



August 12, 2010

Mr. Robert Slockbower  
Director, Military Programs  
U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314

Mr. Kim Denver  
Director, National Contracting Organization  
U.S. Army Corps of Engineers  
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**RE: Use of Project Labor Agreements on U.S. Army Corps of Engineers Construction Projects**

Dear Mr. Slockbower and Mr. Denver:

On behalf of The Associated General Contractors of America (AGC), I am writing to express deep concern about the use of project labor agreements (PLAs) on U.S. Army Corps of Engineers (USACE) construction projects and to offer AGC's recommendations on how the agency might better approach PLAs in the future.

**Background on AGC and Its Policy on PLAs**

AGC is the leading association in the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC is now the nation's largest and most diverse trade association in the commercial construction industry, representing more than 33,000 firms in 95 chapters throughout the United States. AGC members include approximately 7,500 general contractors, 12,500 specialty contractors, and 13,000 suppliers and service providers working in the Federal, building, highway, heavy, industrial, municipal, utility, and virtually all other sectors of the construction industry. AGC proudly represents both union and open-shop companies. AGC is also proud of its long history of partnering with the USACE.

While AGC neither supports nor opposes PLAs *per se*, AGC strongly opposes *government mandates for PLAs* on publicly funded construction projects. AGC is committed to free and open competition in all public construction markets and believes that publicly financed contracts should be awarded without regard to the lawful labor relations policies and practices of the government contractor. AGC believes that neither a public owner nor its representative should mandate the use of a PLA that would compel any firm to change its labor policy or practice in order to compete for, or to perform work on, a publicly financed project. AGC further believes

that government-mandated PLAs can restrain competition, drive up costs, cause delays, lead to jobsite disputes, and disrupt local collective bargaining. In cases where use of a PLA would benefit a particular project, it is the construction contractors working on the project who will be the first to recognize that need and who should negotiate the agreement.

### **Executive Order 13502 and Its Implementing Regulations**

AGC respectfully acknowledges that the Executive Order 13502 (EO) and its implementing regulations (FAR Rule) establish a federal policy of “encouraging executive agencies to consider requiring the use of project labor agreements in connection with large-scale construction projects in order to promote economy and efficiency in Federal procurement.” Section 3 of the EO allows agencies, in awarding a contract in connection with a large-scale construction project – defined in Section 2 as a construction project where the total cost to the federal government is \$25 million or more – on a project-by-project basis, to require the use of a PLA under certain circumstances. The EO effectively, and the FAR Rule expressly, leave a great deal of discretion to agencies in implementation of the policy.

In particular, EO Section 3(a) provides that agencies may impose a PLA:

where use of such an agreement will (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) be consistent with law.

EO Section 3(b) states that *if* an agency “determines” that use of a PLA will satisfy the above criteria, *then* the agency “may, if appropriate” impose a PLA mandate. In addition, EO Section 5 clarifies that the EO “does not require an executive agency to use a project labor agreement on any construction project.”

The FAR rule adopts the EO Section 3(a) criteria verbatim, and it adds a list of factors that agencies may consider in their project-by-project evaluation of whether a PLA is appropriate:

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 the list of factors is “non-exhaustive” and that, in order to “preserve agency discretion,” the FAR 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.

The FAR Rule also gives agencies “broad discretion in formulating the process and timing for the submission of a project labor agreement” (75 Fed. Reg. 19173-4). It allows agencies to choose from among the following options for the timing of PLA submission: (1) when offers are due; (2) prior to award (by the apparent successful offeror); or (3) after award.

In sum:

- The EO leaves the USACE discretion to require or to not require a PLA on each of its projects, and it permits the USACE to require a PLA only if the USACE has made a determination that all of the following conditions exist:
  1. The project will cost the federal government \$25 million or more;
  2. Use of a PLA on the project will advance the federal government's interest in achieving economy and efficiency in federal procurement;
  3. Use of a PLA on the project will advance the federal government's interest in producing labor-management stability;
  4. 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
  5. Use of a PLA will be consistent with law.
- The FAR Rule leaves the USACE discretion as to the procedures to follow and factors to consider when making such a determination.
- The FAR Rule leaves the USACE discretion as to when it will require contractors to submit a PLA if it chooses to require such submission.

