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

March 4, 2014

Norine Horikawa
Naval Facilities Engineering Command, Pacific
258 Makalapa Drive, Suite 100
Pearl Harbor, Hawaii 96860-3134
***Sent via email to norine.horikawa@navy.mil***

**RE: PROJECT LABOR AGREEMENT INQUIRY FOR PARKING APRON/INFRASTRUCTURE AND HANGAR, MARINE CORPS BASE, HAWAII; Solicitation Number: N62742PLA**

Dear Ms. Horikawa,

On behalf of The Associated General Contractors of America ("AGC"), I thank the Naval Facilities Engineering Command, Pacific ("NAVFAC") for soliciting input from the construction community regarding the potential use of project labor agreements ("PLAs") for the construction of the construction of an aircraft hangar, parking apron and infrastructure at marine corps base in Hawaii ("Marine Corps Base 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.

**1. Have PLAs been used on comparable projects undertaken by the public or private sector in Hawaii? If so, please provide supporting documentation.**

AGC is aware of PLA use on only four large-scale projects in Hawaii: (1) a PLA executed by Swinerton Builders and the Hawaii Building & Construction Trades Council covering the General Services Administration's $80-million project, now in progress, for the modernization and renovation of the Prince Jonah Kuhio Kalanianaole Federal Building and U.S. Courthouse in Honolulu; (2) a PLA, executed in 2009, imposed by the City of Honolulu covering a $5.5-billion rail transit project; (3) the Aloha Stabilization Agreement, a PLA voluntarily executed in 2004 by contractor Fluor Federal Services covering a $100 million residential construction project for the U.S. Navy at Ford Island Pearl Harbor; and (4) the Ohana Stabilization Agreement, a PLA voluntarily executed by developer Actus Lend Lease in 2004 covering billions of dollars of construction and renovation work under the U.S. Army's Hawaii Residential Communities Initiative Project over a 50-year period, including seven military installations on Oahua. AGC questions whether any of these projects are comparable to the Marine Corps Base Project. For more information about local history, AGC defers to the knowledge of its local Chapter: the General Contractors Association of Hawaii (www.gcahawaii.org).

**2. Does the local market have sufficient number of available skilled workers for this project? Are there other projects in the vicinity that will limit the pool of skill labor available for this project? Please elaborate and provide supporting documentation.**

As 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 to the U.S. Bureau of Labor Statistics (BLS), the construction industry's unemployment rate in January 2014 was 12.3 percent, among the highest among all industry-wide averages. U.S. construction employment stands at 5.922 million, a dramatic decline of approximately 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 Marine Corps Base Project, BLS data show that 9,400 building construction workers were employed Hawaii as of December 2013. That figure is down 28 percent from August 2007, representing a loss of 3,700 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 Marine Corps Base 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 NAVFAC continues to have concerns about this issue and to maintain that a PLA would be an effective remedy, AGC suggests that NAVFAC may wish to conduct a thorough analysis of the local skilled labor supply to help answer this question. The Construction Labor Research Council (www.clrcconsulting.org), 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 defers to the local knowledge of its local Chapter: the General Contractors Association of Hawaii (www.gcahawaii.org).

**3. Are you aware of any past or current labor strikes or disputes that may impact this project? If so, please elaborate and provide supporting documentation.**

AGC is not aware of any labor strikes or disputes that are likely to impact this project and believes that a PLA mandate is not needed to advance labor-management stability on the project. The only significant strike affecting construction projects in the local area in recent years of which AGC is aware is a strike staged by Teamsters Local 996 against two cement supply firms over seven years ago. Worth noting is that, while the strike did, in fact, shut down most construction work on Oahu for a period of time in 2004 due to lack of needed cement, a PLA on construction projects in the area – even one containing a stringent no-strike clause – could not have prevented the strike or its impact on those projects, since the striking employees were not construction workers and would not have been covered by the PLA.

**4. Which Collective Bargaining Agreements will expire during the course of the project that may cause delays?**

AGC is not in a position to answer this question. For information on the expiration dates of the various collective bargaining agreements (CBAs) in the area, AGC recommends that NAVFAC consult the General Contractors Association of Hawaii (www.gcahawaii.org), the Construction Labor Research Council (http://www.clrcconsulting.org/), or the U.S. Department of Labor (http://www.dol.gov/olms/regs/compliance/cba), which is required by the Taft-Hartley Act to collect CBAs.

