AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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August 26, 2015

Ms. Tiffany Jones
U.S. Department of Labor
200 Constitution Avenue NW
Room S–2312
Washington, DC 20210

**RE: U.S. Department of Labor Proposed Guidance for the Fair Pay and Safe Workplaces Executive Order; ZRIN 1290–ZA02**

Dear Ms. Jones,

On behalf of the Associated General Contractors of America (AGC), I would like to thank you and the U.S. Department of Labor (DOL) for soliciting comments on its proposed guidance (herein "Guidance") to implement the president's "Fair Pay and Safe Workplaces" Executive Order (herein "the Executive Order or the EO"). AGC firmly holds that this EO is unfounded, unnecessary, unworkable and unlawful. If implemented, these executive actions will neither lead to improved economy nor efficiency in government procurement.

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

If implemented, the EO, Federal Acquisition Regulation (FAR) Council proposed rule, and DOL Guidance would be destined to malfunction. They are unreasonable and inconsistent, and would be ineffective, excluding from service to the government not only bad-actor contractors but also a far greater number of well-intentioned, ethical contractors.[1] The EO, proposed rule, and accompanying Guidance would needlessly create a new, complicated and unmanageable bureaucracy to address problems that a host of federal laws, regulations and bureaucracies already address. Furthermore, they would lead to crippling delays in federal contracting, encourage unnecessary litigation, and increase procurement costs to the government and taxpayers. Though AGC is concerned about and discusses below the general problems with the EO and DOL Guidance, the focus of these comments remains on the impact of these executive actions on the commercial construction industry that AGC represents.

**The Guidance Unjustly Subjects Contractors to Debarment for Non-Final Labor Law Violation Determinations; Only Final Labor Law Violations should be Reportable**

[1] As the White House Fact Sheet on the EO notes, "the vast majority of federal contractors play by the rules." See: https://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order

James Madison stated that, "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[2] Through this Guidance, DOL assumes that all government agencies and employees are angels incapable of either simply making mistakes or doing wrong. Under the definitions of "administrative merits determinations," "civil judgments," and "arbitral award or decision," the Guidance explicitly notes that such determinations need not be final to be reportable; that a contractor may not have a chance to contest these types of determinations before reporting them. Consequently, a contractor may be unjustly denied the opportunity to bid on a federal contract based on a non-final labor law violation determination. In doing this, DOL places an inordinate amount of power in the hands of government employees and agencies. As such, AGC strongly recommends that DOL only allow final labor law violations be reportable under the Guidance.

There are a number of proposed labor law violations in the Guidance that require a contractor to report such "violations" before the contractor has had full opportunity to present all the facts and properly defend itself. For example, under the definition of an "administrative merits determination," a contractor would have to report: a complaint issued by the National Labor Relations Board (NLRB) regional director without being afforded an opportunity to rebut the allegations in the complaint; an Occupational Safety and Health Administration (OSHA) citation based on the unchallenged judgment of an OSHA inspector; a letter of determination from the Equal Employment Opportunity Commission (EEOC) that mere reasonable cause exists *to believe*—not that a contractor *in fact*—engaged in or is engaging in an unlawful employment practice; a complaint filed by or on behalf of an enforcement agency—state or federal—that only states allegations, not adjudicated facts or judgments; and civil judgments of labor law violations that are pending further review or appeal and, thus, not settled violations of labor law.

DOL's assertion that an enforcement agency's complaint—as included in the definition of administrative merit determination—requires "full investigation," and, hence, elevates it to a level on par with a final, adjudicated judicial determination is dubious at best. There are no legally distinguishable differences between a private litigant's complaint and a government litigant's complaint filed in federal or state court. DOL asserts that because an enforcement agency issues a complaint, that complaint carries more weight than that of a private entity's complaint. Government agencies, like private entities, are capable of making a mistake. Because an agency conducts an investigation and believes it found evidence that elements of a labor law violation exist does not mean that a neutral third party—like a federal judge—necessarily agrees with the agency based on the law. Hence, DOL essentially establishes a system whereby a contractor is guilty until proven innocent. Additionally, DOL assumes that government enforcement agencies are only driven to issue complaints based on the merits of their claims. While this may very often be the case, it is not always so.[3]

While DOL allows contractors to raise good-faith disputes regarding violations—including non-final labor law violations—and to submit that information to the contracting officer, AGC fears that such

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[2] JAMES MADISON, THE FEDERALIST PAPERS, NUMBER 51, 1788.

