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



September 21, 2010

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

Ms. Barbara J. Bingham
Acting Director
Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, NW, Room N3422
Washington, DC 20210

Re: Evaluation of Affirmative Action Provisions Under Section 503 of the Rehabilitation Act, as Amended (RIN 1250-AA02)

Dear Ms. Bingham:

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") advanced notice of proposed rulemaking to implement affirmative action and nondiscrimination obligations of contractors and subcontractors and to evaluate the affirmative action provisions under Section 503 of the Rehabilitation Act, as amended, published in the *Federal Register* on July 23, 2010.

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 the OFCCP. Most are small and closely held businesses.

AGC supports and encourages compliance with the OFCCP's 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 a veteran or disability. Among the many efforts to recruit and retain members of these 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.
- 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.
- 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.
- Promoted all OFCCP 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 disabled 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 manager and supervisory training to ensure that candidates and workers with disabilities are not discriminated against.
- Review job descriptions to make sure that none are stereotyped and that all physical requirements are of a business necessity.
- Work with recruitment and state agencies that cater to the placement of disabled candidates.

- Educate and require subcontractors and vendors to comply with the company's anti-discrimination policies.

AGC agrees that individuals with disabilities should have an opportunity to earn a living, and AGC members aspire to recruit and hire qualified individuals with disabilities. At this time, however, there are many obstacles that challenge their effectiveness in doing so. While we agree that individuals with disabilities must not be discriminated against in hiring, we believe that a broad affirmative action requirement in construction for the recruitment of individuals with disabilities may be difficult to achieve or possibly counterproductive for many reasons.

Record Unemployment in Construction

As the national economy is rebounding from a recession, the construction industry is still at a point of decline. The construction industry has lost more than 2.1 million jobs in the past four years, falling from a peak of 7,725,000 in August 2006, seasonally adjusted, to 5,611,000 in August 2010. Unfortunately, the recession hasn't ended for construction. Construction began losing jobs four years ago, more than a year before the rest of the private sector, and has not seen a rebound in the last nine months while other industries started adding jobs consistently.

The unemployment rate in construction was 17.0 percent in August of this year, not seasonally adjusted, the highest August rate since the series began in 1976 and far above the unadjusted national rate of 9.5 percent. The August 2010 unemployment rate for construction was higher even than the 16.5 percent rate a year earlier. In addition, total construction spending fell in August to a 10-year low -- \$805 billion at a seasonally adjusted annual rate.

Under these circumstances, construction employers, most of which are small businesses, generally lack the resources and justification to recruit and train new workers, when the number of unemployed workers who are already trained and skilled in such trades is extremely high.

Unique Nature of the Construction Industry

AGC does not believe that federal contractors should be required to conduct utilization analyses or meet hiring goals established by the OFCCP for hiring individuals with disabilities in the same manner that service and supply contractors are required to comply with Executive Order 11246, nor does AGC believe the establishment of placement goals for individuals with disabilities would increase their employment opportunities in the federal contractor sector. However, if the OFCCP is intending to make a final decision to implement this rule, AGC believes the construction industry should be exempted for the following reasons:

1. *The construction industry is a unique industry providing employment that is project-based, transitory and often seasonal.*

When issuing the regulations implementing Executive Order 11246 (41 CFR 60-4), OFCCP recognized that it did not make sense to require construction contractors to meet the same affirmative action requirements of other contractors, since work in the construction industry is typically project-based, transitory, and seasonal. 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, Executive Order 11246 requires service and supply contractors to take a snapshot of the workforce on a particular day, once a year. Construction contractors could do the same analysis, 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. If a rule requiring construction contractors to track statistical data is implemented, construction contractors would be performing statistical analysis 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. In short, construction contractors would not be able to provide valid and reliable data without undue burden, if at all.

2. *The construction industry is a unique industry that can be very physical in nature, and while a person's race or gender – as addressed by Executive Order 11246 – may not affect his or her ability to perform certain construction jobs, some disabilities may have a higher likelihood of impacting a person's ability to perform a job.*

Unlike having a disability, race and gender typically does not affect a person's ability to do a job as some disabilities may have a higher likelihood of impacting the same. For example, in the construction industry, a person confined to a wheelchair may not be able to perform the job functions of a laborer because he or she may not be able to carry materials around a job site, even if a reasonable accommodation was considered. On the other hand, a minority worker or female without a disability may be able to perform the responsibilities of this job without regard to his or her race or gender.

3. *Specifically, the construction industry is a unique industry with safety-sensitive jobs, and the decision to hire should be made on a case-by-case basis based on the candidate's ability to perform the essential functions of a particular job safely, with or without a reasonable accommodation.*

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. 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 and whether or not it will 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. (*Forrisi v. Bowen, Rezza v. U.S. Department of Justice, E.E. Black, Ltd. v. Marshall*).

Invitation to Self-Identify "Pre-Offer" Would be Counterproductive

Federal contractors are required to invite all job applicants to voluntarily and confidentially identify their race and gender pre-offer. Because of this, inviting applicants to voluntarily and confidentially self-identify as a person with a disability would not be an additional burden on most employers. However, unlike with race or gender self-identification, when a person self-identifies as a person with a disability, there is an additional burden on employers to evaluate each response and conduct and individual analysis. In addition, for many individuals with disabilities, disclosure is very personal. Individuals 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 will not be hired. So, while there would be an extra burden on employers -- during these already difficult economic times with high unemployment in the construction industry -- to do additional analysis when a person self-identifies as having a disability, an added burden would also rest on the disabled applicant who must choose whether or not to self-identify. Amending the Section 503 regulations to require contractors to invite all applicants to self-identify if they have a disability prior to receiving an offer of employment would be counterproductive and would discriminate against the very people the law is trying to protect.

Conclusion

AGC genuinely appreciates the opportunity to comment on the ANPRM evaluating the affirmative action requirements of the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended.

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

Sincerely,



Tamika C. Carter
Associate Director, Construction HR