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

June 1, 2009

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

Re: FAR Case 2009–009, American Recovery and Reinvestment Act of 2009 (the Recovery Act) – Reporting Requirements

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the Interim Rule that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereinafter the "FAR Councils") issued on March 31, 2009. In short, that Interim Rule would implement section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds.

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 engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, hospitals, 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 the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration and other Federal departments and agencies. Most are small and closely-held businesses.

<u>Overall Perceptions of the Proposed Rule</u>

While the government's goal of transparency is admirable, it is unlikely the government has reasonably considered the massive amount of information to be collected and its effect on industries, not to mention an already overburdened procurement workforce. This increased burden on contractors may have the unintended consequence of narrowing the field of contractors who have the resources for providing this information, leading to decreased competition.

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The reporting requirements have the potential for long-lasting changes to Federal procurement policy in a manner not fully contemplated by the Congress or the Administration. The overall rationale for the salary disclosure requirements is unclear and its negative effects will be felt throughout the construction industry.

We are greatly concerned that the reporting requirements are likely to be subject to applicable fraud and false-claims statutes, which may increase potential risks to contractors and subcontractors. While the industry is pleased to have the opportunity to offer comments on the Interim Rule, there is great concern that the online reporting tool is not yet operable, and it may be presumed that it is being developed rapidly. Thus, it remains to be seen how well the tool will function, and how clearly it will instruct contractors in how the reports should be completed. This will limit the public's ability to fully provide thoughtful comments on implementation of the Interim Rule.

Requested Information by the Councils

The Councils have asked the public to provide commentary on a variety of components of the Interim Rules. Accordingly, we offer the following comments for consideration by the Councils.

Description of Work

With respect to the Recovery Act, the statute requires a description of the overall purpose, expected outcomes, or results of the work (implemented at 52.204–11(d)(5)). The Councils ask whether the government should provide a list of broad categories of work under the Recovery Act from which the contractor would select and, if so, what should these be? The Interim Rule asks contractors to provide this information; however, we believe that project information and justification for the nature of the contract to the Office of Management and Budget is already provided by the agencies procuring the work. It appears to be redundant and an extra, unnecessary burden for contractors to provide this information. We believe this requirement by the contractors should be removed or shifted to the contracting agency.

Job Creation and Retention

AGC studied the economic impact of infrastructure investment on job creation. Our own analysis, in partnership with George Mason University, showed that investment in nonresidential construction adds significantly to jobs, personal income, and GDP—far beyond the hiring that takes place in the construction industry itself. In addition, wisely chosen investments add to the nation's productive capital stock and can improve the country's economic competitiveness, reduce energy use, and cut emissions of pollutants. For all of these reasons, we strongly believe that investment in nonresidential construction should have been a large component of the Recovery Act.

As we understand the Interim Rule, the Councils are asking employers to convert part-time hours and temporary jobs into full-time equivalents, or FTEs. It also appears that the Councils have left

the definition of FTE up to each individual employer, based on the employer's existing practices. The value of determining a standard FTE has merit for the purpose of establishing quantitative measures of success. However, there is great value in allowing employers to utilize their own well-established methodologies for determining this information.

We have found that employers in the construction industry define FTEs differently. For example, some companies may define a full-time employee as someone working more than 30 hours per week. Others may determine that figure to be 35, 37.5, or 40 hours. We believe it would be more difficult for those employers to calculate the number of FTEs working on a project if they are required to calculate them based on a specific number (e.g., 40 hours per week). We also believe a contractor should, if it is a standard business practice, be allowed to report "head counts" of full-time and part-time employees. For many contractors, this would be the simplest and least onerous way for contractors to report the number of jobs created by the Recovery Act.

AGC understands the importance of ensuring a complete and accurate measure of job creation to the Recovery Act. Accordingly, we have reservations about imposing a "one-size-fits-all" methodology that would unintentionally prevent contractors from providing a full account of their contributions to the success of the Recovery Act. That said, contractors should have the choice of utilizing either a government standard definition of FTE or any other method consistent with their existing practices, as long as the contractor provides an explanation of the methodology, including a description of how part-time and temporary employees are addressed.

One other critical component of the Interim Rule that has been overlooked is the instance where much of the hiring due to the funds derived from the Recovery Act may be at the first-tier subcontractor level. With the limited amount of time available for much of the funding in the Recovery Act and the tight deadlines expected to deliver the projects funded by the Act, in some instance much of the hiring will be done by subcontractors. AGC strongly suggests that the Councils agree to include a provision that would require first-tier subcontractors to directly report to the Federal spending web site, and to prime contractors the number of jobs created and retained due to funds received by the Recovery Act. This will give the Federal agencies, the Administration, and the Congress a clearer idea of how many jobs have been generated or saved by the Recovery Act.

