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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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July 24, 2017

Mr. Bob Holcombe
General Services Administration
Office of Government-Wide Policy
Regulatory Secretariat Division (MVCB)
1800 F Street NW
Washington, DC 20405

RE: Notice–MA–2017–03, Evaluation of Existing Federal Management and Federal Property Regulations & Notice-MV-2017-01, Evaluation of Existing Acquisition Regulations

Dear Mr. Holcombe,

On behalf of the Associated General Contractors of America (AGC), thank you and the General Services Administration (GSA) for seeking input on federal management and federal property management regulations that may be appropriate for repeal, replacement, or modification in accordance with E.O. 13777 "Enforcing the Regulatory Reform Agenda."

AGC is the leading association in the construction industry, representing both union and non-union prime and specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial and public buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

As such, AGC has a unique knowledge of GSA regulations concerning real property and construction. Based on that experience and this request, AGC puts forth the following regulatory and sub-regulatory items within GSA's purview for your consideration:

I. Rescind GSA's Project Labor Agreement Preference Policy to Bring the Agency in Line with other Major Federal Construction Agencies
II. Accounting for True Small Business Participation in Construction Contracts as Required under Section 1614 of the National Defense Authorization Act for Fiscal Year 2014
III. Modify GSAR 543.202—Authority to Issue Change Orders—to Ensure Government Efficiency and Accountability in Procurement
IV. Procuring Construction Services like the Private Sector: GSAR Rule for CMc
V. Rescind Federal Management Regulation Part 102–77—Art-in-Architecture

VI. Eliminate the GSA Mentor-Protégé Program—GSAR Subpart 519.70— in Light of the SBA's Program

I. Rescind GSA's Project Labor Agreement Preference Policy—Public Building Service Procurement Instructional Bulletin 11-05—to Bring the Agency in Line with other Major Federal Construction Agencies

Of the major federal construction agencies, GSA is the only one that includes a bid preference for construction services proposals for contracts that include a project labor agreement. AGC urges you to rescind this preference in order to encourage free and open competition on GSA construction projects.

AGC neither supports nor opposes contractors' voluntary use of PLAs but strongly opposes any government mandates or preferences 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 GSA's PLA policy effectively does.

AGC's policy against preferential procurement based on labor contract signatory status is pursued in an even-handed manner, opposing the consideration of such factors whether used to favor union or open shop contracting. AGC strongly believes that the choice of whether to adopt a collective bargaining agreement should be left to the contractor-employers and their employees, and that such a choice should not be imposed as a condition to competing for, or performing on, a publicly funded project. Government mandates and preferences 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. They would also be most qualified to negotiate the terms of such an agreement.

AGC specifically recommends that GSA rescind any and all policy documents implementing this preference policy. These documents include, but are not limited to: Public Building Service (PBS) Procurement Instructional Bulletin (PIB) 11-05, PBS-PIB 10-04, PBS-PIB 10-04-Revision 1, and PBS PIB 09-02. AGC further presses on GSA to urge the White House to rescind the Obama era Executive Order 13502—Use of Project Labor Agreements for Federal Construction Projects.

We have enclosed a recent letter we previously shared with your agency that details our concerns with this policy.

II. Accounting for True Small Business Participation in Construction Contracts under Section 1614 of the National Defense Authorization Act for Fiscal Year 2014

The majority of construction firms—over 90 percent—are small businesses with fewer than 20 employees. AGC's membership includes a vast number of those firms and we are committed to their fairly and openly competing for federal construction contracts. However, shortcomings in existing regulations blunt the ability of the prime contractors to fully account for small business participation in construction contracts, despite a host of small business goals aimed at ensuring small businesses are considered for subcontracts.

Specifically, prime contractors can only—as of now—count small business subcontractors at the first subcontracting tier and not at all tiers of subcontracting towards these goals. As a result, prime contractors are not incentivized to utilize small businesses at lower subcontracting tiers. In addition, goals that are set do not actually account for true small business participation in such contracts.

The U.S. Small Business Administration promulgated a new rule[1] in December 2016 that would help address this issue, as required under section 1614 of the National Defense Authorization Act for Fiscal Year 2014. However, the Federal Acquisition Regulation (FAR) Council—of which GSA is an important member—must issue a FAR rule to implement the SBA rule that would address this problem. In addition, GSA must make changes to its Electronic Subcontracting Reporting System to make this happen. To date, the FAR Council has not taken action on this rule, blocking needed regulatory change. AGC urges GSA to implement this rule, which will allow GSA to gain a true picture of small business participation in its contracts and thereby satisfy a host of small business regulatory requirements it strives to achieve.

