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



July 11, 2011

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Ms. Debra A. Carr  
Director  
Division of Policy, Planning and Program Development  
Office of Federal Contract Compliance Programs  
Room C-3325  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Proposed Rule pertaining to Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans (RIN 1250-AA00)**

Dear Ms. Carr:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), let me thank you for the opportunity to submit the following comments on the Office of Federal Contract Compliance Program's (hereinafter "OFCCP") notice of proposed rulemaking to implement affirmative action and nondiscrimination obligations of contractors and subcontractors regarding protected veterans as published in the *Federal Register* on April 26, 2011.

### **AGC's Interest in the Proposed Regulations Regarding Veterans**

AGC is among the oldest and largest of the nationwide trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms, both union and open shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for government agencies under contracts covered by the laws administered by OFCCP. Most are small and closely held businesses.

Like OFCCP, AGC and its members are firmly committed to the principles of equal opportunity employment and appreciate OFCCP's efforts to provide an effective pathway to employment for the nation's veterans; however, by implementing the proposed regulations, AGC believes that OFCCP would not meet this objective and would instead, make it more burdensome for employers to hire while simultaneously harming the very people the agency is trying to protect – all other protected classes. Therefore, it is AGC's recommendation that OFCCP, as well as other agencies in the federal government, offer incentives as a way to make hiring less burdensome for employers in order to accomplish the agency's objectives. This proposed rule would do the opposite. If it is OFCCP's final decision to implement this proposed rule despite AGC's concerns, AGC kindly asks OFCCP to exempt the construction industry from the requirements of these additional burdens particularly due to the current state of the construction economy and the construction industry's unique nature.

### **Record Unemployment in Construction**

The U.S. construction industry has been particularly hard hit from the economic recession, falling into recession a year and a half before the overall economy and still has not emerged. Construction spending fell for the sixth straight month in May 2011, touching an *11-year low*, as shrinking public outlays swamped a modest rise in private nonresidential work. As the demand for construction services has plummeted, so, of course, has the demand for construction workers.

Over 2 million workers lost their jobs between April 2006 and May 2011, when employment in the U.S. construction industry dropped by 28 percent. The industry's unemployment rate in May was 16.3 percent (not seasonally adjusted) – the highest of any industry and nearly double the all-industry rate. The construction industry continues to suffer with no expectation to change any time soon as work on stimulus projects tapers off. Accordingly, federal construction contractors, on the whole, are not in a position to hire workers these days and, when they are, fairness and business needs dictate giving priority to unemployed workers who have previous experience and training in the types of jobs being filled (giving higher priority among qualified workers in protected groups). There is little time, need, or staff to hire and train less-qualified workers when so many well-qualified workers are currently seeking jobs.

In addition to construction workers, construction companies have also had to cut HR and administrative staff, making it even more difficult to comply with these complex regulations. As a result, even well-intentioned construction companies that are model federal contractors would find it extremely time-consuming and burdensome to implement the changes required by this proposed rule.

## **Unique Nature of the Construction Industry as it Relates to the Proposed Rule**

In addition to an unemployment rate higher than any other industry, the construction industry has many other unique factors which would hinder compliance with the proposed rule. When issuing other regulations, OFCCP recognized that it did not make sense to require construction contractors to meet the same affirmative action requirements of other contractors because of the distinctive nature of the industry and the work; therefore, if OFCCP is intending to make a final decision to implement this rule, AGC believes the construction industry should be exempted because of its uniqueness which provides employment that is project-based, transitory and often seasonal.

### ***Applicant Tracking***

If implemented, the proposed rule would require covered contractors to maintain certain data related to applicants and new hires including the number of veteran referrals received from veterans or unemployment offices, even if the applicants are not qualified. This mandate would require employers to track candidates who are not qualified, and therefore not being considered for hire. As the construction industry continues to struggle with record unemployment behind other industries, the ratio of qualified applicants to job openings has significantly increased. For example, one construction company's recent job posting yielded a return of over 1,000 applicants. In addition, not all veterans are protected veterans or qualified to do the job, and of those who are, they may choose not to self-identify as such, so the data that OFCCP would be trying to collect and measure would be inevitably skewed. If implemented, AGC again recommends that the construction industry be exempted from meeting these requirements for the reasons listed below.

