AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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July 24, 2014

VIA ELECTRONIC SUBMISSION: http:www.regulations.gov

Mary Ziegler
Director, Division of Regulations Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor Frances Perkins Building
Room S-3510
200 Constitution Ave., NW
Washington, DC 20210

Re: Notice of Proposed Rulemaking to Implement Executive Order 13658, Establishing a Minimum Wage for Contractors *(RIN 1235-AA10)*

Dear Ms. Ziegler:

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 Wage and Hour Division's (hereinafter "WHD") notice of proposed rulemaking implementing Executive Order 13658, establishing a minimum wage for contractors, as published in the Federal Register on June 17, 2014.

AGC is the leading association for the construction industry. AGC represents more than 25,000 firms, including over 6,500 of America's leading general contractors, and over 8,800 specialty-contracting firms. More than 10,400 service providers and suppliers are associated with AGC through a nationwide network of chapters. 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. Most are small and closely held businesses.

It is AGC's understanding from the proposed regulations that, in order for a contract to be covered by the Executive Order and this proposed rule, the contract must qualify as one of the specifically enumerated types of contracts set forth in section 7(d) of the Executive Order. In addition, under such contracts or contract-like instruments, the wages of workers which are governed by the Fair Labor Standards Act (FLSA), the Service Contract Act (SCA) and the

Davis-Bacon Act (DBA) are impacted. Independently, each of these three laws is extremely complex. The level of complexity is multiplied exponentially when there are overlapping requirements for compliance. Like other industries, there are times when construction employers must navigate the ins-and-outs of all three laws simultaneously, in addition to state and local wage and other laws.

With specific regard to the DBA, as you may recognize, although the statute has not changed since its enactment, its regulations are among the most complex and, in some cases, unclear laws with which construction contractors must comply. As a result of the level of complexity associated with complying with these various wage laws, AGC asks WHD to provide in the final rule additional clarity and explicit examples when it comes to covered contracts and contract-like instruments, covered workers and covered work. Accordingly, we offer the following comments about the proposed regulations.

I. WHD Should Provide Additional Clarification and Examples of Covered Contracts and Contract-Like Instruments

The proposed rule defines a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. With regard to the term "contract," the proposed rule specifies the types of contracts that are covered and excluded from the Executive Order. Specifically, it mentions that the Executive Order does not apply to contracts for "the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.*, those subject to the Walsh-Healey Public Contracts Act." It does not specifically address contracts for such products between a manufacturer or other supplier and a high-tier construction contractor for use on a DBA-covered construction project. Examples of such products include lumber, stone and gravel. Such contracts are not subject to the requirements of the DBA, yet the flow-down provisions of proposed rule could be interpreted as extending the new minimum wage mandates to such suppliers. Such an extension would be overly expansive, extending the mandates to employers that have no relationship, direct or indirect, with the contracting agency and may not even know that the materials they are supplying are intended for use on a federal project. AGC urges WHD to explicitly exclude such contracts for materials to covered construction contractors.

In addition, AGC is unfamiliar with the term "contract-like instruments." To our awareness, there are no other Federal executive orders or regulations that use this term. To avoid confusion and inadvertent noncompliance, AGC therefore asks WHD to precisely define and provide several examples of contract-like instruments as they relate to covered construction contracts under the Executive Order.

II. WHD Should Provide Additional Clarification and Examples of Covered Workers and Covered Work

The proposed rule explains that workers performing on covered contracts are entitled to the Executive Order minimum wage if their wages under the contract are governed by the FLSA, the SCA, or the DBA. The proposed rule also explains that the following categories of workers are entitled to the Executive Order minimum wage for all time spent performing on covered Federal contracts:

1. Employees who are entitled to the minimum wage under the FLSA, employees whose wages are calculated pursuant to special certificates issued under the FLSA, and tipped employees;
2. Service employees who are entitled to prevailing wages under the SCA; and
3. Laborers and mechanics who are entitled to prevailing wages under the DBA.

The proposed rule specifically notes that the Executive Order applies to FLSA-covered non-exempt employees who provide support on SCA- or DBA-covered contracts. The proposed rule uses such language as "in connection with the contract" and "other duties necessary to the performance of the project." However, the definitions and application of these phrases are not clear. The examples of such workers provided in the proposed rule are helpful, but additional examples would be more helpful in aiding contractors' understanding of worker coverage. In particular, AGC kindly asks WHD to provide several construction-industry examples to illustrate how the new minimum wage mandate will apply to FLSA-covered non-exempt workers who provide support to DBA-covered projects but are not covered by the DBA.

