July 29, 2020

Mr. Michael Scism
U.S. Army Corps of Engineers, Mobile District
109 St Joseph St
Mobile, AL 36628-0001
United States
Sent via electronic mail to michael.j.scism@usace.army.mil

RE: PLA - Design and Construction of Zone 1 – F-35 Flightline Facilities, Tyndall AFB, Florida; Solicitation Number: W9127820R0035

Dear Mr. Scism,

On behalf of The Associated General Contractors of America ("AGC"), I thank the U.S. Army Corps of Engineers ("USACE") for soliciting input from the construction community regarding the potential use of project labor agreements ("PLAs") on a large-scale construction project (exceeding $25 million) of the design and construction of 11 facilities within the Flightline area of Tyndall AFB, FL, known as Zone 1 – F-35 Flightline Facilities ("Zone 1 – F-35 Flightline Facilities 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) Should PLAs be executed on selected large dollar contracts in Tyndall AFB, FL, and surrounding area?

Whether or not PLAs should be executed on any USACE contracts in Tyndall AFB, FL should be left to the discretion of the contractors awarded the contracts as determined on a project-by-project basis. AGC neither supports nor opposes contractors' voluntary use of PLAs in the Zone 1 – F-35 Flightline Facilities Project or elsewhere, but is opposed to any government mandate for contractors' use of PLAs. AGC strongly supports 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. As explained below, 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 be the most qualified to negotiate such an agreement. Accordingly, AGC urges USACE 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.

AGC believes that a PLA *mandate* would *not* advance the Federal Government's interests in achieving economy and efficiency in federal procurement. There are no widely published studies establishing that the use of PLAs has 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.)

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 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.
- PLAs typically require contractors to pay union-scale wages, which may be higher than the wage rates required by the Secretary of Labor pursuant to the Davis-Bacon Act. They often also require extra pay for overtime work, travel, subsistence, shift work, holidays, "show-up," and various other premiums beyond what is required by law.

Such changes are impractical for many potential contractors and subcontractors, particularly those not historically signatory to collective bargaining agreements ("CBAs"). Data from the Bureau of Labor Statistics (BLS), derived from the Current Population Survey (CPS), indicate that the majority of construction in the U.S. in general, and in the Zone 1 – F-35 Flightline Facilities Project area in particular, is performed on an open-shop basis. According to the BLS, only 12.8 percent of workers in the construction industry were represented by a union (covered by a CBA) in 2018 and only 13.8 were members of a union. While data specific to construction employment in the local project area is not readily available, data covering the closest Metropolitan Statistical Area (MSA) to the Zone 1 – F-35

Flightline Facilities Project area, the Panama City, FL MSA, show that a mere 1.4 percent workers in private industry were covered by a CBA and a mere 1.4 were union members in 2018. (Barry T. Hirsch and David A. Macpherson. 2018. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved July 29, 2020, from http://unionstats.gsu.edu/.)

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 collective bargaining agreements (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.

In sum, a PLA mandate is likely to hinder economy and efficiency in procurement for the Zone 1 – F-35 Flightline Facilities Project by causing potential cost increases and project delays of various types.

(2) Are there concerns by prime contractors on the availability of skilled construction labor?

AGC defers to the wisdom of local prime contractors and the Alabama AGC Chapter (www.alagc.org) concerning local labor supply and demand. However, we question the relevance of this inquiry in the assessment of the need for a PLA mandate. Should skilled labor shortages arise, how would a PLA mandate 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? The union-representation data referenced in our response above indicate otherwise.

(3) Would a PLA benefit a project which contains a unique and compelling mission-critical schedule?

As noted above, there is no reliable evidence that government-mandated PLAs generally enhance the efficiency of a project. This includes helping the project to stay on schedule. Furthermore, government mandates for PLAs often lead to litigation causing costly project delays.

(4) What type of project should not be considered for PLA clauses?

As explained above, AGC believes that the Federal Government should not impose mandatory PLA provisions on any project. Instead, 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.

(5) What is the time impact to the completion of the contract due to a PLA?

Please see AGC's answers to questions 1 and 3 above.

(6) What is the cost impact to the bid due to a PLA?

Please see AGC's response to question 1 above, where AGC delineates how a PLA can increase project costs.

(7) What other factors should the Corps consider before deciding to include PLA provisions in a Mobile Engineer District contract?