III. Modify GSAR 543.202—Authority to Issue Change Orders—to Ensure Government Efficiency and Accountability in Procurement

Construction projects are subject to a wide array of variables that may require GSA to alter its initial plans. Consequently, reasonable delays and changes may be required to meet conditions on the ground. The concern is not with reasonable delays and changes to the initial contract. Rather, the concern rests with contracting officers (COs) failing to timely execute change orders and make payment to contractors for months—and even years—at a time. Unsurprisingly, this delay causes serious harm to project costs and schedule. In addition, it has a deleterious impact upon payment to the prime and subcontractors, especially small businesses which depend upon that cash flow to remain in business.

GSAR section 543.202 provides a host of requirements for COs in regards to change orders, but does not set any deadlines for COs to issue a written acceptance or denial to such proposals. There is no provision that provides a deadline for a CO to either approve or disapprove of a contractor's change order proposal. As a result, COs can take months or even more than a year to make a decision on the proposal. During that time of indecision and lack of government direction, a contractor must:

[1] https://www.gpo.gov/fdsys/pkg/FR-2016-12-23/pdf/2016-30874.pdf

- Proceed with work or face consequences—such as liquidated damages or poor performance ratings—for missing scheduled deadlines; and
- Readjust its coordination of subcontractors and determine how to proceed without violating the terms of any subcontracts, among other things.

That stated, depending on the issue at the center of the change order proposal, the contractor can be left in the precarious position of either (1) self-financing the work to meet the project's schedule; or (2) stopping work altogether while waiting on the CO's approval or disapproval of the change order. These options bring with it real problems and risks to a contractor and the government. When work must be stopped or slowed down because of untimely processing of modifications, contractor overhead costs remain (e.g., labor, equipment). If demobilization and remobilization are required, it only adds to unnecessary and inefficient costs related to the use of that equipment. Contractors will go to great lengths to keep the project going, but there are times when the agency issued modification dictates the schedule. In an environment where there is no deadline for a CO's issuance of change order approvals or denials, there is little accountability for bureaucratic delay that has negative cost and time consequences for delivering GSA construction projects.

To help ameliorate this issue, we recommend modifying GSAR section 543.202 to hold COs accountable for making timely decisions. Specifically, we recommend the revising subsection (d) of that provision to state:

(d) *Coordination of change orders with Government*. Issue change orders only after coordination, as appropriate, with quality control, finance, audit or other technical personnel.

(e) *Coordination of change orders with Contractor*. The Contracting Officer or COR shall provide to the Contractor a written acceptance or denial of a proposal for a change order no later than:

> (1) Thirty (30) calendar days from receipt of a qualifying proposal with a cost of less than $250,000;
> (2) Sixty (60) calendar days from receipt of a qualifying proposal with a cost of $250,000 to less than $500,000;
> (3) Ninety (90) calendar days from receipt of a qualifying proposal with a cost of $500,000 to less than $1,000,000; or
> (4) One hundred-twenty (120) calendar days from receipt of a qualifying proposal with a cost $1,000,000 or more.

(f) A Contracting Officer or COR shall only deny or request the re-submittal of a Contractor's proposal for a change order for material reasons.

(g) When a Contracting Officer or COR does not provide to the Contractor a written acceptance or denial of a proposal for a change order within the applicable deadlines set forth in paragraph (e), the proposal is denied.

(h) The Contracting Officer or COR shall record in the contract file the date on which it receives from the Contractor any proposal for a change order.

Such a provision will help provide some level of accountability to COs to make timely decisions. In the event no decision is reached, contractors can still proceed with a level of certainty that does not currently exist. In addition, it will help provide some record of CO receipts of proposals that could be used to help track CO performance and effectiveness. Lastly, the proposal will help prevent COs from re-starting the clock by denying a proposal or requesting a resubmittal of a proposal based on non-material proposal defects, such as a meaningless typo or misspelling.

IV. Procuring Construction Services like the Private Sector: GSAR Rule for CMc

The current FAR and GSAR do not have detailed coverage differentiating for various construction project delivery methods, although there is some guidance regarding source selection. This is the case for GSA's Construction Manager as Constructor (CMc) procurement and project delivery method. By putting forth a GSAR rule, GSA could standardize the use of this innovative, private sector tool in a more efficient and uniform way than it currently does.

Under this innovative construction process, the design and construction manager/general contractor are engaged at the initial stage of the project. Each party (design professional and constructor) provides estimates for the cost of construction as the design is developed. The constructor's proposal and estimate will include an initial target cost, an initial target profit with incentive provisions, and a ceiling price that is the maximum to be paid to the constructor absent an adjustment. This collaborative process has been shown—by GSA's own numbers—to result in fewer project delays and cost overruns.

