STEPHEN E. SANDHERR, Chief Executive Officer

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

October 1, 2010

Captain Peter S. Lynch
Commanding Officer
NAVFAC Marianas
PSC 455, Box 195
FPO AP 96540-2937

RE: Use of Project Labor Agreements on Construction Projects Associated with the Guam Realignment

Dear Captain Lynch:

Thank you for your September 21 letter offering The Associated General Contractors of America ("AGC") the opportunity to comment on efforts by the U.S. Naval Facilities Engineering Command ("NAVFAC") to carry out the terms of Executive Order 13502 ("EO") and Federal Acquisition Regulation Subpart 22.5 ("FAR Rule") regarding project labor agreements ("PLAs") with regard to construction projects associated with the Guam realignment.

The comment form enclosed with your letter asks whether AGC is in favor or against the use of PLAs in Guam. AGC is neither in favor nor against contractors' voluntary use of PLAs in Guam (or elsewhere) but is strongly opposed to any government mandate for contractors' use of PLAs in Guam. AGC is committed to free and open competition for publicly funded work, and believes that the lawful labor relations policies and practices of private construction contractors should not be a factor in a government agency's selection process. AGC believes that neither a public owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work. AGC also believes that government mandates for PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. If a PLA would benefit the construction of a particular project, the construction contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would also be the most qualified to negotiate such an agreement. For these reasons, and for the reasons discussed below, *AGC urges NAVFAC to exercise the broad latitude granted to it by the EO and FAR Rule to refrain from imposing any PLA mandates on any of its construction contractors.*

Assessment of Conditions for a PLA Mandate

As your letter and enclosures indicate, the EO merely *encourages* executive agencies to *consider* using PLAs in connection with large-scale construction projects (defined as a project where the total cost to the federal government is $25 million or more) on a project-by-project basis, and

does not *require* agencies to use PLAs under any circumstances. The EO effectively, and the FAR Rule expressly, leave a great deal of discretion to agencies in implementation of the policy. As your letter also acknowledges, the EO and FAR Rule further provide that agencies may require a PLA on a particular large-scale construction project if the agency determines that all of the following conditions exist:

1. Use of a PLA on the project will advance the federal government's interest in achieving economy and efficiency in federal procurement;
2. Use of a PLA on the project will advance the federal government's interest in producing labor-management stability;
3. Use of a PLA on the project will advance the federal government's interest in ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters; and
4. Use of a PLA will be consistent with law.

Your form requests comment with specific reference to these conditions. While the EO and FAR Rule call for project-by-project evaluations, AGC submits that the following observations and opinions apply to all of NAVFAC's Guam realignment construction projects:

1. Advancement of Economy and Efficiency in Federal Procurement

It remains far from universally true that a PLA will improve the economy or efficiency of a project. Case studies of the economic benefits of PLAs have had varying results, and AGC is unaware of any reliable study establishing that mandates for PLAs have consistently lowered the cost, increased the efficiency, or improved the quality of construction of public projects. The Congressional Research Service recently issued a report examining many of the arguments for and against PLAs and reviewing previously published research on their economic effects. It found that "much of the research on the effect of PLAs on the costs of construction is inconclusive." (U.S. Congressional Research Service Report R41310, *Project Labor Agreements*, by Gerald Mayer, p. 7.) This finding is consistent with, and partly based on, a 1998 study by the agency then called the Government Accounting Office (GAO), in which 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 EO directs federal agencies to determine the benefits of a mandating a PLA on a project-by-project basis. In many cases – particularly in geographic areas where the proportion of construction performed by union-represented workers construction is a small – government mandates for PLAs have the effect of limiting the number of competitors for 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 just be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.