### **Recommendations**

Consistent with the AGC policy and rationale for the policy discussed above, *AGC urges the USACE 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 or offerors, and to direct its Division and District Commands to follow suit.* Rather than imposing such a mandate, the USACE may and should allow contractors and offerors – the parties that have experience in

construction labor relations and that would be directly governed by a PLA – to make the determination as to 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 and decides to allow division and district commands to consider imposing PLA mandates, then we urge you to exercise agency discretion in a manner that is consistent with the President’s interests in “efficient and timely completion of construction projects” (EO Section 1) and in “creating an unprecedented level of openness in Government” (*Memorandum on Transparency and Open Government*, Pres. Barack Obama, January 21, 2009) by establishing an agency-wide policy and practice of conducting a thorough analysis of uniform, fact-based criteria to determine that a PLA mandate is appropriate before it may impose any such a mandate. Furthermore, USACE should give offerors and contractors maximum flexibility with regard to the timing of PLA negotiations and with regard to the actual execution of a PLA. Finally, USACE should properly document each analysis and publicly disclose it in a manner that is timely, complete, and easily accessible by the public.

#### **A. Analysis of Factors Impacting the Appropriateness of a PLA Mandate**

AGC recommends that the USACE direct Division and District Commands to make objective determinations, based on empirical evidence, 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 issues:

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?
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 supply 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? Will the union hiring halls in the area be able to supply the labor needed?
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

collective bargaining agreements (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 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 applicable enabling 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 USACE project? Would they have an impact on the lawfulness or propriety of a USACE 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?

#### **B. The Timing of PLA Negotiation and The Mandate of PLA Execution**

AGC recommends that the USACE, in considering whether to impose a PLA mandate, judiciously exercise its discretion with regard to the timing of submission of a PLA. It is AGC's understanding that several recent solicitations for USACE projects have required offerors to negotiate a PLA with one or more labor organizations and submit the negotiated PLA with their offers. While AGC acknowledges that the FAR Rule allows for this, as mentioned above, and while we agree that PLAs should be negotiated by the performing contractors on a project rather than by the project owner or another party not employing workers covered by the PLA, we have strong concerns about the timing selected.

Requiring every offeror to engage in labor negotiations over a contract that may never be used (since only the successful offeror's PLA will be used), seems highly inefficient and unduly wasteful of both the offerors' and labor organizations' time and resources. 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 cannot control whether they can 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 National Labor Relations Act, 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 a third party – a party with which the offeror has no authority to compel negotiations – effectively grants the third party (i.e., labor organizations) 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 USACE requires only the apparent successful offeror to execute a PLA after offers have been considered, or if it requires only the successful offeror to execute a PLA after the contract has been awarded, then cost terms may be too uncertain at the time that offers are considered. This method also creates a serious risk of granting labor organizations excessive bargaining leverage. Unless it is careful, the USACE could put the contractor in the untenable position of having to give labor organizations literally anything they may demand or lose the contract. It follows that the USACE should never, under any circumstances, require more than good faith efforts to reach an agreement.

With these considerations in mind, AGC recommends that the USACE provide offerors maximum flexibility by allowing them three options: (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. If the USACE rejects this recommendation and decides to encourage negotiation of a PLA – regardless of the timing selected – then AGC recommends that the agency refrain from requiring actual agreement and the execution of a PLA, and instead limit itself to requiring only that the contractor bargain in good faith with one or more labor

organizations. This is consistent with regular collective bargaining practices and legal obligations.

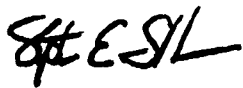
### **C. Analysis Documentation and Disclosure**

AGC recommends that the USACE require all Division and District Commands thoroughly document any decision to impose a PLA on a project. This should include detailed documentation of each analysis conducted of the factors described in Section A above, as well as any other relevant issues. The agency should further require appropriate personnel to fully disclose the documentation in a timely manner and in a place readily accessible to the public, such as the Federal Register and FBO.gov. AGC further recommends that the USACE allow for public comment in response.

### **Conclusion**

AGC continues to oppose government mandates for PLAs on federal construction projects and provides the preceding guidance in an effort to point out the many complications inherent in government mandates for PLAs and the impediments to fulfilling the "economy and efficiency" objectives of the EO. We appreciate the opportunity to share our insights with the USACE and to help advance our common goals of fair competition and of economic and efficient performance of USACE 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  
Chief Executive Officer

cc: Robin Baldwin  
James Dalton  
Gregory Noonan  
Paul Parsonneault