[3] On September 30, 2011, the U.S. District Court for the Western District of Louisiana ordered the United States to pay $1.7 million in a malicious prosecution lawsuit to Hubert Vidrine, based on findings that the U.S. government had maliciously prosecuted Vidrine for alleged environmental crimes. https://wlflegalpulse.files.wordpress.com/2011/10/judgmentvidrine.pdf Keith Phillips, the EPA agent who spearheaded the investigation and subsequent indictment, later pleaded guilty to obstruction of justice and perjury relating to his false testimony during a deposition for the civil malicious-prosecution suit that led to the $1.7 million award to Vidrine. http://www.nytimes.com/gwire/2011/10/04/04greenwire-rogue-epa-agent-pleads-guilty-to-obstructing-j-36303.html

information will not carry considerable weight in the responsibility determination. Practically speaking, perceptions matter. AGC fears that it will be difficult for contracting officers to make objective responsibility determinations based on government agency complaints, even when supplemented by additional material from a contractor. The additional material submitted by the contractor to dispute the complaint may appear self-serving from the vantage point of a contracting officer. While an LCA may have the legal understanding to make more informed judgments, a contracting officer is not likely to have such legal expertise. In the end, the contracting officer, not the LCA, makes the responsibility determination. As such, a contractor's dispute of those allegations is unlikely to carry as much weight—if any—when compared to a dispositive finding of innocence by a court. The same points may be made for a court or arbitral decision subject to further review and/or appeal. Disclosing a civil judgment or arbitral award finding a contractor in violation would be unfair to that contractor when the contractor has grounds for appeal and the possibility of a higher court overturning the decision.

The crux of the matter comes down to fairness and the perception of such in the decisions made by LCAs and, ultimately, contracting officers. A federal procurement system under which contractors do not believe the parameters for contract award are neither fair nor objective will not incentivize prime contractors and subcontractors to comply with federal requirements on federal contracts. Rather, such a system is more likely to incentivize many federal contractors to leave the marketplace, or at a minimum, diversify their portfolio and reduce the amount of federal work sought. This would reduce competition and innovation in the federal construction market. Consequently, AGC strongly recommends that DOL only allow final labor law violations be reportable.

AGC also notes that the Guidance does not expressly exempt reporting of administrative merits determinations in cases that were later settled or dropped before going to court. The Guidance states that private settlements of lawsuits are not "civil judgments" that must be reported, but it does not seem to address cases settled before going to court. AGC respectfully seeks further clarification on this subject.

The Guidance additionally requires reporting of arbitral awards and decisions when an arbitrator has determined that the contractor violated a labor law. But, it is not always clear in an arbitration award whether the arbitrator—particularly in labor arbitration under a collective bargaining agreement—is ruling on a matter of law, contract, or both. In many cases, the arbitrator's authority is limited to determining whether a party violated the terms of the agreement. Is a contractor obligated to report an arbitration award finding that it violated a contract term if the underlying action in violation of the contract could also be a violation of a labor law statute, even if the arbitrator did not expressly address the statutory violation? Furthermore, arbitrators are normally private citizens not representing the government; they may lack the expertise and training to properly interpret and apply the law. For these reasons, in addition to their non-final nature, contractors should not be required to report arbitral awards and decisions.

**The Guidance Fails to Provide Clear Guidelines Necessary for the Government or Contractors to Categorize and Assess Violations in an Objective Manner**

The Guidance fails to provide clear guidelines necessary for the government and contractors to (1) categorize the gravity of labor law violations and (2) assess whether a prime contractor or subcontractor is a responsible entity. In this section, AGC first addresses the categorization problems concerning the definitions of "serious," "repeated," "willful," and "pervasive" violations and how that will be problematic for government employees and contractors in the context of the construction industry. Then,

AGC addresses the problems the government and contractors will have when assessing those various violations to determine whether a contractor or subcontractor is "responsible."

The Difficulties Government and Contractors Face under the Definitions of "Serious," "Repeated," "Willful," and "Pervasive" Violations

*The Definition of "Serious" Violations*

AGC is concerned with several aspects of DOL's definition of a "serious" violation, including the definition of "25 percent or more of the workforce" and the definition of a "worksite." These elements of the definition require further clarity in the context of the construction industry.

