PUBLIC SUBMISSION

As of: 12/20/11 1:16 PM
Tracking No. 80a03fbd
Comments Due: August 13, 2009

Docket: FAR-2009-0024
FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects

Comment On: FAR-2009-0024-0001
Federal Acquisition Regulation; FAR Case 2009-005, Use of Project Labor Agreements for Federal Construction Projects

Document: FAR-2009-0024-0452
Comment on FR Doc # E9-16619

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Government Agency: USN

General Comment

Navy Acquisition & Logistics Management Comments RE: FAR Case 2009-005 are included within the attached word file.

Attachments

Comment on FR Doc # E9-16619

Navy Acquisition & Logistics Management Comments on FAR Case 2009-005, Regarding Project Labor Agreement Rules

Concerning the question on whether agencies should require submission of any project labor agreement prior to award:

Yes, the solicitation should require the submission of the project labor agreement prior to award. To allow submittal only post award would introduce uncertainty about whether the prime contractor would be able to achieve such an agreement. To "negotiate in good faith" is intended and required, but actually achieving the agreement is necessary when the agency determines that it is in its best interest to have such an agreement. Anyone directly involved in the negotiation of an agreement with organized labor will confirm that having the intent to negotiate in good faith does not assure that agreement will be reached. Therefore, until a Project Labor Agreement (PLA) is achieved, it is not known whether an agreement will be reached and, if reached, whether the agreement will meet the requisites sited by the Executive Order and the proposed solicitation provision and contract clause. While offerors would likely make any agreement contingent upon contract award, such agreements should be achieved prior to award to assure each offeror can actually achieve an agreement. The signed agreement presented to the agency is the proof necessary.

Furthermore, to allow submission of the required PLA only after award would likely result in an unbalanced bargaining table during any subsequent PLA negotiations. When the award is made, public announcements commonly follow the award. With the knowledge that the contract has been awarded and that a PLA is required by the agency, the bargaining table for achieving a PLA would be unbalanced and favor the labor organization(s) with which the contractor must reach agreement. Since failure to achieve a PLA would place the contractor in violation of the government contract, greater pressure will be placed on the contractor to reach agreement on a PLA regardless of the terms and conditions of the agreement. Therefore, the contractor may be forced to give concessions that would not be given with a level bargaining table.

Despite the proposed solicitation provision and contract clause language explicitly stating that a price adjustment will not be made, the uncertainty of not having a fully executed PLA until after contract award introduces much greater risks to the awardee and to the government. There will almost certainly be a cost associated with achieving any PLA. The Executive Order itself acknowledges this when

stating “Construction employers typically do not have a permanent workforce, which makes it difficult for them to predict labor costs when bidding on contracts…” These costs may cause unanticipated financial difficulties for the contractor if not known in advance and included in the contractor’s proposed price and project budget. Also, contract performance risks are substantially increased if the PLA has not been achieved prior to contract award. If difficulties are encountered during negotiations for a PLA post award, then contract performance is at risk at the outset of the project. These increased costs or labor related performance issues may ultimately lead to contract performance failure or chronic performance problems. Furthermore, if the solicitation will form the basis of a cost reimbursable type contract, then by its very nature any additional costs will be borne by the government and may result in cost overruns on the project.

Therefore, requiring PLA submittal prior to award will not only document that the offeror has actually achieved a signed agreement with organized labor, but will also allow accurate and realistic planning and contract pricing by the prime contractor and any prearranged subcontractors. It will also provide the benefits of a PLA at the outset of the contract rather than having the PLA negotiation become a distraction or unanticipated problem at the beginning of the project. Since a PLA by definition is “a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project”, the capability to achieve a PLA prior to contract award does exist and should be a condition of contract award.

Concerning the question on factors for the contracting officer to consider in determining whether the use of a PLA will be in the best interest of the Government:

All of the contracting agencies will have many years of experience on prior construction contracts awarded, administered, and completed. It is from these experiences that the agencies should principally rely to make determinations on whether project labor agreements will serve their interest. In regards to specifics, the experiences of each independent government agency will reveal whether substantial delays or inefficiencies were experienced due to strike(s) or other labor dispute action(s) by various contractor or subcontractor employees. Agency experiences will also reveal other circumstances, such as labor shortages in a particular locality or for a specific job class, or on

specific types of construction projects, which may make a PLA advisable.

While public comments on factors to be considered are certainly welcomed, this will ultimately be an agency determination and to require usage upon the presence of those factors should not be in the form of a mandate to the agency. That determination should ultimately be left, as it clearly is in the Executive Order, to the individual contracting agency. Therefore, the agencies should be allowed broad discretion in this regard.

Also, the decision on project labor agreement usage should not be left solely to the contracting officer. Since the project management office and/or the project owner will have a broader and more expansive understanding of the whole project and its local economic impact, those officials should likewise be engaged in determining whether use of a PLA is required. PLA use should also be considered early in the acquisition planning stages of the procurement. Therefore, the Civilian Agency Acquisition Council and the Defense Acquisition Council should carefully consider placing language in Part 7 of the FAR (Acquisition Planning) to address consideration by the entire team of acquisition professionals. Specifically, FAR Part 7.104 addresses requirements and logistics personnel and others that are part of the acquisition planning process. Those managers and the acquisition planning team generally should participate in determining whether a PLA is appropriate for any given project and language within FAR, Part 7 should encourage or require their participation.

Concerning Paperwork Reduction Act analysis:

The data provided in the Paperwork Reduction Act analysis appears to be largely arbitrary and capricious and should not be relied upon for any presumed target for expected use of PLAs.

Two concerns are hereby identified. First, it is possible that this estimate will be used by governmental or outside organizations to achieve benchmarks or unsupportable goals for the use of PLAs. This should not be done since these estimates are not provided for that purpose and do not appear to be based on a valid hard count of existing or planned procurements.

Second, in regards to the estimated time necessary to report this information, the estimate provided appears to be unrealistically low and not based upon valid assumptions and methodology. Project labor

agreements require not only extensive negotiations, but are often many pages and require detailed input from both the contractors and organized labor representatives. Therefore, more so than the document itself, effort and time would be expended reaching those agreements and then reducing the terms and conditions to a written form. It is likely that such agreements would require dozens of hours of effort to produce in a form that would be acceptable to the government contracting agency. Yet, the estimated response time is listed as only one hour and does not fully address the time and effort that will be required by labor organizations, the prime contractor or its subcontracting partners, which are often small businesses.

Concerning whether this collection of information is necessary for the proper performance of functions of the FAR and will have practical utility, the answer is yes. The documents are mandatory and absolutely necessary since they would be utilized to determine whether the contractor had achieved the required PLA as stated in the draft solicitation provision (52.222-XX) and contract clause (52.222-YY).