractors to provide such local information.

Have PLAs been used on comparable projects undertaken by the public or private sector in this geographic region?

PLA use in the Southeast region of the U.S. is very rare. The only PLA used in Arkansas of which AGC is aware is use of a limited PLA on the construction of the Clinton Presidential Library back in 2002. Outside of Arkansas, the only current or recent use of a PLA in the larger region of which AGC is aware is an application of the national Nuclear Power Construction Labor Agreement for the construction of Units 3 and 4 at the Vogtle Electric Generating Plant in Georgia, and one or more PLAs for certain construction projects performed for the Department of Energy at its Savannah River Site nuclear reservation in South Carolina. None of the these projects appears to be comparable to the present project. Again, AGC of Arkansas and local contractors may have more information on the use of PLAs in the local area.

4. **Have PLAs been used on this type of project in other regions?**

We are not certain whether PLAs have been used on this type of project in other regions.

5. **Which CBAs are likely to expire during the course of the project under consideration that might cause delays?**

As indicated by the union representation data provided in the response to question Q4 above, the volume of construction performed under a CBA in the project area is minimal. Accordingly, the expiration of CBAs in the area is not likely to have a significant impact on the present project. For information on the few CBAs that do exist in the area, including their expiration dates and the number of workers that they cover, AGC recommends that the Corps consult the U.S. Department of Labor's Office of Labor-Management Standards, which is required by the Taft-Hartley Act to collect CBAs, or the Construction Labor Research Council (http://www.clrcconsulting.org/).

6. **How do open shop and union wage rates influence prevailing wage rates in the local market and compare to Davis Bacon rates? What impact does unionization in the local market have on wages?**

Davis-Bacon rates are supposed to reflect the prevailing wage rates paid in the local market. As discussed above, the vast majority of construction in the local area is performed nonunion. Nevertheless, a review of Davis-Bacon wage determinations covering the project area indicates that many craft rates are based on rates set forth in collective bargaining agreements. This appears to be a manifestation of the dysfunctional state of the Department of Labor's system for establishing "prevailing" wage rates in wage determinations, as many studies have concluded. (See, e.g., U.S. Government Accountability Office, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey*, GAO-11-152, March 2011.)

7. **Could a PLA contribute to cost savings in any of the following ways?**
   -Harmonization of shifts and holidays between the trades to cut labor costs?
   -Minimization disruptions that may arise due to expiration of CBA?
   -Availability of trained, registered apprentices, efficient for highly skilled workforce?
   -Allowing for changes in apprentice to journeyman ration.
   -Serving as management tool that ensure highly skilled workers from multiple trades are coordinated in the most efficient way. Others?

As noted in AGC's response to question Q4, research regarding the impact of a PLA's use on the economy of projects in general is inconclusive. While case studies have had varying results, AGC is aware of no reliable study establishing that PLA mandates have consistently lowered the cost, increased the efficiency, or improved the quality of construction of public projects savings in any of the ways USACE has denoted here.

8. **Could a PLA minimize risk and contribute to greater efficiency in any of the following ways?**
   -Mechanisms to avoid delays
   -Complying with Davis Bacon and other labor standards, safety rules and EEO and OFCP laws.
   -Ensuring a steady supply of skilled labor in markets with low supply or high competition for workers.

Again, as AGC notes in its response to question Q4, research regarding the impact of PLA use on the efficiency of projects in general is inconclusive. AGC here adds that PLAs might be able to help avoid delays in certain situations where there is a significant risk of 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 disputes like strikes, lockouts, and jurisdictional disputes rarely occur on projects that are not performed under CBAs. As noted above, that describes the majority of construction work in Little Rock Project area. If a PLA is, nonetheless, needed as a mechanism to avoid delays on the projects, the general contractor awarded the contract would be the first to know that and to execute one on a voluntary basis.

AGC further points out that job disruption can occur even in the presence of a PLA with guarantees against strikes, lockouts, and the like. AGC is aware of several incidents of work stoppages impeding the progress of projects covered by a PLA containing a no-strike provision. In some cases, the PLA-covered workers directly violated the provision. One example is the wildcat strike staged by the Carpenters union at the $2.4 billion San Francisco International Airport expansion project in 1999. In other cases, the PLA-covered workers honored the provision, but the project was hindered by strikes at related facilities or at unrelated worksites in the area. This happened in the summer of 2010, when three major Illinois Tollway projects covered by PLAs were nearly brought to a halt because contractors could not obtain needed materials and equipment, as drivers honored picket lines outside asphalt plants, concrete-mix facilities, and quarries as part of an area-wide strike.

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

9. Are there ways in which a PLA might increase costs on this particular project?

As noted in AGC's response to question Q4, a PLA can increase costs on a project. Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. AGC would again direct USACE to its response in question Q4, where AGC delineates ways a PLA could increase project costs.

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

Sincerely,

Stephen E. Sandherr
Chief Executive Officer