A construction project may include dozens of subcontractors working under a prime construction contractor at any one time and on any particular site. On a simple office building project subcontractors may include: carpenters, framers, cabinet makers, joiners, roofers, dry wall installers, flooring installers, carpet layers, electricians, power line technicians, elevator mechanics, fencers, glaziers, heavy equipment operators, insulation installers, ironworkers, laborers, landscapers, masons, painters, interior designers, pile drivers, plasterers, plumbers, pipefitters, sheet metal workers, fire sprinkler installers and welders, among others. Between prime contractor and subcontractors' employees, there could be hundreds and even thousands of workers on a worksite at any one time. Which subcontractors and their employees are on site when depends upon where the project is in construction. For example, dry wall installers will not be on site when excavation of the foundation is underway because there are no walls yet in place. Additionally, contractors have staff that are working on administrative matters regarding the project in remote office locations.

The complexity of a construction project leads AGC to question and have serious concerns about the definition of a "serious" violation including the phrase "affected workers comprise 25 percent or more of the workforce at the worksite." As noted above, the numbers of construction workers on a worksite can vary from day to day, month to month, and year to year. How would contractors determine that a quarter of their workers on a worksite were affected by a labor law violation if they cannot determine what total number of workers on the worksite to use (what is the denominator)? AGC also seeks further clarification and confirmation from DOL to ensure that "worksite" and the typical construction jobsite are not synonymous. The Guidance notes that for workers with "no fixed worksite, such as construction workers. . . the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report." From this definition, AGC believes that a construction company's headquarters or regional office would typically qualify as a "worksite." Therefore, for example, a construction quality control expert's "worksite" would be the construction company headquarters that assigns him work on two construction jobsites.

The issues with this element of the definition become even more confusing when referencing subcontractor workers. There may be times when a subcontractor has only a few employees or even just one employee on the worksite. If a subcontractor only has one employee on a worksite and that employee is affected by a labor violation on the worksite, will that subcontractor have a serious labor law violation?

Based on the ambiguity discussed above, AGC believes that this 25 percent element of the definition of the term "serious" is unworkable in practice. The complexity of a construction jobsite and the construction industry does not fit a one-sized-fits-all standard, which DOL seeks to establish here.

*The Definition of "Willful" Violations*

AGC believes that the complexity of the definition of a "willful" violation will confuse government employees and contractors alike. On the government side, contracting officers are not generally attorneys. On the contractor side, many construction companies do not have in-house legal counsel. However, the terms used for this definition—reckless disregard, knowledge, malice, reckless indifference—are legal terms of art that require a sophisticated understanding of the law and how it is applied to the facts. AGC finds it incredibly difficult to understand how prime contractors could competently categorize its potential and actual subcontractor's labor violations without the expensive assistance of counsel. Similarly, while LCAs in many cases may be lawyers, AGC questions whether all of them will be lawyers, as contracting officers will need the advice of counsel to make informed decisions.[4]

That stated, AGC's primary issue with this definition concerns the catch-all element for other labor law violations that do not have statutory definitions for willful violations. To determine whether a violation is willful under this catch-all element, the Guidance notes two circumstances where the definition would apply: (1) where a contractor or subcontractor knew its actions were legally prohibited, but proceeded anyway ("actual willfulness") and (2) where a contractor or subcontractor's actions are objectively tantamount to willful disregard of the law ("objective willfulness"). AGC is not concerned with the definition of actual willfulness,[5] but rather takes issue with the difficulty of determining whether a violation is objectively willful. The calculus for determining whether a violation under this standard is willful is neither exact nor clear. Such an objective standard is mainly fact driven and subject to varying interpretations. As such, maintaining consistency in the categorization will be incredibly difficult. Additionally, pinning a contractor or subcontractor with a willful violation—that is neither final, subject to contactor rebuttal, nor determined by a court—would be patently unfair to that company and its reputation.

AGC recommends that DOL either remove the "objective willfulness" standard, or, at a minimum, reserve its use for a violation where the objective facts are beyond dispute. DOL should articulate that violations that simply could be considered objectively willful should not be categorized as willful. Again, labeling contractors as having willfully violated the law is a serious matter that could jeopardize the reputation of the contractor. As such, it should be reserved for those violations where willful violation of the law is clear and beyond dispute.

*The Definition of "Repeated" Violations*

Similar to the concerns noted above, AGC fears that the definition of "repeated" violations is unclear, confusing, and will lead to highly subjective determinations as to whether labor law violations have been, in fact, repeated. To start, AGC questions the lack of consistency between this definition's considerations of a company's "establishments" as compared to the "serious" definition's inclusion of a company's "worksites." Is an "establishment" under this definition the same as "worksite" under the definition of serious? The term establishment has other meanings other various labor laws.[6] AGC would seek

[4] These concerns about necessary legal resources underscore AGC's assertion in its FAR Proposed Rule comments that the FAR Council underestimates the cost impact of implementing this Executive Order.
[5] However, AGC does retain its objection that the reported labor law violation that may be considered willful under the actual willful standard is not a final determination that the law had been violated, as previously discussed.
[6] For example, would the definition of "establishment" be that of the term's definition under
The Vietnam Era Veterans' Readjustment Assistance Act regulations and/or EEO-1 reports?

clarification as to what the Guidance means in this case and how it relates to the definition of a "worksite" under the Guidance. This discrepancy is not clearly articulated in the Guidance and could lead to confusion during implementation.

