



August 12, 2010

Ms. Terricka D. Leonard
Mobile District, U.S. Army Corps of Engineers
P. O. Box 2288
Mobile, AL 36628-0001

Re: Two-Phase Design-Build for Air Force Technical Applications Center (AFTAC), Patrick Air Force Base, Florida, Solicitation Number: W91278-10-R-0090

Dear Ms. Leonard:

The Associated General Contractors of America (AGC) seriously questions the recent decision by the U.S. Army Corps of Engineers (USACE) to require a project labor agreement (PLA) for the construction of the Air Force Technical Applications Center (AFTAC) at Patrick Air Force Base. Indeed, it is far from clear that such a requirement would be appropriate. Under the circumstances, AGC requests all information relating to your determination that requiring a PLA for the construction of this project would be consistent with Executive Order 13502 (EO) and its implementing regulations. AGC makes this request under the Freedom of Information Act and in accordance with President Obama's January 21, 2009, memorandum on Transparency and Open Government.

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, including Florida. 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.

While AGC neither supports nor opposes PLAs *per se*, AGC strongly opposes *government mandates for PLAs for the construction of publicly funded projects*. AGC is committed to free and open competition for such 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.

AGC respectfully acknowledges that the EO and implementing regulations 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 provides that agencies may, on a project-by-project basis, where the total project cost to the federal government will equal or exceed \$25 million and where certain other conditions are met, require a PLA. As Section 3 of the EO and Subpart 22.503(b) of the implementing regulations set forth, federal 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.

Consistent with the preceding, Section 5 of the EO expressly states that the EO “does not require an executive agency to use a project labor agreement on any construction project.”

Accordingly, the EO leaves the USACE free to require or to not require a PLA on the AFTAC project, and the EO permits the USACE to require a PLA only if the USACE has determined 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.

AGC requests copies of all documents, including all emails and other electronic communications, about and/or relating to the USACE’s determination that each of these five conditions exists and that mandating a PLA would advance the government's interests better than the alternative of not mandating such an agreement. Without limiting the scope of this request, AGC specifically seeks copies of all documents about and or relating to the following matters.

1. Advancement of Economy and Efficiency

As it remains far from universally true that a PLA will improve the economy or efficiency of a project, AGC also wishes to know how the USACE determined that mandating a PLA for this particular project would have such an effect. 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. Just last month, the Congressional Research Service issued a report examining many of the arguments for and against PLAs, and reviewing 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 was consistent with, and partly based on,

a 1998 study by 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, such as adopting different work rules, hiring practices, and wages and benefits, as well as restraining their ability to use their current employees on the project. These changes will be impracticable for many potential competitors, particularly those firms not historically signatory to collective bargaining agreements (CBAs).

Patrick Air Force Base is located in such an area. According to the Union Membership and Coverage Database, which provides estimates of labor data based on statistics compiled from the Current Population Survey, only 5.6 percent of the private-sector workers in the Palm Bay-Melbourne-Titusville, Florida, metropolitan area are either members of a union or covered by a CBA. While construction-specific data for the metropolitan area is not readily attainable, statewide data reveals that only 1.2 percent of Florida construction workers are members of a union and only 1.8 percent are covered by a CBA. (Barry T. Hirsch and David A. Macpherson. (2010). Union Membership and Coverage Database from the CPS. In *Unionstats.com*. Retrieved August 9, 2010, from <http://unionstats.gsu.edu/>.)

Given that so little construction work in the relevant area is performed under CBAs, has the USACE researched the contractors that normally construct similar projects in that area, and whether these firms operate on a union or open-shop basis? Has the USACE conducted a study of the local area to determine whether a sufficient number of well-qualified contractors would be willing to bid on the project with a PLA mandate? Has the USACE conducted research to determine whether the hiring halls in the area would be able to supply the union labor needed to perform the job under the referral terms of a PLA? Has the USACE considered whether a PLA mandate would effectively shut out local contractors and workers from working on the project? Would such a mandate tilt the scale in favor of out-of-town contractors and workers willing and able to abide by the terms of the PLA? If so, what impact would that have on advancing government interests in economy and efficiency in procurement?

Even if a mandate for a PLA does not deter or shut out potential competitors, mandating a PLA could drive up costs in a more direct manner, as the successful competitor and its subcontractors would have added costs involved in changing their business practices to comply with the terms of a PLA. For example, PLAs typically require contributions to union pension and health and welfare funds, even though the benefit plans' eligibility and vesting rules usually prevent open-shop employees from ever receiving the benefits of their employers' contributions to the funds. To

maintain benefits for its regular employees, open-shop contractors would be forced to contribute to both the union benefit funds and to their own benefit plans, causing employment costs to skyrocket. These would be added burdens that go beyond what is already required by the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act – statutes that set minimum standards for wages, benefits, and labor practices based on prevailing practices– leaving the parties to a PLA free to negotiate only higher rates and more stringent practices. Accordingly, has the USACE considered whether a PLA mandate would result in higher labor costs? Has the USACE researched how many PLAs have actually been used in the local area in the recent past? If so, how commonly have they been used and what impact have they had on the projects’ cost, timeliness, quality, and other factors?