Separate Invoicing

The Councils have made inquiries about separate invoicing for all supplies or services funded by the Recovery Act, and the challenges and benefits this would pose. AGC does not see any benefit to separate invoicing as it is not necessary for work funded by the Recovery Act. For existing contracts modified to add work funded by Recovery Act funds, existing invoicing procedures break-out amounts invoiced on a modification-by-modification basis, thus capturing and reporting the Recovery Act spending. For new contracts funded solely by Recovery Act funds, each invoice will report Recovery Act spending.

Such information is already available and can be tracked through the existing invoicing rules. FAR 52.232-5 sets forth contractor responsibilities for submitting proper invoices and calls for several key items of information that must already be included, such as:

- An itemization of the amounts requested, related to the various elements of work required by the contract covered by the payment requested;
- A listing of the amount included for work performed by each subcontractor under the contract;
- A listing of the total amount of each subcontract under the contract;
- A listing of the amounts previously paid to each such subcontractor under the contract;
- Separate billing for stored materials as authorized in accordance with the contract;
- Additional supporting data in a form and detail required by the Contracting Officer.

Also, with each progress payment request, contractors must also certify that the request for payment includes only work performed in accordance with the specification and contract conditions. That said, it would be highly disruptive and costly to invoice all Recovery Act products separately, especially on projects where there are mixed (Recovery and non-Recovery) funds.

Salary Disclosure Requirements

FAR 52.204-11(d)(8) requires each prime contractor and all first-tier subcontractors to disclose the names and total compensation of each of their five most highly compensated officers if they received: (1) 80 percent or more of annual gross revenues in Federal awards their previous fiscal year, (2) $25M or more in annual gross revenue from Federal awards the previous fiscal year; and (3) the public does not have access to information about the compensation of the senior executives through periodic reports filed under section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), 78o(d)) or section 6104 of the Internal Revenue Code of 1986.

This requirement presents several problems. The impact of the public disclosure of total compensation could have long-lasting negative effects on the construction industry. We are also concerned that the implementation of the Recovery Act is serving to push forward guidelines for a rulemaking that has not yet been finalized. Finally, we also have grave reservations about the requirement for prime contractors to obtain salary information from its first-tier subcontractors. For this and other reasons discussed in more detail to follow, AGC recommends that prime contractors not be expected to obtain directly and report to the government salary information for their first-tier subcontractors, but that the subcontractors report this information directly to the government website.

<u>Concerns with the Public Disclosure of Total Compensation</u>

AGC has great reservations about the release of this critically private information to the public. This information will be available for all to see and creates privacy and morale issues for owners of construction firms nationwide. The vast majority of construction firms are small businesses. In 2005, there were 778,000 construction firms with 6.8 million paid employees. Thus, average

employment was fewer than nine per firm. In 2005, 92 percent of construction firms had fewer than 20 employees. Only one percent had 100 or more. More than two million additional construction firms had no paid employees—mainly self-employed individuals, but also partnerships and holding companies. The majority of contracting opportunities funded by the Recovery Act have been and will be awarded to small, often closely-held, businesses that do not have the resources to comply with such detailed recordkeeping.

The ability of private enterprises to become successful, maintain their level of success, and cultivate the positive economic impacts derived from such successes (for both the public and private sectors) is due in part to their right to operate "privately." American owners of private companies are fiercely independent, hard working, risk takers who strongly value their privacy.

Contractors competitively bidding on construction projects funded by the Recovery Act enter into construction contracts, provide the necessary bonds as required by statute, and bear the majority of the risk for completing the project as designed and on time. In a competitively-bid environment where the contractor assumes the financial risk of project completion, and receives no guarantee from the project owner of profitability or sustainability, requiring contractors to publicly disclose their compensation structure is an unnecessary interference with privacy rights that have little, if any, benefit for the government or the public.

Federal construction contracting firms, like any other businesses, must be allowed to maintain the business model that works best for each individual company. A privately-held company should not be punished for organizing itself in a manner that best suits its needs, nor should it be punished for having a successful business model. The 80 percent and $25 million thresholds were arbitrarily legislated to obtain personal information from certain private firms who receive a revenue stream generated by taxpayer dollars. AGC agrees that American taxpayers should be able to review how their money is spent; however, this requirement does not provide the government or the public with any valuable information that can be used to determine whether a contractor successfully competes for and completes a contract as required by the government. The collection of this information raises several questions. For example, what is the burden on the government to collect executive compensation information? How will this information be used? It is clear that this requirement will be a burden to Federal contractors, yet AGC sees no clear benefit.

Concerns Over Timing of the Interim Rule Requirement

The Councils have justified inclusion of this provision due to the passage of legislation in 2008 amending the Federal Funding Accountability and Transparency Act of 2006 (FFATA). Industry has been anticipating the guidance implementing this new law. However, the Councils have not yet issued the reporting requirements stipulated by FFATA in FAR Cases 2008–039 (FFATA flow-down) and 2008–037 (Financial Disclosure). AGC is extremely concerned that the Councils have not yet released a Notice of Proposed Rulemaking for the two pending FAR Cases, yet have presumptively advanced to the Interim Rule stage a similar regulation that has not yet been

finalized of its own accord, which addresses the policy issues contained in the two pending cases.