AGC believes DOL's "substantially similar" test to determine whether violations are repeated is similarly unclear, confusing and subjective. DOL notes that "this inquiry turns on the nature of the violation and underlying obligation itself." While this is simply stated, conducting the inquiry and making a clear determination is far from simple. Various labor statues can include provisions on wages violations. However, what happens if the first time a wage violation occurs, it was the result of discriminatory practices and the second time it occurs, it was because of a misclassification issue. Is this an example of a repeated violation because it involves a wage issue or not? Arguably, the underlying obligations are different—misclassification and discrimination—but the impact can be similar to employees in the form of wage violations. This is a highly complex analysis that will require legal expertise on the contractor side and on the government side that will impact the efficiency of procurements and the ability of contractors to find potential subcontractors.

AGC also seeks further clarification on the definition of "repeated" and the apparent acknowledgment of the validity of reporting final, adjudicated labor law violations, as opposed to non-final violations discussed earlier. Under the definition of repeated "for an administrative merits determination to serve as a predicate violation that will render a subsequent violation repeated, it must have been adjudicated or be uncontested." It is difficult to understand why DOL implicitly acknowledges the fairness, validity and importance of allowing a contractor to contest allegations put forth by enforcement agencies under this definition, but it does not do so under the definition of an administrative merits determination. AGC again requests that DOL only require final, adjudicated decisions be reportable under this Guidance and the proposed FAR Rule. If DOL declines to accept this recommendation, AGC respectfully requests DOL explain its logic concerning the definition of repeated.

*The Definition of "Pervasive" Violations*

AGC has significant concerns about the Guidance's definition of "pervasive" violations. This term appears to be an amalgamation of the other three violation categories combined. AGC questions the need for creating a category of violations that categorizes the other categories of violations, as it appears redundant and adds an unnecessary level of analysis to this already complex, confusing and subjective Guidance. Many of the factors to determine whether a violation or set of violations is pervasive—i.e., the size of a company and the efforts taken to remediate violations—includes the same guidance that DOL provides when the government and contractors assess violations and consider mitigating factors in making its responsibility determinations. Consequently, AGC recommends that this category of violations be removed from the Guidance. Factors included in this definition, but not elsewhere, such as whether the upper management of a company is involved in labor law violations or a significant number, among others, may then be better considered during the actual assessment of responsibly.

In the event DOL retains the "pervasive" category of violations, AGC questions the utility of establishing a hard percentage or number of employees affected by a violation as a means to assess either the pervasiveness of a violation or as a part of a final evaluation of responsibility. No matter where DOL sets the percentage or number of employees, there will be issues and ambiguities, as various industries have their own unique circumstances. As the Small Business Administration's size standards show, one-size standard does not necessarily fit all industries. Unless DOL proposes to set forth specific-industry based

standards based on facts as opposed to feeling, it should not create a one-size-fits-all standard for all industries.

The Guidance Lacks Clear Guidelines as to how Government Employees and Contractors should Assess Labor Law Violations to make Responsibility Determinations

Construction companies need some degree of certainty in order to undertake the expensive and time consuming process of bidding and working on federal contracts. In the context of this Guidance, AGC members need to be certain as to how the government will determine that their companies have a satisfactory record of business ethics and integrity so they can feel comfortable that their investment in federal compliance programs is worthwhile and could result in federal contract awards. However, even if the definitions of the categories of violations were crystal clear, the assessment process to make the responsibility determination is ambiguous and provides AGC and its members with little sense that this Executive Order will be implemented in a consistent manner within one government contracting agency, let alone government-wide.

DOL's guidance states that each contractor's disclosed violations will be evaluated on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor and any mitigating factors. While the DOL guidance provides numerous factual examples of violations or patterns of violations, the examples are clearly fact specific and are often accompanied by qualification. For example, the statement that a "single violation may not necessarily give rise to a determination of a lack of responsibility" reflects the need to make fact-specific determinations. These require a level of analysis which should prompt a prudent contractor to seek professional advice. Even then, the term "necessarily" suggests that reasonable consultants may offer differing advice and conclusions. The bottom line is that contractors and the government seeking to make these determinations, are likely to have differing opinions of the same sets of facts, placing a significant degree of uncertainty into the federal contracting marketplace. All of this amounts to an evaluation process that will elicit differing opinions from LCA to LCA, contracting officer to contracting officer, and contractor to contractor.