- Specifically, unlike work performed by service and supply contractors, once a construction project is complete, workers often relocate to another project for the same or a different employer, depending on labor needs. This alone would make it extremely difficult for construction contractors to track statistical data and ensure the accuracy of such data. In addition, construction contractors could collect such data, but the data may significantly change as early as the next day because workers often move around to other projects or when workers are provided by union hiring halls, the workforce itself may change.
- Applicants who apply for construction jobs are typically trained construction workers who often lack the ability or desire to apply for work using a company's electronic centralized hiring system or by travelling to the company's headquarters office to apply where such data may be more accurately tracked. In construction, because a company may perform work in many different states and/or localities within a particular region, it may be to the benefit of the applicant to apply for work directly on the job site.

If a rule requiring construction contractors to track statistical data is implemented, construction contractors would be performing statistical analyses continuously because the workforce would be forever changing. Also, depending on the date chosen to perform the analysis, construction work may be in or out of season. While the data can be collected, the numbers would be meaningless as the construction workforce changes with each project or even with each phase of a project. In short, construction contractors would not be able to provide valid and reliable data without undue burden, if at all.

### ***Invitation for Veterans to Self-Identify “Pre-Offer”***

In construction, hiring is typically handled at individual job sites, not a headquarters office or electronically. Often, available construction workers “walk up” to the job site inquiring about work opportunities and with the number of potential job sites a construction company may have at any given time, it would be necessary for construction companies to revise and make available to each job site updated hard copies of applicant flow logs in order to comply with this proposed rule, which would not only be an administrative burden for construction employers, but also a financial and environmental burden for construction companies as they are more fiscally conscious and strive to become more environmentally friendly.

In addition, federal contractors are required to invite all job applicants to voluntarily and confidentially identify their race and gender pre-offer; however, unlike with race or gender self-identification, when a person self-identifies as a protected veteran, there is an additional burden on employers to evaluate each response and conduct an individual analysis. In addition, for veterans who are disabled, disclosure may be very personal. Veterans with disabilities may be less willing to designate in advance because of the stigma that may have previously been associated with being disabled. For many, it may result from a fear that they would not be hired. So, while there would be an extra burden on employers – with administrative staff already overwhelmed and thinly stretched – to do additional analysis when a veteran self-identifies as having a disability, an added burden would also rest on the disabled veteran applicant who must choose whether or not to self-identify. It is already difficult for contractors to get applicants to self-identify as a member of any protected class, so the new burden for contractors would be to encourage applicants to self-identify as a protected or disabled veteran for tracking that is *required*. If the applicant chooses not to self-identify, the data may become unreliable because it would be provided inconsistently and therefore may erroneously look like non-compliance.

### ***Job Postings and Linkage Agreements with Recruitment Sources***

The proposed rule has a mandatory job listing requirement that mandates a contractor to list all employment openings for the duration of a contract with an “appropriate employment service delivery system,” and to provide the job vacancy information “in the manner that the employment service requires.” OFCCP states that there have been many instances in which a contractor provided job listings to an employment service in manner or format that was unusable to that employment service. AGC would like OFCCP to consider that there are many employment services available and each of them may have unique job posting requirements that

suit the business operations for that organization. With that said, AGC recommends that OFCCP consider re-establishing a central website such as the America's Job Bank website which was once viewed as the "one stop shop" for employers, agencies and applicants. This would also ensure that applicants who are willing to relocate in order to find employment would have the opportunity to consider available job openings in any part of the country, not just in the region where the employment service is located.