By moving forward with a GSAR rule, the agency will help ensure that this delivery method is consistently used throughout its various regional offices. AGC strongly supports moving forward with this rulemaking as the standardization of this tool will reduce procurement unknowns and burdens and help increase competition throughout the nation on such GSA projects.

V. Rescind Federal Management Regulation Part 102–77—Art-in-Architecture

AGC urges GSA to rescind FMR Part 102-77, which governs art-in-architecture. Under this regulation, Federal agencies must incorporate fine arts as an integral part of the total building concept when designing new Federal buildings, and when making substantial repairs and alterations to existing Federal buildings, as appropriate. The selected fine arts, including painting, sculpture, and artistic work in other media, must reflect the national cultural heritage and emphasize the work of living American artists. Federal agencies, using taxpayer dollars, must set aside funds to pay for these works of art.

Specifically, under this program, each new federal building gets its own artwork, which is commissioned with usually half a percent of the building's construction budget and ranges between $25,000 and $800,000.[2] Between 2011 and 2014, the GSA spent $11,055,412 on

[2] See https://www.washingtonian.com/2007/06/01/this-sculpture-1-million-buyer-you/ and https://www.gsa.gov/portal/content/104456

commissioned art for federal buildings.[3] The American taxpayer expects its federal bureaucracy to do the peoples' work, not waste time and resources making subjective purchasing decisions about art.

The program is outdated and wasteful, especially at a time where construction and maintenance budgets do not meet the needs of federal agencies' missions. The Federal Bureau of Investigation headquarters is falling apart.[4] The average age of 251 federal buildings consistently rated as poor performers is 70 years old.[5] The money spent on art could be better spent on helping address the needs of these federal facilities.

From a contractors' perspective, especially small business contractors, money spent on art for their project could otherwise pay for change orders so they can pay their middle class workers on time and deliver the facility to the agency on time. It is patently unfair for federal agencies, like GSA, to set aside project money to fully pay artists for artwork, but fail to allocate sufficient contingency funds to deal with change orders for construction contractors that build their facilities.

AGC, again, urges GSA to rescind this regulation and end this program. Savings from this program should be used by GSA to help pay for contingencies during construction that always occur.

VI. Eliminate GSA's Mentor-Protégé Program—GSAR Subpart 519.70—in Light of the SBA's Program

Approximately 80 percent of AGC's construction contractor members are small business firms composed of 20 or fewer employees. As such, AGC supports the interests of its small business construction contractor members. Mentor-protégé programs can provide an avenue for small businesses to gain experience and grow, thereby providing a gateway for growing competition for government construction services contracts and subcontracts.

The GSA has a mentor-protégé program under which mentor companies voluntarily assist protégé firms that seeks to accomplish the aforementioned goals. GSA's program can be found in the General Services Acquisition Regulation (GSAR) subpart 519.70[JH1]. The problem with GSA's program is that there are a dozen or so federal agencies that have their own unique programs. As a result, there are slightly different rules for different agencies. As a result, complying with these rules for small businesses that work for multiple federal agencies and under various agency mentor-protégé programs can be an administrative nightmare. Even more so, small businesses may not have the in-house compliance capabilities—or resources for significant outside counsel assistance—to keep the varying requirements straight.

[3] http://dailysignal.com/2015/01/05/price-tag-10-federal-art-project-may-surprise/
[4] https://www.washingtonpost.com/news/digger/wp/2015/10/16/the-fbis-headquarters-is-falling-apart-why-is-it-so-hard-for-america-to-build-a-new-one/?utm_term=.4daf0699b24f
[5] http://www.gao.gov/assets/680/671424.pdf

On July 25, 2016, the U.S. Small Business Administration published a final rule[6] establishing a government-wide mentor-protégé program for the benefit of all small businesses as protégés. The rule implemented statutory provisions within the Small Business Jobs Act of 2010 and National Defense Authorization Act of Fiscal Year 2013.[7] Arguably, it is the intent of Congress in those provisions to reduce the number of mentor-protégé programs across many federal agencies and, to a large extent, streamline the regulatory process for interested participants.

As such, AGC believes that its contractor members and other small businesses would benefit from GSA's elimination of its own mentor-protégé program and acceptance of the SBA's for GSA contracts from the standpoint of creating a singular set of regulatory requirements for the creation and operation of mentor-protégé relationships.

Thank you for your consideration of AGC's input.

Sincerely,

/S/

Jimmy Christianson
Regulatory Counsel
Associated General Contractors of America

Enc.