AGC also notes the burdensome and unfair reporting of relatively minor violations that may not fall within one of the four categories of violations defined by DOL. If the contractor in the initial representation stage represents that it has had violations, then it must provide additional details about the violations during the pre-award stage at which a responsibility determination is made, and it must update the information post-award every six months. However, only violations deemed "serious, repeated, willful, or pervasive" bear on the assessment of the contractor's integrity and business ethics. By requiring the reporting of violations that are not relevant to the responsibility determination, the rule is unduly over-reaching. It imposes overly broad recordkeeping and reporting burdens on contractors. It also makes vast amounts of information (such as information about minor, inadvertent, and isolated violations), some of which is private (such as arbitral awards) open to public disclosure, which might unfairly harm contractors' reputations and business relationships both within and outside the federal contracting arena. AGC does not see, and neither the proposed rule nor guidance offers, any benefits to off-set the significant costs for this overly broad requirement. Accordingly, AGC recommends requiring contractors to report only "serious, repeated, willful, or pervasive" violations.

Prime Contractor Difficulties making Subcontractor Assessments throughout the Subcontractor Tiers

The process that a prime construction contractor goes through to submit a proposal is often fast-paced, short and can be chaotic. As a 2015 GAO report notes, "Subcontractors, to remain competitive, often wait to submit their bids to the prime contractor until just minutes before the prime contractor is required to submit its proposal to the agency, which allows minimal time for the prime contractor to ensure that the bids are reasonable and cover the required scope of work."[7] Construction subcontractors often do this to prevent their bids from being shopped prior to contract award. For large projects, there can be hundreds of perspective subcontractors. Even after a prime contractor submits its bid, prime contractors may be uncertain of subcontractor bids. Those subcontractor bids may not include the full or accurate scope of work. Consequently, prime contractors must do their best to quickly assess the accuracy and completeness of the various bids they review for one trade.

As construction prime contractors can subcontract up to 85 percent of the value of the contract to subcontractors, the possibility for a significant number of subcontracts of $500,000 or more is extremely high. Consequently, the ability to prepare a bid while, at the same time, having to review potentially hundreds of subcontractors bids for their accuracy and scope, and evaluate their labor law violations, and determine whether they are "responsible" prior to making a proposal would not be a simple or inexpensive process. In fact, one prime contractor GAO interviewed for the report noted above estimated that it may review approximately 500 subcontractor bids to prepare its proposal. Taking potential lower tier subcontractors into account will could make this figure even higher. An AGC member survey on this topic revealed that on typical building construction projects of $20 million, many members noted that they typically receive 50-100 bids from different *first-tier* subcontractors for subcontracts above $500,000. To AGC's knowledge, there is no prime contractor in the construction industry that seeks pre-bid information from potential, lower tier subcontractors. First tier subcontractors may not know who their subcontractors—and subcontractor subcontractors and so forth—are at bid time. AGC believes that this information would be practically impossible for a prime contractor to gather before it bids on a contract. As a result, AGC recommends that prime contractors only be responsible for reviewing first-tier potential subcontractor labor violations, if, in fact, this requirement for subcontractor review is not just eliminated on the whole.

AGC discussed the possibility of prime contractors pre-approving subcontractors prior to bidding. Prime contractors, however, noted that they work all over the country, in various regions and cities. As a result, they often hire subcontractors in the local area where a project is located, in an effort to reduce the costs of transporting equipment and supplies, among other things. Every area has different specialty trade subcontractors, different suppliers, different labor conditions, different soil conditions, and other variables impacting who may bid on prospective work. Oftentimes, prime contractors receive bids from many subcontractors with whom they have never worked. While pre-approving national subcontractors may be helpful, the fact remains that there are approximately 600,000 construction companies in the country.[8] For a prime contractor to limit its pool of subcontractors to only those it has pre-approved, the prime contractor risks missing out on offers from other subcontractors it may not have known about that could offer a better price, could better perform, and be more responsible than those who are pre-approved.