The proposed rule would also require employers to establish "linkage agreements" with three organizations for each establishment. It is unclear whether "each establishment" means each company or each location. Again, a typical construction company may be working on several federal construction projects at one particular time throughout the country. For example, a company with 15 federal projects would be required to sign and follow-through with the requirements, including formal meetings, of 45 linkage agreements. This requirement would be extremely burdensome both administratively and financially on any construction company – even a large one.

Furthermore, the proposed rule would require covered contractors to state in all advertisements that they are an "equal employment opportunity of veterans protected under Section 4212." Such a statement added to a job advertisement may significantly increase the cost for posting the advertisement, an additional financial burden for employers. Coupled with the requirement to partner with agencies that would give veterans priority referrals to covered employers, agencies and employment services may be forced to violate federal or state laws, such as right-to-work laws, in order to comply with the regulations. An organization's ability to give priority to many other categories of job seekers, such as the economically-disadvantaged, women, minorities, people with disabilities and other individuals on a non-priority basis who want assistance finding employment, may also be compromised.

Finally, the proposed regulations also require covered contractors to annually provide to state employment services additional information regarding the contractor's status as a federal contractor. The requirement to provide such information is unnecessary with the creation of the General Services Administration's Excluded Parties List System ([www.epls.gov](http://www.epls.gov)), a system created to efficiently and conveniently disseminate information on parties that are excluded from receiving federal contracts, certain subcontracts, and certain federal financial and nonfinancial assistance and benefits.

### ***Training Requirements***

According to the Bureau of Labor Statistics' August 2010 Report of Labor Force Characteristics by Race and Ethnicity, Hispanics represent 44 percent of construction laborers in the United States. AGC is concerned that many of these workers may lack proficiency in English and as a result, covered contractors would need to provide the training programs in both English and Spanish, in addition to providing a Spanish-speaking trainer. Costs for providing training in both languages, as well as travel to and from each job site, would be an enormous financial and administrative burden on construction contractors.

It is also important for OFCCP to understand that many construction employers already provide brief diversity training programs that include *all* protected groups using products such as AGC's "Crossing the Line: What Can Create a Hostile Work Environment" video.

AGC also appreciates OFCCP's offer to create a training program to be used for this purpose in an effort to eliminate the cost burden on employers for providing such training. However, OFCCP has not considered the cost associated with planning and coordinating each training program for each office, and consequently, each and every construction job site where federal work is being performed. Because such training would have to be performed at the site of the work, there may be additional costs associated with providing facilities along with the appropriate resources to carry out each training program.

### ***Special Considerations for Disabled Veterans in the Construction Industry***

The construction industry is filled with safety-sensitive jobs, and the decision to hire qualified disabled veterans should be made on a case-by-case basis based on the disabled veteran's ability to perform the essential functions of a particular job safely.

According to the proposed rule, if a reasonable accommodation is rejected by the disabled veteran, he or she would be permitted to provide, at the veteran's own expense, an accommodation that would help him or her perform the functions of the job. AGC and AGC-member firms are strongly committed to the safety of workers in the construction industry. Unfortunately, because of the physical tasks required, dangers presented, and safety regulations that must be followed in many construction craft positions, many disabled individuals are not qualified to perform the essential functions of the job with or without a reasonable accommodation. For example, some disabilities may hinder a worker from balancing appropriately while constructing a high-rise building.

The law recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace, and it permits employers to establish qualification standards that exclude individuals who pose a significant risk of substantial harm to the health or safety of the individual or of others, if that risk cannot be eliminated by reasonable accommodation. Adding additional equipment to the existing heavy machinery and equipment located throughout a construction job site may pose a significant danger to both the disabled person and other workers. While construction employers can, should, and do recruit and hire qualified individuals with disabilities, they must be able to consider the extent of a person's disability, even with an accommodation provided by the individual, and whether or not it would affect the person's ability to safely perform the essential functions of the job on a case-by-case basis, as courts have previously ruled. (*See, e.g., Forrisi v. Bowen, Rezza v. U.S. Department of Justice, E.E. Black, Ltd. v. Marshall*).

