



September 23, 2009

Ms. Lynn A. Intrepid
Mr. Al Stewart
Interim National Director, Office of Job Corps
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: New Job Corps Center in Manchester, NH - Solicitation Numbers DOL099RI20791 and DOL099RB20811

Dear Ms. Intrepid and Mr. Stewart:

The Associated General Contractors of America (AGC) wishes to convey deep concern about the Department of Labor's determination to require the use of a project labor agreement (PLA) on the project for construction of a new Job Corps Center in Manchester, New Hampshire, and to request information about the Department's determination. This request is made pursuant to the Freedom of Information Act and is consistent with the goals expressed in 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 nearly 100 chapters throughout the United States, including AGC of New Hampshire. AGC members include approximately 7,500 general contractors, 12,500 specialty contractors, and 13,000 suppliers and service providers working in the 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 in general, AGC strongly opposes *government-mandated* PLAs on any publicly funded construction project. 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.

AGC respectfully acknowledges that Executive Order 13502 (EO) establishes 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. In particular, 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.

Section 5 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 Department free to require or to not require a PLA on the Manchester Job Corps Center project, and the EO encourages the Department to require a PLA only if the Department 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 would like to know if the Department has conducted an analysis to determine that the above conditions exist and, if so, requests documentation of the analysis, including details concerning the specific criteria and facts examined that led the Department to conclude that each of the five conditions exists and that the government's interests would be advanced more with a mandatory PLA on the project than without one. In particular, AGC requests information on the issues raised below.

1. \$25 Million Threshold

What is the estimated cost of the project? The solicitations merely provide an “estimated cost range of over \$10,000,000.” How much over? Please provide more specific information about the estimated cost and basis of the calculation. Is the project expected to reach the \$25 million standard for a “large-scale construction project” established by the EO?

If not, why does the Department think that a PLA is appropriate? If the project is indeed so large, will the Department be able meet the 100-percent set-aside goal it has set for the project? Has the Department conducted any research to determine whether a sufficient number of small businesses are available to bid on the project and are capable of performing the work?

2. Advancement of Economy and Efficiency

AGC also wishes to know how the Department determined that mandating use of a PLA will improve the economy and efficiency of the project, as this is not always the case. Case studies of the economic benefits of PLA use have had varying results, and AGC is unaware of any reliable study establishing that PLA mandates have consistently lowered the cost, increased the efficiency, or improved the quality of construction of public projects. In its 1998 study titled "Project Labor Agreements: The Extent of Their Use and Related Information," the Government Accounting Office (GAO) reported that it could not document the alleged benefits of past PLA mandates 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 use of the PLA versus other factors.

In any case, the EO directs the agency to make the determination about these benefits on a project-by-project basis. In many cases – particularly in geographic areas where union market share is weak – the effect of government mandates for PLAs is to limit the number of potential bidders and competition, which leads to increased costs to the government and, ultimately, the taxpayers. This is because government-mandated 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 bidders, particularly those firms not historically signatory to a collective bargaining agreement. The effect is to reduce the number of potential bidders and competition, which can lead to increased costs to the government and, ultimately, the taxpayers. Even if the changes do not deter potential bidders, the mandate can drive up costs as the successful bidders pass along the added costs incurred in changing their business practices to the contracting agency.

New Hampshire is 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 8.7 percent of the construction workforce in New Hampshire are union members and only 10.9 percent are covered by a collective bargaining agreement. Has the Department researched which construction contractors and subcontractors normally perform projects like the present project in the area and whether they are union or open-shop firms? Has the Department conducted a study of the Manchester area to determine whether a sufficient number of qualified contractors will be willing to bid on the project with a PLA mandate? Has the Department conducted research to determine whether the hiring halls in the area will be able to supply the labor needed to perform the job under the referral terms of a PLA? The Capacity Statement requested in Solicitation Number

DOL099RI20791 includes a request for information about PLA experience, but is the Department aware of how many PLAs have actually been used in New Hampshire in the recent past or even, say, in the past 20 years? AGC is aware of extremely few, on either public or private projects. Given all of these questions, will imposition of a PLA mandate effectively shut out local contractors and workers from working on the project, because only out-of-town contractors and workers will be willing and able to abide by the terms of the PLA? If so, what impact will that have on advancing government interests in economy and efficiency in procurement?

Will the project be subject to the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and/or other prevailing wage laws? If so, how would the requirements of the PLA differ from the requirements of the law with respect to wages, fringe benefits, and labor practices? As the Department is well-aware, such laws 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 Department considered whether a PLA mandate will result in higher labor costs for the project?