The notion that most contractors can master the various labor laws and the varying concepts in the DOL Guidance is grossly unrealistic. If trained contracting officers and their staffs need the input and guidance of agency LCAs, contractors will need the advice of labor law counsel, as well as lawyers knowledgeable in government contracting law. Many contractors do not have in-house counsel. Counsel with the

[7] http://www.gao.gov/assets/670/668163.pdf at page 8

[8] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_23I1&prodType=table

experience necessary to advise contractors on these issues will easily cost a contractor at least $125,000 for compensation. This includes nothing for support staff and overhead. In an environment where DOL, the FAR Council and the president all acknowledge that the vast majority of federal contractors are in compliance under the law, this is an annual cost that seems punitive. Furthermore, such costs will be most felt by small and emerging small business contractors, which will now face higher barriers to entry into the federal market as a result. AGC finds it difficult to understand how limiting competition by establishing higher barriers to entry will make the federal procurement more efficient and save taxpayers in the long run.

**The Guidance Violates Contractors' Contractual Privacy Obligations**

In the definition of "arbitral award or decision," the Guidance expressly includes private and confidential arbitral proceedings. Given that reported violations will be public, the reporting of such matters could require violation of contractual confidentiality obligations.

State and federal courts, including the U.S. Supreme Court, have held that a Federal Arbitration Act establishes a strong national policy favoring the use of arbitration to resolve disputes.[9] The purpose of arbitration, in many respects, is to "assure a private adjudicatory alternative to public adjudication."[10] The free discovery and admissibility of arbitration communications can reasonably be expected to have a chilling effect on the willingness of parties to use arbitration, thereby frustrating the strong federal policy favoring the arbitration of disputes. Simply put, parties may be reluctant to use arbitration if they know that it is not confidential; if they know that their communications in arbitration can be publically disclosed and then potentially admitted into evidence in other legal proceedings.

In regards to confidentiality provisions within arbitration agreements, decisions of the United States Second and Fifth Circuit Courts of Appeals have stated that an "attack on the confidentiality provision is, in part, an attack on the character of arbitration itself."[11] Some states have adopted specific provisions regarding the confidentiality of arbitration. For example, Missouri state law states that:

> Arbitration . . . shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.[12]

Requiring contractors to disclose private and confidential arbitration matters to comply with the Executive Order places contractors at risk of breaching contractual agreements and jeopardizes the purposes of entering into arbitration or other forms of alternative dispute resolution processes. As such,

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[9] See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626-28 (1985) (reiterating the policy) ; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (establishing the policy).

[10] http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1328&context=facpubs at page 1278

[11] Guyden v. Aetna, Inc., 544 F.3d 376, 385 (2d Cir. 2008), quoting Iberia Credit Bureau, Inc, v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004).

[12] MO. ANN. STAT. 435.014 (2015)

AGC recommends that such decisions not be included within the definition of "arbitral award or decision."

**The Guidance Does Not Provide Sufficient Time for Contractors to Establish Internal Reporting Systems and Properly Track Violations**

DOL Guidance seemingly assumes that construction contractors maintain centralized and detailed records regarding the many complex and reportable violations detailed under the definitions of administrative merits determinations, civil judgments and arbitral awards or decisions spanning 14 federal laws, covering thousands of pages of regulations, and an unspecified number of equivalent state laws. As it stands, AGC is not aware of any federal construction contractor—large or small—that tracks this information in a manner necessary to comply with proposed rule or guidance. Such information extending over a three-year period may be difficult to compile in the context of the construction industry. Consequently, AGC urges DOL: (1) provide contractors a sufficient amount of time—i.e., at least one year—to establish centralized reporting systems; and (2) to begin the time period of when violations are reportable starting from one year after the rule goes into effect.

To undertake the task of not only tracking and centralizing such violation information, but also ensuring that remedial information is also properly recorded, will be a difficult task for construction contractors. Construction job sites—which in federal construction can be in remote and dangerous locations like military installations in Iraq or Afghanistan—are not typically equipped for administrative purposes, and electronic equipment that is available is usually reserved to facilitate the construction work being performed. There can also be 50 or more subcontractor companies working on the jobsite under the prime contractor. This means that there can be hundreds and even thousands of employees at any one jobsite. When an OSHA inspector, for example, issues a citation on such a jobsite, the prime contractor must ensure that the citation is delivered to the proper prime contractor employee on site who can log the citation and also record any steps the contractor takes to remedy the citation.[13] Then, that contractor employee must report that information to someone—presumably in the contractor's headquarters office for inclusion in any bid disclosures and semi-annual update reports. To establish such a reporting system will require prime contractors to train not only their employees, but also establish protocols for subcontractor employees. The difficulties for prime contractors of tracking violations extend beyond coordination among numerous, remote jobsites and many subcontractors and their employees. Reportable labor violations under the guidance cross multiple subject matter disciplines, further complicating tracking and centralization of record keeping. These violations could find themselves on the desks of human resources, safety, and legal departments/outside counsel. Establishing an effective system of compliance and communication among these different departments—as well as hiring of additional staff to meet compliance needs—will take a fair amount of time and resources.