### ***Effect on Small Construction Contractors***

Of major concern to construction contractors is the potential for these proposed regulations to apply company-wide, particularly for contractors that perform both public and private work. If this is OFCCP's intent, such contractors would no longer be able to compete for private construction contracts with contractors who do not perform federal work. Private contractors that are interested in becoming federal contractors would be forced to do so exclusively, therefore inhibiting the growth and development of small construction contractors.

In addition, placing such a burden on small contractors, in general, would discourage small businesses from entering into the federal market, making it possible for only large construction companies with well-established resources to comply with these proposed regulations. Of AGC's 32,000 member companies, most are small and closely held businesses, and these complex and cost-intensive regulations would increase costs and reduce the competition of doing federal work, particularly for small construction companies (including minority and disadvantaged business enterprises).

### **General Requirements of the Proposed Rule**

There are many additional requirements of this proposed rule that generally would negatively affect not only federal construction contractors, but all federal contractors. A few of the proposed requirements that AGC would like to highlight include the general training requirements, recordkeeping requirements, the annual evaluation of job descriptions, and the establishment of benchmarks.

### ***Training Requirements***

The proposed rule would require covered contractors to host annual training programs with employees, plus special sensitivity and legal training programs for executives, management, and all other employees involved with recruitment, screening, selection, promotion, discipline and related processes, including a thorough discussion during new hire orientations, regarding the company's obligations to protected veterans. AGC believes it is unnecessary to separate protected veterans from other protected groups because of the appearance of preferential treatment over the other groups and the cost associated with providing such training throughout the construction industry.

Currently, OFCCP does not require special training to educate employees on the hiring and treatment of any other group, such as women, minorities, people with disabilities, immigrants and others. Therefore, elevating the hiring and training process for protected veterans could potentially be at the expense of other protected groups, ultimately having a negative effect on the very populations OFCCP is trying to protect.

### ***Recordkeeping Requirements***

There are several references throughout the proposed rule that would require covered contractors to collect, calculate, and maintain new data points on veteran referrals, applicants and hires for a period of five years. Employers are already required to comply with the recordkeeping requirements of other OFCCP regulations for a period of two years. Creating a separate recordkeeping requirement for information solely pertaining to this proposed rule would invite confusion among contractors and create pitfalls for non-compliance, for even the most well-intentioned federal contractors, without any reasoned basis for treating veteran referrals differently from other protected classes. If implemented, AGC recommends that OFCCP keep the recordkeeping requirements for this proposed rule at two years, as with other regulations enforced by OFCCP.

The proposed rule would also require contractors to create and maintain a written statement explaining why a covered veteran was rejected for a position or for training and then provide the veteran with a copy of the written statement if requested. This is an unnecessary burden for contractors, particularly because the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) was implemented during a time when there was a stigma associated with the hiring of veterans after a very unpopular war in the United States, the Vietnam War. This type of stigma no longer exists for veterans today and as mentioned earlier, contractors *want* to hire qualified veterans.

The proposed rule would also require covered contractors to consider covered veterans for *all* job openings, even for those jobs to which they did not apply. Does this mean they would have to be considered for *all* job openings in the company? And how long would contractors have to keep them as an "active applicant" for consideration? Overall, this would give veterans unnecessary preferential treatment over everyone else, including other protected classes, who did not take the affirmative action to apply for the other positions. This is counterproductive to OFCCP's overall mission and would automatically cause the collected data to be inaccurate if one veteran applicant applied for one job and is being considered for fifty jobs. Would contractors be required to maintain documentation stating why the veteran was not selected for each of the positions for which they are now being considered? Particularly in construction, work can be performed in many different states across the country, so does that mean contractors would be required to consider veteran applicants for jobs in states or regions where the applicant may not be considering relocation? Contractors trying to comply with this requirement would always look non-compliant.