[6] https://www.gpo.gov/fdsys/pkg/FR-2016-07-25/pdf/2016-16399.pdf
[7] This final rule implements section 1347(b)(3) of the Small Business Jobs Act of 2010, Public Law 111–240, and section 1641 of the NDAA 2013, Public Law 112–239.

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

October 19, 2015

Mr. Raymond J. Porter
Contracting Officer
General Services Administration
The Strawbridge Building
20 North 8th Street
Philadelphia, PA 19107¬3191
Sent via email to raymondj.porter@gsa.gov

RE: Construction Contract for Measurement Systems Laboratory (MSL) NASA Langley Research Center located in Hampton, Virginia; GSA Solicitation No. RJP-NASA_MSL-0001-8-11-2015

Dear Mr. Porter,

On behalf of The Associated General Contractors of America ("AGC"), I write you to express deep concern about the General Services Administration Mid-Atlantic Region's ("GSA") consideration of project labor agreements ("PLAs") as an evaluation factor in choosing a contractor for the construction of a Measurement Systems Laboratory (MSL) NASA Langley Research Center located in Hampton, Virginia ("Laboratory Project"). AGC strongly urges you to remove the preferential treatment of proposals that incorporate a PLA. Additionally, pursuant to the Freedom of Information Act and in accordance with President Obama's January 21, 2009, memorandum on Transparency and Open Government, AGC also requests information about GSA's determination to consider PLAs as a selection factor for this project.

Background on AGC and AGC's Policy on PLAs

AGC is the leading association for the construction industry. Founded in 1918, AGC represents more than 25,000 firms, including over 6,500 of America's leading general contractors, and over 8,800 specialty-contracting firms and more than 10,400 service providers and suppliers working in the federal, building, highway, heavy, industrial, municipal utility, and virtually all other sectors of the commercial construction industry. AGC proudly represents both union and open-shop companies. AGC is also proud of its long history of partnering with GSA.

AGC neither supports nor opposes contractors' *voluntary* use of PLAs on the Laboratory Project or elsewhere but strongly opposes any *government mandates or preferences* 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's policy against preferential procurement based on labor contract signatory status is pursued in an even-handed manner, opposing the consideration of such factors whether used to favor union or open shop contracting. AGC strongly believes that the choice of whether to adopt a collective bargaining agreement should be left to the contractor-employers and their employees, and that such a choice should not be imposed as a condition to competing for, or performing on, a publically funded project. As discussed below, government mandates and preferences 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. They would also be most qualified to negotiate the terms of such an agreement. Accordingly, AGC strongly urges GSA to remove any PLA preference in the selection process for, or any PLA mandate in the performance of, the Laboratory Project, and to defer to the contractor's judgment as to whether a PLA is appropriate for the project once the contract has been awarded.

GSA's Compliance with the Competition in Contracting Act and Federal Acquisition Regulation

AGC seriously questions GSA's legal authority to consider PLAs as a selection factor and, in particular, to grant preferential treatment to offerors that include a PLA in their bids. The Competition in Contracting Act ("CICA") and the Federal Acquisition Regulation ("FAR"), particularly FAR § 6.101, establish a strong policy favoring "full and open competition" in awarding federal contracts. The law provides for only seven specific exceptions to this policy, none of which seems to permit an agency to grant a selection preference for bids with PLAs.

FAR § 3.101-1 further states, "Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none." Providing "full credit" to offers including a PLA and "zero credit" to those not including a PLA – as GSA has indicated in the solicitation that it intends to do – constitutes such preferential treatment. Since there is no statute or regulation specifically authorizing such a preference, the preference is illegal.

AGC, therefore, requests information about GSA's determination that it may grant such a preference without running afoul of CICA and these FAR mandates. Does GSA maintain that the "full and open competition" mandates do not apply here, that a PLA bid preference does not violate those mandates, or that one of the seven exceptions to the mandates applies? Does GSA maintain that there is indeed a statute or regulation specifically authorizing such a preference? Please explain in detail the basis of GSA's conclusions in these regards.

GSA's Compliance with Executive Order 13502

AGC respectfully points out that Executive Order 13502 ("the EO") and its implementing FAR rule – which 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" – neither preempt CICA's mandates regarding full and open competition, nor themselves authorize a PLA bid preference. In fact, they do not address bid preferences at all, and they authorize a PLA mandate only where the agency has made a project-specific determination 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.

Has GSA conducted a project-specific analysis to determine whether the latter four conditions are present with regard to the Laboratory Project? Please provide evidence that such an analysis has taken place and the details of the analysis. In particular, AGC raises the following concerns and questions regarding such an analysis.