Again, USACE should not impose mandatory PLA provisions on any projects, including in a Corps of Engineers Mobile District contract. As explained above, there is no reliable evidence establishing that a PLA mandate 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 collective bargaining agreements (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.

(8) Please provide a list of recent (2-5 years) construction projects in the local labor market of the project under consideration. Include the following items:
Project Name/Location
Project Description
Initial Cost Est/Actual Final Cost
Was the project completed on time? (Y/N)
Number of craft trades present on the project PLA?
Were there any challenges experienced during the project?
(9) Which trades are expected to be employed on this project? Are you likely to need some union skilled trades for at least part of this project?

AGC does not have adequate data to confidently answer these questions and defers to the local knowledge of our local chapter, Alabama AGC Chapter (www.alagc.org).

(10) What market share does union labor have in the geographic area for this project or type of construction?

As discussed above, union market share is very low in the Zone 1 – F-35 Flightline Facilities Project area. Please see the response to Question 1 for related data.

(11) Does the local market contain the sufficient number of available skilled workers for this project? Are there other projects in the vicinity going to limit the pool of skill labor available for your project?

AGC does not have adequate data to confidently answer this question and again defers to the local knowledge of our local chapter, Alabama AGC Chapter (www.alagc.org).

(12) Has a project like this been done before in the local market?

AGC is unaware of any instances where a PLA has been used on a comparable project in the geographic areas of this project. For more information about possible local use of PLAs, Alabama AGC Chapter (www.alagc.org).

(13) What investments have been made to support registered apprenticeship programs?
(14) Have PLAs been used on comparable projects undertaken by the public sector in these geographic regions? Have PLAs been used on this type of project in other regions?
(15) Which CBAs are likely to expire during the course of the project under consideration that might cause delays?
(16) How do open shop and union wage rates influence prevailing wage rates in the local market and compare to Davis Bacon rates? What impact does unionization in the local market have on wages?

AGC does not have adequate data to confidently answer these questions and again defers to the local knowledge of our local chapter, Alabama AGC Chapter (www.alagc.org).

(17) Could a PLA contribute to cost savings in any of the following ways?
-Harmonization of shifts and holidays between the trades to cut labor costs?
-Minimization disruptions that may arise due to expiration of CBA?

-Availability of trained, registered apprentices, efficient for highly skilled workforce?
-Allowing for changes in apprentice to journeyman ration.
-Serving as management tool that ensure highly skilled workers from multiple trades are coordinated in the most efficient way.
-Others?
(18) Could a PLA minimize risk and contribute to greater efficiency in any of the following ways?
-Mechanisms to avoid delays
-Complying with Davis Bacon and other labor standards, safety rules and EEO and OFCP laws.
-Ensuring a steady supply of skilled labor in markets with low supply or high competition for workers.

It is impossible to reliably predict whether a PLA would minimize risk or contribute to cost savings or efficiency on the project. As stated above, there are no widely published studies establishing that the use of PLAs has consistently lowered the cost, shortened the completion time, or improved the quality of construction of public projects. (Please see response to Question 1 above.)

Regarding whether a PLA could help minimize disruptions that may arise due to expiration of CBA, we recognize that 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 discussed in the response to Question 1 above, only a minor portion of construction work in the Zone 1 – F-35 Flightline Facilities Project area is performed under a CBA. As a matter of historical fact, work disruptions like strikes, lockouts, and jurisdictional disputes rarely occur on projects that are not performed under CBAs. Furthermore, 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 involves a 2015 strike in New York City where the carpenters union walked off at least 12 projects—some 30 worksites—despite the no strike provision in the PLA. 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 Zone 1 – F-35 Flightline Facilities Project. 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.

As to whether a PLA could help ensure compliance Davis Bacon and other labor standards, safety rules and EEO and OFCP laws, AGC questions how a PLA mandate could possibly do so. 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 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 not aware of instances where these standards have not been met on federal contracts in the local area and suggests that, if any exists, then it is the responsibility of the appropriate

government enforcement agencies to curb that misconduct. For more information on projects in the area, AGC again refers to Alabama AGC Chapter (www.alagc.org).

(19) Are there ways in which a PLA might increase costs on this particular project?

Yes. Please see the answer to Question 1 above for more information.

Conclusion

In summary, AGC opposes government mandates for PLAs on federal construction projects and urges USACE to refrain from imposing such a mandate on the Zone 1 – F-35 Flightline Facilities 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