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

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

Such changes will be impracticable for many potential contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs). This describes the vast majority of construction firms in Guam, not to mention the vast majority of small construction firms across the U.S. (According to the Bureau of Labor Statistics, only 15 percent of all U.S. construction workers in 2009 were represented by a union. While the Bureau does not track union representation data for Guam, strong anecdotal evidence tells us that the percentage is much smaller there.) Accordingly, AGC believes that a PLA mandate there would hinder 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 the who negotiates the PLA terms and when the PLA must be submitted to the agency. With regard to who negotiates the PLA, the FAR Rule allows (but does not require or even encourage) agencies to include in the contract solicitation specific PLA terms and conditions and to require the contractors to become a party to a PLA containing those terms and conditions. Exercising that option, though, can lead to added costs, particularly when the agency representatives selecting the PLA terms lack sufficient experience and expertise in construction-industry collective bargaining. AGC strongly believes that, if a PLA is to be used, its terms and conditions should be negotiated by the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, that have a vested interest in forging a stable employment relationship and ensuring that the project is completed in an economic and efficient manner, that are authorized to enter into such an agreement under the National Labor Relations Act (NLRA), and that typically have the

appropriate experience and expertise to conduct such negotiations. Under no circumstances should a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated by the agency or by a contractor (or group of contractors) not employing covered workers on the project.

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

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

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

required to reach an agreement but should only be required to engage in good-faith bargaining to impasse, consistent with the mandates of the NLRA.

Finally, yet another cost that can result from government mandates for PLAs is the high cost of litigation, as such mandates have frequently led to litigation, which is expensive in itself and can lead to costly delays.

2. Advancement of Labor-Management Stability

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 not present where work is normally performed open shop. As a matter of historical fact, work disruptions like strikes, lockouts, and jurisdictional disputes rarely occur on projects that are not performed under CBAs. It is our understanding, as mentioned above, that local construction is virtually all non-union in Guam and that there is no significant history of labor-management strife. Accordingly, AGC cannot see how a PLA mandate would advance labor-management stability there. Again, if a PLA is needed on a particular Guam realignment project, the general contractor awarded the contract would be the first to know that and to negotiate one on a voluntary basis.

Furthermore, AGC wishes to point out that job disruptions 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 just this summer, when three major Illinois Tollway projects covered by PLAs were nearly brought to a halt because contractors could not obtain needed materials and equipment, as drivers honored picket lines outside asphalt plants, concrete-mix facilities, and quarries as part of an area-wide strike.

3. Advancement of Compliance with Labor and Employment 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 – in Guam 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 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 Guam and suggests that, if any exists, then it is the responsibility of the appropriate government enforcement agencies to curb that misconduct.

5. Consistency with Law

As mentioned above, government mandates for PLAs are often challenged on legal grounds. While the U.S. Supreme Court's 1993 decision in the Boston Harbor case (*Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190) is often cited by proponents of government-mandated PLAs as establishing unqualified legal authority for such PLAs, it did not do so. The decision leaves many federal and nonfederal legal issues open to challenge in any given case involving a government-mandated PLA, including, but not necessarily limited to the following:

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

To avoid such legal challenges, and the cost and delay risks that they would entail, AGC again recommends that NAVFAC refrain from mandating the use of a PLA on any project and instead leave to contractors the option of using PLAs on a voluntary basis.

Consideration of Factors to Determine Whether a PLA Mandate is Appropriate

As you have noted, the FAR Rule also provides a list of factors that agencies may consider in their project-by-project evaluation of whether a PLA is appropriate (and which relate to determining whether the above-discussed four conditions are present):

1. The project will require multiple construction contractors and/or subcontractors employing workers in multiple crafts or trades;
2. There is a shortage of skilled labor in the region in which the construction project will be sited;

3. Completion of the project will require an extended period of time;
4. PLAs have been used on comparable projects undertaken by federal, state, municipal, or private entities in the geographic area of the project;
5. A PLA will promote the agency's long-term program interests, such as facilitating the training of a skilled workforce to meet the agency's future construction needs; and
6. Any other factors that the agency decides are appropriate.

The preamble to the FAR Rule explains that this list of factors is "non-exhaustive" and that, in order to "preserve agency discretion," the rule:

> leaves an agency free to decide whether it will adopt some or all of the factors (or any other factor that the agency considers to be appropriate) as part of its own procedures. Similarly, how an organization structures its review team, draws upon agency or external resources, documents any decisions relating to the use of a project labor agreement, and addresses similar management matters is left to the discretion of each agency. (75 Fed. Reg. 19172.)