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. What assessment has USACE conducted, if any, of the risk of litigation in this case and the potential costs of such litigation?

2. Advancement of Labor-Management Stability

Please also explain what leads the USACE to conclude that a PLA mandate would help produce labor-management stability on the present project. Such stability does not necessarily flow from such a mandate. While a PLA can establish uniform standards and dispute-resolution mechanisms that may help avoid or solve some workforce problems, a government mandate for a PLA can also exacerbate such problems.

First, and as a matter of historical fact, strikes, lockouts, jurisdictional disputes, and similar work disruptions rarely occur on projects that are not performed under CBAs. Second, a government-mandated PLA can be the source of new frictions, disputes, and confusion by forcing a new labor framework onto previously nonunion employees, by forcing union contractors to assign work to the members of trades that differ from the ones that their regular CBAs require, and by otherwise altering the previously agreed-upon status quo. Third, even though the USACE is requiring that the PLA contain guarantees against strikes, lockouts, and similar job disruptions, such job disruptions could still occur. 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 unrelated worksites in the area. This happened just last month, 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.

Has the USACE studied the recent history of strikes or other delay-causing labor disputes in the local construction industry to determine whether a PLA is actually needed to prevent such problems? Given that the vast majority of construction in the area is normally performed nonunion, and that strikes and similar work disruptions rarely occur on nonunion jobsites, how would a PLA mandate actually advance labor-management stability on the project? If the USACE

has evidence that union contractors are most likely to be the successful bidders for the work, has the agency considered whether local area-wide CBAs would offer sufficient protection and whether these union contractors would prefer to work under their regular agreements rather than a PLA?

4. Advancement of Compliance with Labor and Employment Laws

AGC would also like to know what has led the USACE to conclude that a PLA mandate would actually advance compliance with labor and employment laws. How would a PLA mandate on this project enhance compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters? Which elements of a PLA would 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? 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?

5. Consistency with Law

Has the USACE conducted a thorough legal review to determine that a PLA mandate itself would not run afoul of the law? For example, has the USACE properly considered whether such a mandate would violate the Competition in Contracting Act, Federal Acquisition Regulation, National Labor Relations Act, Employee Retirement Income Security Act, Small Business Act, or any legislation enabling the agency to undertake the project or authorizing or appropriating funds for the project?

In addition to the preceding questions about the USACE's determination that a PLA is appropriate for this project, AGC has questions about the agency's decision to require all Phase 2 offerors to negotiate and execute a PLA with one or more labor organizations as a condition precedent to making an offer that the government will entertain. AGC acknowledges that the EO's implementing regulations authorize this approach, and AGC agrees that the contractors competing for or selected to perform the work – rather than the project owner or its representative – should be the ones to negotiate any PLA that would cover the work. Nevertheless, we have strong concerns about the approach being taken.

To start with, 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 those in the Patrick Air Force Base area – have no familiarity with the labor organizations in that area and have no idea of how to initiate the required negotiations. In these ways, the PLA mandate is, again, likely to deter many qualified contractors from bidding on the project.

Moreover, prospective offerors cannot control whether they can fulfill the negotiation obligation. Quite simply, they have no authority or means to compel labor organizations to negotiate with them.

Absent an established collective bargaining relationship under Section 9(a) of the National Labor Relations Act, unions have no legal obligation to negotiate with any particular employer and have no legal obligation to negotiate in a good-faith, nondiscriminatory, and timely manner. Please explain how the USACE expects prospective offerors – especially those that normally operate on an open-shop basis – to identify the labor organizations with which they should negotiate. If the prospective offeror does identify and contact representatives of appropriate labor organizations and asks to negotiate a PLA with them, what can and should the prospective offeror do if the labor representatives fail to respond or refuse to negotiate? What assurances does the USACE have that the unions representing the trades needed to perform the AFTAC construction would be willing to negotiate and execute a labor agreement with all of the prospective offerors? What assurances does the USACE have that the unions would negotiate in a good-faith, nondiscriminatory, and timely manner with each contractor – regardless of the contractor’s union or open-shop status and regardless of any bargaining history or existing relationship with each contractor?

Requiring all offerors to conclude agreements with labor organizations as a condition precedent to competing for the work could well have the practical effect of granting the unions the power to prevent certain contractors from competing. How has the USACE accounted for the reality that its approach could enable the unions to determine which contractors can compete for the work (by picking and choosing the contractors with which they will execute an agreement)? How has it accounted for the reality that its approach would may even enable the unions to determine which offeror will be the most competitive (by giving a better deal to one contractor over another)? How would the requirement support 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?”

In sum, AGC has many concerns and questions about the PLA mandate included in the solicitations for the AFTAC. We look forward to receiving responses to the above questions and requests, and we would be pleased to have an opportunity to discuss this matter with you further, in person or otherwise.

Sincerely,



Stephen E. Sandherr
Chief Executive Officer

cc: Robin Baldwin
James Dalton
Leo Hickman
Jim Kastner
Gregory Noonan
Paul Parsonneault
Colonel Steven Roemhildt
Shirley West