### ***Annual Evaluation of Job Descriptions***

The proposed rule would require covered contractors to conduct an annual analysis of all job descriptions, including details about physical and mental job requirements, along with statements regarding why the requirements are necessary to perform each job. In addition, covered contractors would be required to describe and maintain information regarding how the review was conducted, the results of the review, and any actions taken in response. OFCCP estimates

that 90 percent of contractors would have no changes to their job descriptions in a given year and for those that do need updating, it would take only 0.5 minutes (30 seconds) per job title to update and an additional one minute per job qualification to save the information for recordkeeping purposes. While AGC appreciates OFCCP's efforts to calculate the time it would take to perform this detailed analysis, AGC respectfully disagrees with the estimation.

For employers who seriously undertake this process, it takes time to do so in a thoughtful way. For many construction companies, the process would start in the compliance department, particularly since this would be a requirement for federal contractors versus private contractors. After the compliance department, it is likely that all job descriptions selected for changes would have to be thoroughly reviewed and edited by the human resources department with additional conference with the company's legal department. Outside counsel may also need to give approval along with the scheduling and performance of interviews with both workers and their supervisors regarding each worker's job responsibilities. This process would clearly take more than 30 seconds. In fact, the HR professional of one of our member companies explained his company's process of reviewing job descriptions periodically simply as a "best practice" which took well over one year.

### ***Establishment of Benchmarks***

The proposed rule would require covered contractors to establish their own benchmarks for hiring that would need to be evaluated on an annual basis. These benchmarks would have to be self-calculated by each employer based on certain information, including information regarding the number of available veterans in the labor force in the state where the contractor is located. AGC believes this process would be unduly burdensome for contractors and would invite confusion, mistakes, and oversights, particularly for less sophisticated contractors. In addition, benchmarks correspond with goals, and goals are often misunderstood by contractors to be quotas, leaving contractors to feel the need to meet such data requirements by hiring protected veterans who may not be as qualified as non-veterans, protected or otherwise, in order to meet the benchmark.

While AGC does not agree that benchmarks should be used at all, in the event that OFCCP still finds it necessary to require the establishment of such benchmarks, AGC recommends that OFCCP take the guesswork out of performing the calculations and instead establish a nationwide goal as identified in Executive Order 11246 regarding the recruitment of minorities – a process of which federal contractors are already familiar.

### **Construction Industry Efforts to Promote Equality and Diversity**

AGC agrees that veterans should have an opportunity to earn a living after serving and protecting our country and AGC members aspire to recruit and hire such qualified protected veterans. After all, veterans are typically well-trained, dedicated, loyal, and accountable, with impressive leadership qualities which are the characteristics that any company would desire when looking for candidates to fill a job opening. AGC agrees that veterans must not be discriminated against

in employment and as such, we also affirm OFCCP's purpose of ensuring equal opportunity employment. In an effort to help qualified applicants, including veterans, who seek employment with construction companies, AGC has partnered with ConstructionJobs.com, a website with a job board where construction contractors can post available opportunities around the country. Jobs that are posted by construction contractors on ConstructionJobs.com are automatically posted on additional websites such as TopUSAjobs.com, Diversityjobs.com, and VetJobs.com. The use of ConstructionJobs.com is free to jobseekers.

While many AGC members use job posting services such as ConstructionJobs.com, many have also developed effective outreach and recruitment programs of their own such is the case with AGC member company, Fluor Construction. Within in a twelve month period, Fluor hired 850 veterans, has been named to G.I. Jobs magazine's list of the "Top 50 Military Friendly Employers" for four consecutive years and was recently featured in *HR Magazine*, a publication of the Society for Human Resource Management, for its outstanding efforts to recruit and train veterans.

Other construction industry efforts include the establishment of *Helmets to Hardhats*, a free website for veterans that connects them to promising careers in construction. Other organizations like it include *Veterans Build America* and *Hire-A-Patriot.com*.