1. Advancement of Economy and Efficiency in Federal Procurement

How will a bid preference for a PLA advance economy and efficiency in the procurement of a contractor for the Laboratory Project? There are no widely published studies establishing that PLA mandates have 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 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), evidence that the vast majority construction in Virginia is performed on an open-shop basis. In the Commonwealth of Virginia, 95.1 percent of construction workers were ***not*** covered by a CBA and 96.2 percent were ***not*** members of a union in 2014. (Barry T. Hirsch and David A. Macpherson. 2015. Union Membership and Coverage Database from the CPS. In Unionstats.com. Retrieved October 13, 2015, from http://unionstats.gsu.edu/.) Consequently, AGC believes that PLA mandates in Virginia would likely harm economy and efficiency in federal procurement by both hindering competition and raising project costs.

Given that so little construction work in the relevant area is performed under CBAs, AGC questions how a PLA mandate or preference would advance economy and efficiency in federal procurement here. Has GSA researched the contractors that normally construct similar projects in the area and whether they operate on a union or open-shop basis? Has GSA 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 GSA 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 GSA considered whether a PLA mandate or preference 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 a PLA? If so, what impact would that have on advancing government interests in economy and efficiency in procurement?

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.

Please advise AGC as to GSA's intentions regarding who will negotiate any PLA used on the Laboratory Project, if one is used, and when the PLA must be submitted to the agency. Please also explain GSA's rationale for this approach and why GSA believes that this approach will advance economy and efficiency in federal procurement.

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. (For a discussion of such disputes, please see the "Consistency with the Law" section below.) Please advise us as to what assessment GSA has conducted, if any, of the risk of litigation over a PLA preference or

mandate on the Laboratory Project and of the potential costs of such litigation, and the results of any such assessment.

Given the uncertainty of cost savings and potential for cost increases as described above, not to mention the delays that can be caused by litigation and the like, AGC recommends that the GSA refrain from mandating the use of a PLA on the Laboratory Project and instead leave to contractors the option of using PLAs on a voluntary basis.

2. Advancement of 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 not present where work is normally performed open shop. As a matter of historical fact, work disruptions like strikes, lockouts, and jurisdictional disputes rarely occur on projects that are not performed under CBAs. As discussed above, the Commonwealth of Virginia is virtually completely non-union; and, to our knowledge, there is no significant history of labor-management strife in the area. However, for more knowledge of local labor relations, AGC suggests that NAVFAC contact the local AGC Chapter in the region, the AGC of Virginia (http://agcva.org/). Accordingly, AGC cannot see how a PLA preference or mandate would advance labor-management stability there.

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 multi-project strike the New York City Council of Carpenters lead that impacted up to 20 construction sites citywide, despite PLA agreements in place at 12 of those projects—including the $20 billion Hudson Yards redevelopment project and $2.75 billion World Trade Center 3 project—in July 2015. Another 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.

Again, AGC is not aware of any relevant, recent history of construction project delays caused by labor-management disputes in the Commonwealth of Virginia. As such, AGC does not believe that a PLA mandate is needed to advance labor management stability on projects there. Again, if a PLA would be helpful in this regard, the general contractor awarded the contract would be the first to recognize that fact and to choose to use a PLA voluntarily.

3. Advancement of Compliance with Labor and Employment Laws

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, labor and employment laws – on the Laboratory Project or elsewhere. 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 also unaware of any evidence of rampant employer violations of employment laws in the Commonwealth of Virginia and suggests that, if any exists, then it is the responsibility of the appropriate government enforcement agencies to curb that misconduct. Please advise us of any evidence GSA has of such rampant violations specific to the project area and any evidence that PLAs have been successfully used to curb such past misconduct.

4. Consistency with Law

As mentioned above, government mandates for PLAs are often challenged on legal grounds. 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); 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.

As discussed above, AGC believes that the GSA's PLA preference runs afoul of CICA and the FAR. AGC also believes that a PLA preference and PLA mandate may run afoul of other laws listed above. AGC, therefore, requests information about whether GSA has conducted a thorough legal review to determine that a PLA preference or mandate itself would not run afoul of the law, and the results of any such review.

Conclusion

In summary, AGC opposes government mandates and preferences for PLAs on federal construction projects, and believes that GSA should not impose such a mandate or preference on the Laboratory Project. As outlined above, AGC has many concerns and questions about the PLA preference that GSA

intends to grant in the selection of the Laboratory Project's construction contractor, and we look forward to receiving responses to the above requests for information.

We appreciate the opportunity to share our insights with GSA 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