While the Councils do state in the Interim Rule that these two pending cases "are in process and as they are finalized, will be amended to ensure that they do not duplicate, overlap, or conflict with the requirements of the Interim Rule," AGC is justifiably concerned that the normal deliberative rulemaking process has been trumped by the implementation of the Recovery Act. The passage of the Recovery Act was designed to stimulate our economy, not serve as the foundation, much less a back door, for newly entrenched Federal regulations.

Concerns Over Prime Contractors Obtaining Salary Information from Subcontractors

AGC members have indicated that they fully believe that it would be extraordinarily difficult to obtain the required salary disclosure terms from their subcontractor partners. It is very likely that such requests will be met with great resistance. For contracts that have yet to be awarded, there is no guarantee that they will be able to successfully obtain this information from potential first-tier subcontractors, which creates a barrier to entry. For contracts that have already been awarded, this modification to the original contract would create a whole separate set of difficulties in that subcontractors would be faced with the decision to either accept the contract modification or refuse, which could force the prime contractor to either terminate the contract or lead both parties down the uncertain road of litigation. Any refusals to submit to these requirements will, in turn, force a financial hardship on prime contractors by obtaining subcontract help elsewhere at a possibly higher cost. Such a result would limit competition for subcontracts due to a limited pool of subcontractors that would be willing to bid on Recovery Act work. Either of these options would undoubtedly lead to delayed completion of the contract and would be costly to both the prime contractor and the government.

Another concern centers on the 1967 Court of Claims decision (*Schweigert, Inc. v. United States,* 181 CT. CL. 1184 (1967)) which held that a prime contractor could be held responsible for the delays of its first-tier subcontractors or suppliers. The Default clause was later amended to include delays caused by subcontractors and suppliers at any level within the scope of the prime contract's delay responsibility, no longer limiting a prime contractor's responsibility for all first-tier subcontracts and suppliers. Ultimately, AGC is concerned about the potential penalties concerning violations of the reporting requirements and how they will be assumed by or imposed on the prime contractor.

As mentioned at the start of this section, AGC recommends that in the name of efficiency and to assist the government in posting the information to the Federal reporting web site, prime contractors should not be expected to obtain directly and report to the government salary information for their first-tier subcontractors, but that prime contractors and subcontractors each separately file this information directly to the government website. The prime contractor's responsibility would be to flow-down this requirement to the subcontractor. As long as the prime contractor fulfills that obligation, the prime should be credited with fully performing its obligation. Accordingly, if a subcontractor were to fail to report this information, it should not

reflect negatively on the prime contractor's performance evaluation. If the Councils insist on keeping this requirement as is, AGC strongly recommends the inclusion of a safe harbor and affirmative defense for prime contractors for violations committed by any subcontracting entity. An additional solution is to ensure that the salary disclosure requirements be visible only to government officials, but not the public.

Additional Considerations

Request for Clarification

AGC would like the Councils to consider amending the Interim Rule to clarify one key consideration concerning the timing of the reporting elements required by the Interim Rule. We have heard from our members that over the past several weeks, several Federal contracting officers have recently demanded compliance with the salary disclosure requirement during the Request For Proposals (RFP) phase. When the affected contractors asked the contracting officers why they must submit this information, they were told it was required in order to be considered to receive the contract award, and if they did not include this information, their bids would be rejected as non-responsive. We have seen no evidence that the original legislation, the Recovery Act, or the Interim Rule imposes such a requirement. We respectfully request that the Councils and OMB issue guidance clearly stating that this information is only required post-award during the applicable reporting periods required by the Recovery Act.

Barrier to Entry

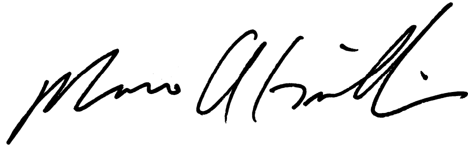
The government believes that the Interim Rule will further minimize the reporting burden on government contractors, including all small businesses, as well as other businesses, by using existing Federal acquisition registration systems to pre-populate. AGC believes that the rule would have a significant economic impact on a substantial number of small businesses, and particularly on the small suppliers and subcontractors that dominate the construction industry. These firms do not, themselves, hold government contracts. AGC both believes and fears that many would find the costs and complications of complying with the Interim Rule to exceed the benefits of undertaking Federal work. This would have the unintended consequence of discouraging entrance into the Federal market and bidding on Recovery Act opportunities. Government contractors have the option of taking their business elsewhere, and if they do, the Federal government could experience significant increases in the cost of its construction projects, and perhaps delays in the completion of existing contracts.

Conclusion

AGC appreciates the opportunity to comment on the rule that the Councils proposed on March 31, 2009. AGC finds that the Interim Rule would change far more than the Councils have acknowledged and that its approach will create complications even greater than even the Councils may have contemplated.

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,



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