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



October 31, 2012

Shane Mahelona
Naval Facilities Engineering Command Southwest
Coastal IPT, Code RUA00.SM
2730 McKean St., Building 291
Naval Base San Diego, San Diego, CA 92136.
Sent via e-mail to shane.mahelona@navy.mil

RE: Project Labor Agreement Inquiry; Y--P730-Bachelor Enlisted Quarters (BEQ) at Naval Base Coronado, San Diego, CA; Solicitation Number: N6247313R4201

Dear Mr. Mahelona,

On behalf of The Associated General Contractors of America (“AGC”), I thank the Naval Facilities Engineering Command Southwest (“NAVFAC”) for soliciting input from the construction community regarding the potential use of a project labor agreement (“PLA”) on an upcoming project for the construction of a multi-story, 234 module Bachelor Enlisted Quarters (BEQ) building at Naval Base Coronado in San Diego, California (“Bachelor Enlisted Quarters 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.

At the outset, let me explain that AGC neither supports nor opposes contractors’ voluntary use of PLAs for this project, or elsewhere, but strongly opposes any government mandate for contractors’ use of PLAs. 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 project owner nor its representative should compel any firm to change its lawful labor policies or practices to compete for or perform public work, as PLAs effectively do. 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 contractors otherwise qualified to perform the work would be the first to recognize that fact, and they would be the most qualified to negotiate such an agreement. Accordingly, AGC urges NAVFAC to refrain from imposing any PLA mandates on any of its contractors and to defer to the contractor’s judgment as to whether a PLA is appropriate for a given project.

Please see the enclosed survey Project Labor Agreement Inquiry Form for further comments. 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,

/s/ Stephen E. Sandherr

Stephen E. Sandherr
Chief Executive Officer
The Associated General Contractors of America

PROJECT LABOR AGREEMENT INQUIRY FORM

NAVAL FACILITIES ENGINEERING COMMAND SOUTHWEST

Project Title: P730 Bachelor Enlisted Quarters (BEQ) at Naval Base Coronado, San Diego, CA-Design Build

Solicitation Number (if applicable): N62473-13-R-4201

1. Would a PLA advance the Federal Government's interests in achieving economy and efficiency for this project? If not, why?

An assessment of whether a PLA would likely advance government interests in economy and efficiency should be made by the selected general contractor on a project-specific basis. Research regarding the impact of PLA use on the economy or efficiency of projects in general is inconclusive. While case studies have had varying results, The Associated General Contractors of America (AGC) is aware of no reliable study establishing that PLA mandates have consistently lowered the cost, increased the efficiency, 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 difficulty of conclusively demonstrating that performance differences were due to the PLA versus other factors. (U.S. Government Accounting Office, Project Labor Agreements: The Extent of Their Use and Related Information, GAO/GGD-98-82.) The Congressional Research Service reached the same conclusion in a report issued in July 2010. (U.S. Congressional Research Service Report R41310, Project Labor Agreements, by Gerald Mayer.)

Government mandates for PLAs—even when competition, on its face, is open to all contractors—can have the effect of limiting the number of competitors on a project, increasing costs to the government and, ultimately, the taxpayers. This is because government mandates for PLAs typically require contractors to make fundamental, often costly changes in the way they do business. For example:

- PLAs typically limit open shop contractors' rights to use their current employees to perform work covered by the agreement. Such PLAs usually permit open shop contractors to use only a small "core" of their current craft workers, while the remaining workers needed on the job must be referred from the appropriate union hiring hall. While such hiring halls are legally required to treat union nonmembers in a nondiscriminatory manner, they may, and typically do, maintain referral procedures and priority standards that operate to the disadvantage of nonmembers.
- PLAs frequently require contractors to change the way they would otherwise assign workers, requiring contractors to make sharp distinctions between crafts based on union jurisdictional boundaries. This imposes significant complications and inefficiencies for open-shop contractors, which typically employ workers competent in more than one skill and perform tasks that cross such boundaries. It can also burden union contractors by requiring them to hire workers from the hiring halls of different unions from their norm and to assign work differently from their norm.
- PLAs typically require contractors to subcontract work only to subcontractors that adopt the PLA. This may prevent a contractor (whether union or open shop) from using on the project highly qualified subcontractors that it normally uses and trusts and that might be the most cost-effective.
- PLAs typically require open-shop contractors to make contributions to union-sponsored fringe benefit funds from which their regular employees will never receive benefits for such employees, such contractors must contribute to both the union benefit funds and to their own benefit plans. This "double contribution" effect significantly increases costs.