AGC suspects that DOL and the FAR Council will seek to establish the effective date of any final rule sooner rather than later. That stated, AGC would urge DOL to begin the time period of when violations are reportable one year after the rule goes into effect. As noted above, AGC is not aware of any federal construction contractor that tracks these labor violations and remedial actions in a manner necessary to

[13] Given this point, AGC respectfully requests clarification as to whom a violation is issued and how that would be properly reported. As noted, there can be many subcontractors, and, thus, subcontractor employees, working under the prime contractor on a construction site. When OSHA issues a citation, for example, to the prime contractor because of an issue involving or stemming from a subcontractor employee(s), must the subcontractor also report the citation under this guidance?

comply with proposed rule or guidance. In fact, many contractors of all sizes have indicated to AGC that they do not do so. As a result, information—either a violation or remedial information—necessary for a contractor to fully comply with the guidance may be unavailable, jeopardizing the accuracy of its disclosures. It would be patently unjust to penalize a contractor that has incomplete labor law violation records to comply with a rule and guidance it did not have a crystal ball to foresee three years ago. AGC suggests that DOL provide one year from the effective date of a final rule for prime contractors to establish their compliance program, train existing employees and hire new ones. Furthermore, AGC recommends requiring contractors to report only violations occurring one year after the effective date of the FAR Rule. Labor law violations that occurred prior to the one-year anniversary of the effective date of the rule would not be reportable. For instance, if the rule becomes effective on January 19, 2017, a contractor's labor violation on January 18, 2018, would not be reportable by a contractor submitting a bid on a covered contract on February 19, 2018, but a violation that occurred on January 19, 2018, would be reportable under such a scenario. Such an approach may provide contractors with the time they need to ensure compliance and remove the threat of contractors failing to track violations they otherwise may not have tracked.

The Paycheck Transparency Provisions Concerning Weekly Breakdown of Overtime Hours, Translation into Foreign Languages, and Frequency of Independent Contractor Notification are Overly Burdensome

AGC supports the general principle of paycheck and worker classification transparency and efforts to weed out bad-actor contractors capable of underbidding contractors complying with the law in good faith. That said, AGC has identified several concerns with the particular provisions of the Guidance's implementation of the EO's paycheck transparency section.

To begin with, while many construction contractors are likely already providing the required information in the required manner, many others will need to modify their payroll systems to comply with the new mandates. The Guidance requires that, if the pay period is broader than the period for which overtime pay is calculated (usually weekly), then the wage statement must include a breakdown of overtime hours for each overtime pay period (usually each week). While covered construction contractors are already paying construction "laborers and mechanics" as defined by the Davis-Bacon Act on a weekly basis in accordance with that Act, many pay workers who are not covered by the Davis-Bacon Act but who are due the wage statement under the proposed rule on a bi-weekly or semi-monthly basis. If they currently include overtime pay information on "pay stubs" only on a cumulative basis for the pay period, they will need to modify their practices and systems. Moreover, while many, perhaps most, contractors use a lag time of several days or a week for payroll processing (e.g., the paycheck reflects pay earned one week prior to the date of paycheck issuance), others use a "pay-to-date" process (i.e., the paycheck reflects forecasted pay earned up to the date of paycheck issuance, and overtime or other variances are "trued-up" in the following paycheck). The latter practice will no longer be feasible under the proposed rule, and such contractors will need to change their practices and systems. DOL has not accounted for the costs of these changes in its assessment of the regulatory burden.

AGC also has concerns about the language requirements for the wage statement and independent contractor notification. The Guidance requires that, where a "significant portion" of the workforce is not fluent in English, the contractor must provide the wage statement and independent contractor notification in both English and "the language(s) with which the workforce is more familiar." This requirement is not needed. Immigrant and resident foreign workers who take jobs in foreign countries do so knowing potential language barriers and assuming the related burdens. (If you were to move to France and accept employment

with a French employer, would you expect your pay stub to be in English?) AGC recommends removing this requirement from the Guidance and proposed FAR rule.

If DOL rejects that recommendation, AGC urges it to revise the language mandate to minimize confusion, scope, and costs. First, neither the proposed rule nor the proposed guidance defines "significant portion." This vague term leaves contractors uncertain as to when they are required to provide the information in other languages, and thereby creates an unfair pitfall for noncompliance and associated penalties. AGC recommends that DOL clearly and reasonably define what percentage of the workforce is considered a "significant portion" triggering the obligation.

