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



September 23, 2009

FAR Secretariat (VPR)
1800 F Street, NW
Room 4041
Attn: Hada Flowers
Washington, DC 20405

Re: FAR Case 2009–005, Use of Project Labor Agreements for Federal Construction Projects; Addendum to Comments

On behalf of the Associated General Contractors of America (hereinafter “AGC”) wishes to submit this letter in addendum to comments filed August 13, 2009 on the proposed rule concerning Use of Project Labor Agreements for Federal Construction Projects issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereinafter the “FAR Councils”), which would implement Executive Order 13502 (hereinafter the E.O.), which encourages federal departments and agencies to consider requiring the use of project labor agreements (PLAs) for federal construction projects where the total cost to the government is more than \$25 million.

In short, AGC is greatly concerned that some Federal agencies may mistakenly interpret the intent and spirit of the E.O. and the forthcoming rulemaking and impose a government-mandated project labor agreement on a Federal construction project *after* contract award. We have become aware of several recent attempts to impose such a requirement for the PLA after the contracts were competitively bid and awarded.

AGC strongly urges the FAR Councils to clarify in the Final Rule that agencies, contracting officers, and their representatives are forbidden from pursuing such course of action. AGC staunchly opposes this *ex post facto* imposition as it directly interferes with the relationship between a prime contractor and the subcontractors and causes massive disruption of the procurement process. A prime contractor prepares a bid based on bids received from subcontracting partners and its suppliers. Imposing a PLA after this process has taken place disrupts a great deal of careful preparation and bid gathering on the part of the prime contractor.

As AGC noted in its previously submitted comments, a government-mandated PLA potentially could be the cause of new frictions, disputes, and confusion by forcing a new labor framework onto previously non-union employees or by forcibly altering the prior agreed upon status quo of union-contractor employees. Requiring a PLA *after* contract award would only magnify these concerns because of its unpredictability. Allowing the possibility of “surprise” PLAs may also further discourage contractors from bidding on Federal work because of the unpredictability in the market.

Letter to FAR Secretariat (VPR)

September 23, 2009

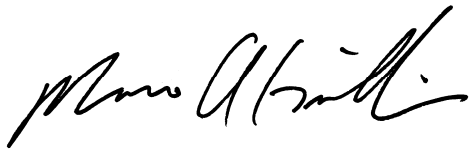
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Furthermore, imposition of a government-mandated PLA after the contract is awarded is tantamount to a post-award change to the terms and conditions of the contract, which goes far beyond the scope of permissible changes under the Changes Clause. Allowing an agency the option to impose a PLA after award would be no different than having two different specifications governing the manner of performance and allowing the agency the option to pick one after the price for the work is fixed. The imposition of the PLA after contract award would disrupt a wide variety of cost factors that would materially change the contractors pricing, and we strongly believe that any such situation could only be remedied by entitling the contractor to an equitable price adjustment.

To surmise, AGC requests that the Councils clarify the Final Rule to state that, should an agency choose to implement a PLA, it must be so advertised in the project solicitation prior to bidding. The Councils should also forbid an agency or its representatives from imposing a PLA after contract award.

AGC appreciates the opportunity to additional comments on the rule that the FAR Councils proposed on July 14, 2009. AGC finds that the issues we present in our comments will avoid a great deal of confusion and complication for the Federal construction procurement process. Thank you again for considering AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Marco A. Giamberardino". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Marco A. Giamberardino, MPA
Senior Director
Federal and Heavy Construction Division