Such changes are impractical for many potential contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements (CBAs). This describes the 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 San Diego, CA, area in particular, is performed on an open-shop basis. According to BLS, union representation in the U.S. construction industry was just 14.9 percent in 2011. While industry data are not readily available from BLS specifically for the project area, the Union Membership and Coverage Database – which provides estimates of labor data based on CPS statistics – reports that only 6.8 percent of workers across all private industries in the San Diego-Carlsbad-San Marcos, CA, area were covered by a CBA in 2011 and only 6.0 percent were members of a union. (Barry T. Hirsch and David A. Macpherson. 2011. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved October 30, 2012, from <http://unionstats.gsu.edu/>.) Consequently, AGC believe that PLA mandates in the area would likely harm economy and efficiency in federal procurement by both hindering competition and raising project costs.

Another way that government mandates for PLAs can drive up costs and create inefficiencies is related to who negotiated the terms of the PLA and when the PLA must be submitted to the agency. With regard to who negotiates the PLA, the Federal Acquisition Regulation implementing Executive Order 13502 (“FAR Rule”) allows (but does not require or even encourage) agencies to include in the contract solicitation specific PLA terms and conditions. Exercising that option, though, can lead to added costs, particularly when the agency representatives selecting the PLA terms lack sufficient experience and expertise in construction-industry collective bargaining. AGC strongly believes that, if a PLA is to be used, its terms and conditions should be negotiated by the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, that have a vested interest in forging a stable employment relationship and ensuring that the project is complete in an economic and efficient manner, that are authorized to enter into such an agreement under the National Labor Relations Act (“NLRA”), and that typically have the appropriate experience and expertise to conduct such negotiations. Under no circumstances should a contracting agency require contractors to adopt a PLA that was unilaterally written by a labor organization or negotiated by the agency or by a contractor (or group of contractors) not employing covered workers on the project.

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

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

otherwise parties to collective bargaining agreements” as well as its objective of advancing economy and efficiency in federal procurement.

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

Yet another cost that can result from government mandates for PLAs is the high cost of litigation, as such mandates have frequently led to litigation, which is expensive in itself and can lead to costly delays. In its 1993 decision in the Boston Harbor case (*Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S. Ct. 1190), the U.S. Supreme Court held that the NLRA does not preclude a state agency from including a PLA requirement in the bid specification for a public project when the agency is acting in a proprietary rather than a regulatory capacity. While the decision is often cited by proponents of government-mandated PLAs as establishing unqualified legal authority for government-mandated PLAs, it did not do so. Rather, the decision left many federal and nonfederal legal issues open to challenge in any given case involving a government-mandated PLA, including, but not necessarily limited to the following:

- Whether the PLA mandate violates the construction industry provisions of the NLRA permitting only employers “engaged primarily in the building and construction industry” to enter into pre-hire CBAs;
- Whether the PLA mandate is preempted by the NLRA because the government was acting in a regulatory rather than proprietary manner;
- Whether the government-mandated PLA has a disproportionately adverse impact on minority and women business enterprises in violation of Title VI of the 1964 Civil Rights Act, or its state or local counterparts;
- Whether the government-mandated PLA contains provisions requiring contributions to fringe benefit plans or participation in apprenticeship programs in violation of the Employee Retirement Income Security Act (ERISA);
- 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 legal challenges and the cost and delay risks that they would entail, AGC again recommends that the NAVFAC refrain from mandating the use of a PLA on the Bachelor Enlisted Quarters Project and instead leave to contractors the option of using PLAs on a voluntary basis.

2. What is your position on whether or not a PLA would result in producing 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 absent where work is normally performed open shop. As a matter of historical fact, work disputes like strikes, lockouts, and jurisdictional disputes rarely occur on projects that are not performed under CBAs. As noted above, that describes the majority of construction work in the Bachelor Enlisted Quarters Project area.

