



Robert C. Lanham, Jr, President
Dan K. Fordice, III, Senior Vice President Lester C.
Snyder, III, Vice President Jeffrey L. DiStefano, Treasurer
Stephen E. Sandherr, Chief Executive Officer Jeffrey D.
Shoaf, Chief Operating Officer

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

Flightline Facilities Project area, the Panama Canal Expansion (Panama Canal Expansion) and other 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 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, 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

are ovg ty kg'r ct vgu'v'eqmgevxg'dcti clpki "ci tggo gpwö"cu'y gm'cu'ku'qdlgevxg'qh'cf xcpekpi "geppqo { "

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*

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?

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?

- 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 ó 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 projectsô some 30 worksitesô 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 ó 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 of the Davis Bacon Act, 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 emp.024 115.22 Tm0 g0 Gþc78.46 Tm0 g6ior and

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 ó F-35 Flightline Facilities Project. For