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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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October 20, 2014

Ms. Christy J. Love
U.S. Army Corps of Engineers, Vicksburg District
CEMVK-CT-C
P.O. Box 60267
New Orleans, LA 70160-0267
Sent via electronic mail to Christy.J.Love@usace.army.mil

RE: Y--New Orleans to Venice, NOV-05A, Upper Reach A, West Bank Levee Back Levee, St. Jude to City Price, Plaquemines Parish, Louisiana; Solicitation Number: W912P8-14-B-0025

Dear Ms. Love,

On behalf of The Associated General Contractors of America (“AGC”), I thank the U.S. Army USACE of Engineers, Vicksburg District (“USACE”) for soliciting input from the construction community regarding the potential use of project labor agreements (“PLAs”) for the New Orleans to Venice, NOV-05A, Upper Reach A, West Bank Levee Back Levee, St. Jude to City Price, Plaquemines Parish, Louisiana (“West Bank Levee 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. 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.

To AGC’s knowledge, PLA use in the New Orleans area is very rare. In 2009, the U.S Department of Veterans Affairs (VA) commissioned a study by consultants Rider Levett Bucknall (RLB) to determine the potential cost, schedule, and other impacts associated with the use of PLAs on projects in five cities where the VA had upcoming projects, including New Orleans. The RLB report cites three examples of PLAs used on large projects in the area in the 10 years leading up to the 2009 study: two on hotels and one on a related casino. The only other project in the area in recent years that AGC believes may have been covered by a PLA is a shipyard modernization project undertaken by Northrop Grumman Ship Systems in or around 2003. AGC questions whether those four projects are “comparable” to the West Bank Levee Project.

AGC points out that you will find no PLAs on Louisiana state procurement projects in recent years. In fact, the state adopted a statute prohibiting state and local agencies from imposing PLA mandates on public works projects in June 2011.

2. Are you aware of skilled labor shortages in the area for those crafts that will be needed to complete the referenced project? If so, 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 September 2014 was 7 percent, among the highest of all the industry-wide averages. U.S. construction employment stands at 6.079 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 West Bank Levee Project area, BLS data for employees of the construction industry in the New Orleans-Metairie-Kenner, LA area show 32,300 workers employed in that sector as of August 2014. The sector has lost 1,200 jobs since October 2008.

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 West Bank Levee 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 defers to the knowledge of its local Chapters in the region: The Louisiana AGC (<http://www.lagc.org/>) and the Mississippi Valley Branch AGC (<http://www.mvagc.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 best respond to this specific question. A prime contractor is likely best able to respond. However, this question leads to the question of whether a government mandated PLA would provide the federal government any efficiencies. It is impossible to reliably predict whether a PLA on the West Bank Levee Project—or any project—would result in net cost savings or improved scheduling outcomes. 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.)

Furthermore, at least one relatively recent study concerning New Orleans in particular concluded that such a mandate would have a significant cost-increase impact. In 2009, the U.S. Department of Veterans Affairs (VA) commissioned a study by consultants Rider Levett Bucknall (RLB) to determine the

potential cost, schedule, and other impacts associated with the use of PLAs on projects in five cities where the VA had upcoming projects, including New Orleans. RLB's report included the following findings regarding possible labor and other project costs of a PLA mandate in New Orleans:

- “As New Orleans is approx 90 to 95% non-union, there is a concern that large out-of-state union contractors, who are able to execute the job and will agree to a PLA, will incorporate items such as travel and housing costs into their bids.”
- “Many non-union contractors in New Orleans have their own benefits package. Under a PLA there is generally the requirement to also contribute to union benefits which therefore results in duplication. Also, given unions require a number of years of membership for these benefits to be distributed, these benefits are ‘lost’ to the nonunion contractor and their employees.”
- A PLA mandate would not necessarily lead to cost savings by increasing productivity. “Unions claim that their apprenticeship programs result in more efficient and productive workers, however there is no statistical data to confirm that this union labor is indeed more, or less productive in New Orleans.”
- Large projects like the VA hospital under consideration in New Orleans “would lend itself to large, out-of-state union contractors having the upper hand.” Because New Orleans’s open-shop contractor community would be largely opposed to bidding on a PLA, “the general feeling is that a PLA will exclude 90%-95% of the market, reducing competition and increasing costs. As a result, there is a perceived cost premium associated with bidding a PLA project in New Orleans.”

RLB concluded that a project utilizing a PLA in New Orleans “could experience a construction cost premium of approximately 7.5%.” (U.S. Department of Veterans Affairs, *Project Labor Agreements – Impact Study*, by Rider Levett Bucknall.)

As the RLB report indicates, 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.

Such changes are impractical for many potential contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs). As RLB found, this describes the vast majority of construction firms based in the New Orleans area, not to mention the large majority of construction firms across the country. 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 New Orleans, LA, area in particular, is performed on an open-shop basis. According to BLS, union representation in the U.S. construction industry was just 14.1 percent in 2013. In the State of Louisiana, that percentage was even lower, with just 5 percent of construction workers covered by a CBA and a mere 4.1 of employees represented as union members. While industry data are not readily available specifically for the project area, the Union Membership and Coverage Database – which provides estimates of labor data based on CPS statistics – reports (similar to RLB) that only 5 percent of workers across all private industries in the New Orleans-Metairie-Kenner, LA, area were covered by a CBA in 2012 and merely 2.1 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 October 20, 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 West Bank Levee Project and instead leave to contractors the option of using PLAs on a voluntary basis.

4. 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.

USACE should not consider mandatory PLA provisions on any projects, including on the West Bank Levee Project. As AGC notes in its response to question 3, there is no reliable evidence that indicates that a government mandated PLA would advance the federal government's interest in achieving economy and efficiency. AGC strongly recommends that the USACE allow prime contractors to decide whether a PLA is appropriate for a particular project and to execute one voluntarily should they deem it appropriate. If, however, the 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 scientific and well-documented study of relevant factual conditions and circumstances to determine whether a PLA mandate would advance each of the government interests set forth in Section 3(a) of Executive Order 13502 more than the interests would be advanced without a PLA mandate. Such an analysis should include thorough research and analysis of such issues as:

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

- Are there any local or state laws requiring, prohibiting, or otherwise governing the use of PLAs in the area of the project? If so, do those laws apply to the present project? Would they have an impact on the lawfulness or propriety of a decision to mandate a PLA or to not mandate a PLA?
- Is a PLA mandate likely to provoke a bid protest or other challenge under federal, state or local laws? Could such a challenge increase the cost of the project or delay its initiation and completion? Would a public hearing be required or appropriate under the relevant procurement laws and regulations?

AGC further urges the USACE (if rejecting our primary recommendation of imposing no PLA mandate) to provide offerors maximum flexibility by allowing them three options on any project on which a PLA mandate is being considered: (1) to submit a proposal based on performance under a PLA, (2) to submit a proposal based on performance not under a PLA, or (3) to submit two proposals, one based on performance under a PLA and one based on performance not under a PLA. This will enable the agency to better evaluate the likely cost impact of the PLA. If the 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.

5. Identify specific reasons why 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 responses to questions 3 and 4.

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

Please see AGC's responses to questions 3 and 4.

7. Please identify any additional information you believe should be considered on the non-use of a PLA on the referenced project.

Please see AGC's responses to questions 3 and 4.

In summary, AGC opposes government mandates for PLAs on federal construction projects and urges USACE to refrain from imposing such a mandate on the West Bank Levee 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