In addition, the proposed rule states that covered contractors and subcontractors must pay all covered workers the new minimum wage required by the Executive Order for all hours spent performing work on covered contracts. In order to provide contractors with flexibility as they embark down a new path of monitoring the hours worked by workers who are not laborers or mechanics but working non-exclusively on DBA-covered projects, AGC requests that WHD require contractors to apply the minimum wage only when a *de minimis* amount of time has been exceeded. AGC further recommends that WHD provide added clarity by expressly defining a *de minimis* amount of time as less than 20 percent of time spent during any workweek. This standard is currently being used by WHD in its enforcement of other regulations, is familiar to federal contractors, and would be consistent with the directive in Section 4 of the Executive Order to incorporate existing procedures, enforcement processes, and the like into the new regulations.

Furthermore, the proposed rule includes confusing references to apprentices. Section 10.5 of the proposed rule requires contractors to pay the new minimum wage to "workers," and Section 10.2 defines "worker" as including "any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship." This would lead contractors and contracting agencies to believe that apprentices must be paid the new

minimum wage. However, Section 10.4(e)(1) expressly excludes apprentices from "the requirements of this part," leading one to believe that apprentices need not be paid the new minimum wage. AGC recommends that WHD modify the definition of "worker" in Section 10.2, further explain the exclusion in Section 10.4, and otherwise clarify that apprentices are not subject to the new minimum wage requirement.

III. WHD Should Institute a Safe Harbor for Compliant Prime Contractors and Higher-Tier Subcontractors

As mentioned previously, the proposed rule explains that contractors and subcontractors must include the Executive Order contract clause in lower-tiered subcontracts. Depending on the size, a federal construction contract could include numerous subcontractors – dozens even. Does this requirement truly apply to all subcontractors, no matter how far down the line from the federal contractor? It is unfair to hold the prime or any higher-tier subcontractor responsible for all tiers of subcontractors' compliance with the requirement to flow down the contract clause. Likewise, it is unfair to hold such contractors responsible for all lower-tier subcontractors' noncompliance with the minimum wage requirements, particularly when the higher-tier contractor has complied with the language flow-down requirement.

While construction contractors already may be held responsible for lower-tier subcontractors' violations of the contract clause and prevailing wage requirements of the DBA, holding contractors so responsible for such violations of the Executive Order is a significant expansion of potential liability. By extending coverage to workers who support a DBA-covered project but who are not DBA-covered laborers or mechanics, the Executive Order and present proposed rule reaches to workers with whom the higher-tier contractor would have no contact or even have knowledge of. Unlike laborers and mechanics working at the site of the construction project, the higher-tier contractor would not become aware of such workers by seeing or working alongside them at the site or by seeing their names on certified payroll records. The prime contractor, for example, likely has no idea who, if anyone, among its many subcontractors' office or other off-site staff is spending part of their day working in support of the covered contract. Therefore, the proposed rule should adopt the approach of the FLSA than the DBA and refrain from imposing any vicarious liability for separate employers' violations.

Rather than holding higher-tier contractors responsible for lower-tier subcontractors' violations, AGC asks WHD to include in the final rule a "safe harbor" for prime contractors and higher-tier subcontractors that properly flow down the required contract clause to subcontractors with regard to lower-tier subcontractors' violations.

IV. WHD Should Freeze Wage Rate Mandates for the Duration of Multi-Year Contracts or, at the Very Least, Include an Adjustments Clause in Contracts

WHD should strive to ensure that the roles and responsibilities of contractors and federal agencies are clearly articulated during the pre-contract award phase of the procurement

process, and are not subject to change mid-performance. This will enable contractors to better understand their costs, risks, and responsibilities, leading to fewer claims and change orders that could cause project delays or cost overruns. For that reason, DBA wage determinations in effect at the time of contract award, and that are incorporated into a contract, generally remain in effect for the duration of the contract regardless of whether new wage determinations are issued while the contract is being performed. The same principle should apply with regard to annual minimum wage increases under the Executive Order.

Applying minimum wage increases after contract award would present uncertainty and problems in the procurement process. Typically, a federal contracting agency undertakes a number of steps before awarding a construction contract. These steps include: conducting market research; drafting a request for proposal based on market research, agency needs and resources; conducting a site visit; solicitation of a request for proposal; convening a source selection evaluation board (SSEB) to choose the best proposal; and, lastly, awarding the contract. What happens if notice of a wage rate increase is issued late in the pre-award contracting process? For example, take the instance of WHD publishing a notice of a wage rate increase the day before a SSEB is scheduled to select a contractor for contract award. The contracting agency has already gone through the solicitation phase and contractor proposals were submitted months before based on the previous year's wage rate. Such a wage rate increase can have an impact on a contractor's price proposal. Would WHD expect the contracting agency to scrap the current procurement process, which could take many months and delay project delivery? Would there be a provision in the contract to allow for cost adjustments based on potential minimum wage rate increases throughout the life of the contract?

To avoid such issues, AGC strongly recommends that WHD, in the present rulemaking, adopt the approach of the DBA by freezing the minimum wage applicable to a construction project at the time of bidding for the life of a contract and impose any annual increase only on new solicitations that occur after the increased rate becomes effective. If WHD rejects this approach, then, as a less ideal alternative, we urge you to work with the Federal Acquisition Regulatory Council to establish a mandatory clause that will allow for contract adjustments based on wage rate increases. Such an approach will reduce the risks associated with forecasting operational costs in the pre-award phase of federal construction projects as well as reduce confusion, delay, cost overruns, and possible litigation during the project delivery phase.