In addition to veterans, AGC and other construction industry organizations support and encourage compliance with OFCCP's overall mission of ensuring that federal contractors offer *all* individuals an equal opportunity for employment, without regard to race, color, religion, sex, national origin, status as disabled or status as a protected veteran. Among the many efforts to recruit and retain members of all protected classes, as well as ensure a safe workplace for all construction employees, AGC of America has:

- Provided training and reference materials to construction professionals on affirmative action requirements, preventing on-the-job harassment of any type, and creating a model hiring program;
- Hosted a library of information on AGC's website which includes links to OFCCP's Technical Assistance Guide for Construction Contractors and all OFCCP-hosted compliance assisted webinars and national events;
- Developed and conducted AGC's Project Manager Development Program, Supervisory Training Program and Project Manager Series, all of which offer modules on ethics, leadership, working in teams, team building, and motivation that promote the values of skill, integrity, and responsibility espoused by AGC and its member firms;
- Hosted a session at AGC's 2009 HR Professionals Conference where a representative from OFCCP presented on the affirmative action requirements of construction contractors;

- Coordinated a Federal Contracting Compliance Construction HR Workshop for AGC's 2011 HR Professionals Conference that would feature a session on complying with the affirmative action requirements of construction contractors;
- Conducted a live webinar series on OFCCP compliance techniques where two OFCCP representatives were speakers, and made a recording of the event available to the public;
- Published AGC's *Affirmative Action Manual for Construction*, a book that covers the affirmative action requirements that are unique to contractors working under federally funded and federally assisted construction contracts;
- Conducted a live audio conference on compliance with the OFCCP's "Internet applicant" rule and the EEOC's revised EEO-1 reporting requirements, and made a recording of the event available to the public; and
- Promoted all OFCCP-sponsored compliance assistance webinars and teleconferences to the HR professionals of AGC's member firms.

In addition, many of our member firms that are federal contractors voluntarily or in accordance with other federal, state or local laws:

- Promote diversity throughout the company by making a concerted effort to seek out more veteran candidates as well as candidates from other protected classes;
- Dedicate an Affirmative Action Officer to insure that no protected classes of workers are discriminated against;
- Provide management and supervisory training to ensure that candidates and workers who are members of protected classes are not discriminated against;
- Review job descriptions periodically to make sure that all physical and mental requirements are of a business necessity;
- Work with recruitment and state agencies that cater to the placement of veterans candidates; and
- Educate and require subcontractors and vendors to comply with the company's anti-discrimination policies.

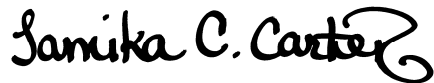
## Conclusion

AGC appreciates OFCCP's efforts to help veterans become gainfully employed, and AGC members *want* to hire qualified veterans, but AGC believes that this proposed rule would fail to meet those objectives by making it harder for employers to hire veterans and simultaneously harming OFCCP's overall mission of promoting equal opportunity employment for all people. There are only so many jobs the economy can create and the protected groups that OFCCP advocates for would ultimately end up in competition with each other. The bottom line is that you can't get more equal than equal; therefore, protected veterans should have the same opportunities to work as other protected groups such as minorities, women, and people with disabilities – not be placed on a pedestal above them. If implemented, OFCCP needs to consider that the additional requirements included in this rule may have an overall negative effect on the populations it is trying to serve while also diverting resources from job creation to regulatory reporting.

AGC recommends that OFCCP develop an incentive plan to make hiring easier for employers in order to meet the agency's goals. However, if OFCCP decides to implement this proposed rule despite AGC's concerns, AGC urges the agency to exempt the construction industry from the new requirements due to the unique nature of the industry.

AGC would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter". The signature is written in a cursive, flowing style with a large, decorative flourish at the end.

Tamika C. Carter  
Director, Construction HR