Again, AGC recommends that NAVFAC exercise the discretion provided in both the EO and the FAR Rule to refrain from imposing any PLA mandate on projects associated with the Guam realignment. However, should NAVFAC reject this recommendation and continue to consider imposing PLA mandates, then AGC recommends that NAVFAC exercise the discretion provided in the FAR Rule to make a more in-depth analysis of factors to determine, on a project-by-project basis, that a PLA mandate would advance each of the government interests set forth in EO Section 3(a) more than the interests would be advanced without such a mandate. Such an analysis should include consideration of the following factors. (These factors expand beyond the five substantive factors listed in the FAR Rule, and much of their analysis, in relation to the Guam realignment projects, is effectively provided above.)

1. Which firms normally perform the type of construction involved in the project under consideration and are likely to submit a well-qualified proposal for the project? What proportion of them are union contractors and what proportion are open-shop contractors? What experience do they have in working under a PLA? Are they willing to work under a PLA, or would a PLA mandate deter them from bidding on the project? Would a PLA mandate disadvantage local contractors or subcontractors?

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

3. Is there a set-aside goal on the project for small, minority, or woman-owned businesses? If so, what proportion of the contractors in the area that would qualify to satisfy the goal are union contractors and what proportion are open-shop contractors? Are the contractors willing and able to work under a PLA?

4. What is the level of labor surplus or shortage in the local area for each of the crafts needed to complete the project? What percentage of that workforce is represented by a

union? What evidence is there that the local union hiring halls will be able to supply the particular labor needed? What other sources of labor or recruitment tools are available?

5. What is the recent history of construction-industry strikes or other delay-causing labor disputes in the local area of the project? If the area is largely open-shop, is a PLA actually needed to prevent such problems? If the area is largely union, would local area CBAs offer sufficient protection against such problems?

6. What is the recent history of government-mandated PLAs in the local area? If PLAs have recently been used in the area, what quantifiable impact (positive or negative) have they had on project cost, timeliness, quality, and other factors?

7. 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?

8. How will a PLA mandate enhance compliance with employment and safety laws beyond the compliance-encouragement efforts already provided by the Department of Labor's Occupational Safety and Health Administration, Wage and Hour Division, Office of Labor-Management Standards, and Office of Federal Contract Compliance Programs, and by the Equal Employment Opportunity Commission, National Labor Relations Board, and other agencies specifically tasked with advancing and enforcing compliance with such laws? Is there evidence of rampant employer violations of the law in the area of the project? Is there evidence of that PLAs have been used successfully to curb such misconduct in the past?

9. 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?

10. 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 NAVFAC project? Would they have an impact on the lawfulness or propriety of a NAVFAC decision to mandate a PLA or to not mandate a PLA?

11. Would a PLA mandate provoke a judicial challenge under federal, state or local laws? Would 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?

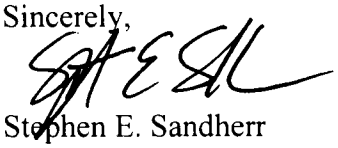
AGC further recommends that NAVFAC properly document each analysis and publicly disclose it in a manner that is timely, complete, and easily accessible by the public.

Conclusion

AGC continues to oppose government mandates for PLAs on federal construction projects and provides the preceding comments to explain why such mandates are problematic in general, as well as why such a mandate on Guar realignment construction projects in particular is not only unnecessary but could impede economy and efficiency in government procurement and other objectives of the EO. We urge you to allow your contractors maximum flexibility and defer to their judgment as to whether a PLA is appropriate for a given project and to their expertise in negotiating a PLA should they deem one appropriate.

We appreciate the opportunity to share our insights with NAVFAC and to help advance our common goals of fair competition and of economic and efficient performance of the Guam realignment construction projects. If you would like to discuss this matter with us further, in person or otherwise, please do not hesitate to contact me.

Sincerely,



Stephen E. Sandherr
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cc: Joseph Gott
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