V. WHD Should Add Outreach Efforts to Notify Contractors of Minimum Wage Increases

The proposed rule states that adjustments to the Executive Order minimum wage shall be published in the Federal Register no later than 90 days before such wage is to take effect. It also provides that the applicable minimum wage will be published on www.wdol.gov (or any successor website). Unfortunately, extremely few contractors have staff devoted to reading the Federal Register on a daily basis, and contractor staff generally visit www.wdol.gov only when

they affirmatively need specific information from the website. Such passive notification is inadequate to ensure that contractors know of the change. To help ensure that contractors are in fact aware of the increase and to reduce the risk of noncompliance, AGC recommends a more active approach to communicating increases to the federal contracting community. In particular, AGC suggests that WHD direct (or work with the Federal Acquisition Regulatory Council to direct) contracting agencies to notify their current and recent contractors, individually and in writing, of any new minimum wage increase within a short, specified time (say 14 days) of publication of the increase notice in the Federal Register.

VI. WHD Should Clarify How the Executive Order Applies to IDIQ Contracts

It is unclear how the proposed rule applies to "indefinite delivery, indefinite quantity" (IDIQ) contracts that have already been awarded. IDIQ contracts can last many years in construction. These types of contract vehicles allow for agency issuance of contracts—in the form of task orders—stemming from the original IDIQ contract from a limited pool of contractors. Consequently, the original IDIQ contract acts as a "master contract" that delineates the scope of a project and the responsibilities of the parties to the contract—the contractor and the federal government. The proposed rule clearly states that it would not impact contracts awarded before January 1, 2015. As such, IDIQ contracts awarded before that date would not be impacted. However, would the task order for contracts issued after January 1, 2015, under that IDIQ contract fall within the mandate of the rule? This is a critical question, as it could have significant impacts on price for contractors at all tiers of the contract.

If 2015 task order contracts issued under pre-2015 IDIQ contracts fall under this rule, WHD should explicitly state so in the final rule. Further, if such is the case, for reasons stated above, task orders should include an adjustments clause related to any increase of the minimum wage rate. This would, again, be an issue in future years where IDIQ contracts are awarded and the minimum wage is, perhaps, increased multiple times. Otherwise, confusion will exist not only for contractors but also for federal contracting agencies, which could lead to litigation and project delays. Such an adjustments clause would provide the flexibility for both federal agencies and contractors to deal with any price increases stemming directly from this federal action.

VII. WHD Should Restrict Use of the Debarment Process

Debarment represents the absolute last, most dramatic measure that the government may take to protect the public interest from a truly unscrupulous contractor that willfully or recklessly violates the law. When a contractor is simply proposed for debarment or debarred in fact, that contractor is immediately banned from bidding or working on government contracts. Debarment is the business equivalent of the death penalty for a contractor that relies upon government contracts to sustain its business. It should only be utilized in the most serious of situations. As such, WHD should more clearly articulate the debarment process stemming from a violation of the rule.

AGC is extremely concerned that, as written, the proposed rule's debarment process could be instated for any and every violation, including innocent paper work mistakes. The proposed rule allows the Secretary of Labor to debar for a period of up to three years any contractor found to have "disregarded its obligations to workers or subcontractors." The term "disregarded" could mandate a strict liability standard for violation of the rule; meaning that any and all violations of the rule would lead a contractor to be considered for debarment. Such violations would include innocent mistakes that could be redressed without what would be a punitive use of debarment. The FAR cautions that "[t]he existence of a cause for debarment. . . does not necessarily require that the contactor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision." FAR 9.406-1(a).

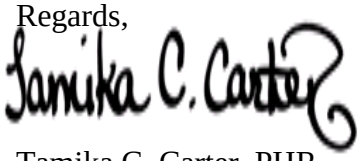
As such, AGC recommends that WHD, at a minimum, include "knowingly or recklessly" in front of the term "disregard" throughout the section on debarment to help ensure that minor and inadvertent mistakes do not lead to debarment proceedings.

Conclusion

AGC respectfully asks WHD to modify the rule establishing a minimum wage for federal contractors for the reasons and in the manner discussed above. The consequences of contractor noncompliance with the rule, including potential debarment and False Claims Act liability, are extremely serious – particularly given that a False Claims Act violation may be established without any proof of specific intent by contractor to defraud the government. Accordingly, it is imperative that the rule be as clear, precise, and concise as possible. Such an improved rule will not only enhance transparency and fairness, it will better advance the government interests of economy and efficiency in procurement articulated in the Executive Order.

AGC appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to develop regulations that impact construction employers. If we can offer assistance in any way, please do not hesitate to contact me.

Regards,



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