3. Advancement of Labor-Management Stability

Please also explain what leads the Department to conclude that a PLA mandate will help produce labor-management stability on the project, as this too is not always the case. While a PLA can establish uniform standards and dispute-resolution mechanisms that may help avoid or solve certain jobsite problems, a government-mandated PLA can also exacerbate such problems by forcing a new labor framework onto previously nonunion employees or by forcibly altering the agreed-upon status quo of union-contractor employees. In addition, a PLA does not guarantee freedom from the effects of strikes and work stoppages. It cannot prohibit off-site strikes or work stoppages at related facilities (such as a fabrication or material yard) which could then impede progress on the PLA-covered project.

Has the Department studied the recent history of strikes or other delay-causing labor disputes in the New Hampshire construction industry to determine whether a PLA is needed to prevent such problems? Given that strikes, jurisdictional disputes, and similar problems, as a matter of fact, rarely occur on projects not covered by collective bargaining agreements, how will a PLA mandate be helpful here, where almost 90 percent of construction work is done without a collective bargaining agreement? If the Department has evidence that union contractors will most likely perform the work on the job, has the Department considered whether local area-wide collective bargaining agreements would offer sufficient protection and whether these union contractors would prefer to work under their regular agreements rather than under a PLA?

4. Advancement of Compliance with Labor and Employment Laws

How will 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 beyond the compliance assistance, administration, and enforcement of such laws and regulations already provided by the Department's own

Occupational Safety and Health Administration, Wage and Hour Division, Office of Labor-Management Standards, and Office of Federal Contract Compliance Programs, as well as the Equal Employment Opportunity Commission, National Labor Relations Board, and other agencies 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?

5. Consistency with Law

Has the Department conducted a thorough legal review to determine that a PLA mandate itself would not run afoul of the law? For example, has the Department 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, and any legislation enabling the agency to undertake the project or authorizing or appropriating funds for the project?

In addition to the above questions about the Department's determination that a PLA is appropriate for this project, AGC has questions about the PLA itself. Has the Department already selected an agreement? If so, who negotiated the agreement? Were the parties experienced, well-qualified, and legally authorized to negotiate such an agreement? Did they have advancement of the government's interest in achieving economy and efficiency in procurement in mind when negotiating the agreement, and do the terms of the agreement reflect this? Has the Department done any research to determine whether all of the local building trades in the area of the project who will be needed for the project will be willing to sign on to the particular agreement? Has the Department conducted any research to determine whether the qualified contractors in the area of the project will be willing to sign on to the particular agreement?

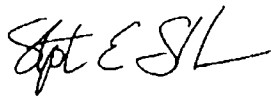
If the Department has not yet selected an agreement, who is expected to negotiate an agreement? AGC strongly believes that the proper parties to negotiate a PLA are the employers that will employ workers covered by the agreement and the labor organizations representing workers covered by the agreement, since those are the parties that form the basis for the employer-employee relationship, have a vested interest in forging a stable employment relationship and ensuring that the project is completed in an economic and efficient manner, and are authorized to enter into such an agreement under the National Labor Relations Act. Does the Department plan to allow labor to recommend a PLA that it has written unilaterally without negotiating with employers who will perform under the agreement? If so, would such an agreement be legal, advance government interests, and be acceptable to all local unions and all contractors that the Department selects to work on the project?

If the Department plans to negotiate the PLA terms with labor itself, does the Department have staff with sufficient experience and expertise in negotiating construction labor agreements, as compared to the very experienced union representatives, to ensure that the government's interests are advanced? If the Department plans to hire an outside expert, does the expert have sufficient knowledge of local area practices and labor relations? AGC points out that the Federal

Acquisition Regulation Council recognized the dangers of PLAs negotiated by the government in its proposed rule implementing the EO, stating, “The Government will not participate in the negotiations of any project labor agreement.” AGC further points out that the term “government” here must be read to include anyone acting as an agent of the government, including any construction company serving under the agency construction management model for the government and that will not directly employ any workers covered by the PLA.

In sum, AGC has many concerns and questions about the PLA mandate included in the solicitations for the Manchester Job Corps Center. We look forward to receiving responses to the above questions and requests, and we would be honored to have the opportunity to discuss this matter with you further.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen E. Sandherr". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Stephen E. Sandherr
Chief Executive Officer

cc: Olivia J. Thorpe, US Department of Labor
Gary Abbott, AGC of New Hampshire
AGC of New Hampshire Board of Directors