AGC further points 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 in the summer of 2010, when three major Illinois Tollway projects covered by PLAs were nearly brought to a halt because contractors could not obtain needed materials and equipment, as drivers honored picket lines outside asphalt plants, concrete-mix facilities, and quarries as part of an area-wide strike.

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

3. If a PLA is implemented on this project, how would it assist with compliance of laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters? If it would not, please explain.

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—on the Bachelor Enlisted Quarters Project or elsewhere. Contractors are subject to those laws, 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 U.S. 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 the Bachelor Enlisted Quarters Project area and suggests that, if any exists, then it is the responsibility of the appropriate government enforcement agencies to curb that misconduct. Furthermore, AGC is unaware of any reliable evidence that PLAs have been successfully used to curb such misconduct in the past.

4. Will this project require multiple construction contractors and/or subcontractors that will employ workers in multiple crafts or trades?

AGC is not in a position to answer this question. It is a matter best assessed by the prime contractor on a project.

5. Do you anticipate a shortage of skilled labor in the region for this construction project?

The U.S. construction industry fell into recession a year and a half before the overall economy and still has not emerged from it. According to BLS, the industry’s unemployment rate in September 2012 was 11.9 percent. U.S. construction employment stands at 5.523 million, a decline of 5,000 workers from a year earlier and a dramatic decline of 2.2 million workers from the industry’s peak employment in April 2006. These data and others indicate that the U.S. currently has an ample pool of unemployed construction workers. In the San Diego-Carlsbad-San Marcos, CA, area, construction employment dropped a devastating 39 percent between June 2006 and September 2012, representing a loss of 37,100 jobs. AGC, therefore, believes that skilled construction labor is likely to be readily available for NAVFAC’s upcoming Bachelor Enlisted Quarters Project.

6. Would a PLA assist or hinder you in recruiting and retaining a skilled workforce for this project?

7. Do you anticipate a skilled labor shortages resulting from competition within the contractor community arising from concurrent large-scale construction contracts in the project vicinity?

8. What expected costs, benefits, and/or savings would you anticipate if a PLA is implemented?

9. Do you have any previous experience with contracts including PLAs?

AGC is not in a position to answer questions 6-9 and respectfully defers to the expertise of the individual contractors that respond to this survey.

10. Is there a possibility you would utilize any union workers on this project?

While AGC is not in a position to answer this question, as we are not a potential offeror or contractor on the project, we wish to raise concerns about the objective of the inquiry. The National Labor Relations Act prohibits employers from discrimination in employment based on a worker's affiliation or nonaffiliation with a union. While this mandate does not directly apply to NAVFAC in the hiring of its construction contractors, AGC maintains that it would be highly inappropriate for the agency to select contractors based in part on the company's intention, or lack of intention, of employing union workers on the project. AGC is aware of no federal law instituting a preference one form of labor force over another for work on federal government projects, but this question appears to insinuate that NAVFAC is considering instituting such a preference.

11. Does your company have or support any apprentice programs designed to develop skilled workers? If yes, please describe.

Again, AGC is not in a position to answer this question. However, we wish to point out that many of our local chapters across the country sponsor or otherwise support such apprenticeship programs. This includes the AGC San Diego Chapter, which proudly operates California's first and largest open-shop construction apprenticeship program. The program has been approved by both the California Division of Apprenticeship Standards and the U.S. Department of Labor for the following trade classifications: carpenter, cement mason, drywall lather, drywall finisher, heavy equipment operator, painter, and laborer. Completion of the program takes students between two and four years depending on the trade. For more information about the program, please visit <http://www.agcsdatt.org> or call (858) 558-0739. In addition, the AGC San Diego Chapter supports joint (labor-management administered) apprenticeship and training programs through its collective bargaining relationships with several construction unions, including the Operating Engineers, Cement Masons, Laborers, Iron Workers, and Carpenters unions. The association's collective bargaining agreements with those unions requires signatory construction contractors to make monetary contributions to joint apprenticeship and training funds based on hours worked. For more information, please contact the chapter at (858) 558-7444.