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AGC of America
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July 30, 2014

Ms. Marta Anerton
Contract Specialist
U.S. Army Corps of Engineers, Huntsville
P.O. Box 1600
Hunstville, AL 35807-4301
Sent via email to marta.l.anerton@usace.army.mil

RE: Y--Project Labor Agreement for the Project: Repair/Renew Building #40 Forensic Toxicology Drug Testing Lab/Department of Clinical Investigation, Tripler Army Medical Center, Honolulu, HI; Solicitation Number: W912DY-14-PLA-2

Dear Ms. Anerton,

On behalf of the Associated General Contractors of America ("AGC"), I thank the U.S. Army Corps of Engineers Huntsville Center ("USACE") for soliciting input from the construction community regarding the potential use of project labor agreements ("PLAs") for a large-scale construction project: Repair/Renew Building #40 Forensic Toxicology Drug Testing Lab/Department of Clinical Investigation, Tripler Army Medical Center, Honolulu, HI ("Tripler Army Medical Center 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 the questions presented in your sources sought notice.

1. **Do you have knowledge that a PLA has been used in the local area on projects of this kind? 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 Tripler Army Medical Center Project. For more information about local PLA history, AGC defers to the knowledge of its local Chapter: the General Contractors Association of Hawaii (www.gcahawaii.org).

2. **Are you aware of skilled labor shortages in the area for those crafts that will be needed to complete the referenced project? Are there large scale construction projects in the area (over $25M, within 50 miles of Tripler Army Medical Center, HI which could impact availability of skilled labor for this project? What is the anticipated volatility in the labor market for the trades required for the execution of the project? Please 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 June 2014 was 8.2 percent, among the highest of all the industry-wide averages. U.S. construction employment stands at 6.015 million, a dramatic decline of almost 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 Tripler Army Medical Center Project, BLS data show that 9,600 building construction workers were employed Hawaii as of June 2014. That figure is down 26 percent from August 2007, representing a loss of 3,300 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 Tripler Army Medical Center 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. 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 knowledge of its local Chapter: the General Contractors Association of Hawaii (www.gcahawaii.org).

3. Are you aware of time sensitive issues/scheduling requirements that would impact the rate at which the referenced project should be completed? If so, please elaborate and provide supporting documentation where possible.

AGC is not in a position to respond to this question. A prime contractor would best be able to determine whether time/scheduling issues would impact the rate at which Tripler Army Medical Center Project should be completed.

4. Is the proposed schedule/completion time one which would benefit for a PLA - if so, how? Will a PLA impact the completion time? Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?

AGC believes that a PLA mandate would not advance the Federal Government's interests in achieving economy and efficiency, which include scheduling issues, in federal procurement. There are no widely published studies establishing that PLA mandates, PLA bid preferences, or PLA uses 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, GAO 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 most construction work in the U.S. in general, and in the State of Hawaii, in particular, is performed on an open-shop basis. Specifically, data show that 66.5 percent of construction workers were ***not*** covered by a CBA and 68.3 percent of construction workers were ***not*** members of a union. (Barry T. Hirsch and David A. Macpherson. 2011. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved July 24, 2014, from http://unionstats.gsu.edu/.) Consequently, AGC believe 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 Tripler Army Medical Center Project.

5. Are there any concerns regarding labor-management stability related to this project? Will the use of a PLA produce labor-management stability on this project? Have labor disputes or other labor issues contributed to project delays in the local area? Are you aware of examples of labor-management conflicts in the area which could impact the efficiency of this project, which a PLA could positively impact/resolve?

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 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 the Tripler Army Medical Center Project area.

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 several 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.

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.

Accordingly, AGC cannot see how a PLA mandate would advance labor-management stability on the Tripler Army Medical Center Project. Again, if a PLA is needed to ensure such stability on the project, the general contractor awarded the contract would be the first to know that and to execute one on a voluntary basis.

6. **Identify specific reasons why or how you believe a PLA would advance the Federal Government's interest in achieving economy and efficiency in federal procurement.**
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.**
8. **Please identify any additional information you believe should be considered on the use of a PLA on the referenced project.**
9. **Please identify any additional information you believe should be considered on the non-use of a PLA on the referenced project.**

In response to questions 6 through 9, AGC strongly holds that a PLA would not advance the Federal Government's interest in achieving economy and efficiency in federal procurement. AGC refers USACE to its detailed response to question 4 for this information.

In summary, AGC opposes government mandates for PLAs on federal construction projects and urges USACE to refrain from imposing such a mandate on the Tripler Army Medical Center 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