**5. Could a PLA contribute to cost savings in any of the following:**

**a. Harmonization of shifts and holidays between the trades to cut labor costs?**
**b. Minimizing disruptions that may arise due to expiration of Collective Bargaining Agreements?**
**c. Allowing for changes in apprentice-to-journeyman ratio?**
**d. Serving as a management tool that ensures highly skilled workers from multiple trades are coordinated in the most efficient way?**

It is impossible to predict whether a PLA on the Marine Corps Base Project would result in cost savings or other efficiencies. 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.)

AGC points out that government mandates for PLAs – even when competition, on its face, is open to all contractors – can have the *effect* of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. For example:

- PLAs typically limit open-shop contractors' rights to use their current employees to perform work covered by the agreement. Such PLAs usually permit open shop contractors to use only a small "core" of their current craft workers, while the remaining workers needed on the job must be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.

- PLAs frequently require contractors to change the way they would otherwise assign workers, requiring contractors to make sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers competent in more than one skill and perform tasks that cross such boundaries. It can also burden union contractors by requiring them to hire workers from the hiring halls of different unions from their norm and to assign work differently from their norm.

- PLAs typically require contractors to subcontract work only to subcontractors that adopt the PLA. This may prevent a contractor (whether union or open shop) from using on the project highly qualified subcontractors that it normally uses and trusts and that might be the most cost-effective.

- PLAs typically require open-shop contractors to make contributions to union-sponsored fringe benefit funds from which their regular employees will never receive benefits due to time-based vesting and qualification requirements. To continue providing benefits for such employees, such contractors must contribute to both the union benefit funds and to their own benefit plans. This "double contribution" effect significantly increases costs.

- PLAs typically require contractors to pay union-scale wages, which may be higher than the wage rates required by the Secretary of Labor pursuant to the Davis-Bacon Act.

Such changes are impractical for many potential contractors and subcontractors, particularly those not historically signatory to CBAs.

Another way that a PLA mandate can drive up costs and create inefficiencies is related to who negotiates 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 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 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 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 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);

- 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.

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 NAVFAC refrain from mandating the use of a PLA on the Marine Corps Base Project and instead leave to contractors the option of using PLAs on a voluntary basis.

**6. Could a PLA minimize risk and contribute to greater efficiency in any of the following ways:**

**a. Mechanisms to avoid delays?**

Please see the answer to question 5 above. As indicated there, AGC believes that the efficacy of a PLA in contributing to the efficiency of a project – as a mechanism to avoid delays or otherwise – is unpredictable at the very least and that PLA mandates can even cause delays. Again, AGC believes that the general contractor selected for the project would be in the best position to judge whether a PLA is appropriate and should be left to decide, on a voluntary basis, whether a PLA should be used.

**b. Compliance with Davis-Bacon and other labor standards, safety rules, EEO and OFCCP laws?**

It is unclear to AGC 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 – on the Marine Corps Base Project 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. 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 Marine Corps Base Project area and suggests that, if any exists, then it is the responsibility of the appropriate government enforcement agencies to curb that misconduct.

**c. Ensuring a steady supply of skilled labor in markets with low supply or high competition for workers?**

Please see the answer to question 2 above. As noted there, AGC does not anticipate a shortage of skilled labor to affect the Marine Corps Base Project and questions how, if such a shortage were to arise, a PLA mandate would be the best solution for the problem.

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

Please see the answer to question 5 above.

**8. Could a PLA increase costs on this project? If so, please elaborate and provide supporting documentation (if any).**

Please see the answer to question 5 above.

In summary, AGC opposes government mandates for PLAs on federal construction projects and urges NAVFAC to refrain from imposing such a mandate on the Marine Corps Base Project. For the reasons discussed above, NAVFAC 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

2300 Wilson Blvd., Suite 400 • Arlington, VA 22201-3308
Phone: 703.548.3118 • Fax: 703.548.3119 • **www.agc.org**