Second, the proposed FAR rule and Guidance seem to require that every covered employee and independent contractor working in a workforce where a "significant portion" is not fluent in English be issued a statement in multiple languages – even if the individual recipient is fluent in English. Moreover, the proposed rule and guidance fail to clearly address workplaces in which a "significant portion" of the workforce is not fluent in English but no "significant portion" of the workforce is "more familiar" in any single language. That is, what is the contractor's obligation in workplaces where workers are fluent in various foreign languages? Must the contractors provide every employee with a wage statement, and every independent contractor with a notification, in every language that is spoken by workers who are not fluent in English? This could make for a very lengthy statement or notification, perhaps many pages long – even when only one person in the workforce speaks one of those languages, and even for independent contractors and employees who speak only English. Not only would translating the statements into multiple languages be overly burdensome and costly for contractors, such a lengthy document will be annoying for the recipient workers and counterproductive to the proposed rule's apparent intent. Moreover, contractors would have to monitor the language fluency of their workforces and change statement translations over time. In the realm of construction contractors that work in various locations with different worker demographics over time, workforce fluency changes could be frequent and such monitoring, translations, and statement changes could be extremely difficult. AGC acknowledges that a few other regulations require employers to provide employee notices in foreign languages (most do not), such as the FAR and DOL rules implementing Executive Order 13496 concerning Notification of Employee Rights Under Federal Labor Laws. However, those rules concern the posting of central notices in one or few places in the workplace on a one-time, permanent basis. Here, however, the requirement concerns many individual notices each and every time a paycheck is issued or an independent contractor is engaged.

To at least partially address these problems, AGC recommends that the FAR Council and DOL (if they rejects the recommendation to remove the translation requirement) revise the wage statement translation trigger so that it is based not only on whether a "significant portion" of the workforce (clearly and reasonably defined per above) is non-fluent in English but also on whether a "significant portion" of the English non-fluent workforce is fluent in another language. More specifically, AGC recommends revising the rule to state, "Where a significant portion of the workforce is not fluent in English but is fluent in another language, the contractor shall provide the wage statement in English and in each other language in which a significant portion of the workforce is fluent." With regard to independent contractor notifications, AGC recommends requiring the contractor to provide the notice in a foreign language only when the company knows that the individual is not fluent in English. More specifically, AGC recommends revising the rule to state, "If the contractor has actual or constructive knowledge that an independent contractor is not fluent in English, the contractor shall provide the independent contractor notification in the language in which that individual is fluent." AGC further recommends allowing all contractors to meet the translation requirements by merely including in each wage statement and independent contractor notification a website address where translations are posted, rather than including full translations in each statement for each

worker. This should apply regardless of whether the contractor regularly provides documents to the workers by electronic means or whether the worker can access the website through a device provided or made available by the contractor, as such provisions are largely uncommon and impractical at construction jobsites.

The independent contractor notification requirements raise additional concerns for construction contractors. The proposed rule and guidance require contractors to provide the independent contractor with a notice (a) separate from any written independent contractor agreement, (b) each time the individual is engaged to perform work under a covered contract, and (c) before the individual begins performance under that contract.[14] This notice requirement is overly broad and unnecessarily burdensome. Construction contractors often hire the same independent contractor for multiple projects (under different federal contracts or under nonfederal contracts). Those projects might be consecutive or even concurrent. In such situations, what benefit is there to the contractor giving the individual a new notice before beginning work on each and every project under a new contract? The likelihood of an individual being treated as an independent contractor on some such projects and as an employee on others, and the need for a new notice in each case to prevent confusion on the part of the individual as to his or her status, is low. In situations where the individual has executed a written independent contractor agreement, the need is nonexistent. Neither the FAR Council nor DOL has provided any rationale for requiring a separate notice in such situations.

Finally, AGC requests that the FAR Council or DOL publish a model notification with recommended language for contractors to provide to independent contractors. This will help reduce the burden on contractors, improve compliance, and ensure clear and consistent communication with recipient independent contractors.

**Conclusion**

For all the reasons articulated above, AGC, again, urges DOL—along with the FAR Council—to withdraw this Guidance and the proposed rule implementing the Executive Order because they will neither increase the economy nor the efficiency of the federal procurement system. In the event DOL and the administration do not heed this advice, AGC hopes the agency would consider the recommendations and answer the questions put forth in this document.

Thank you for your consideration of this critical matter.

Sincerely,

/S/

Jimmy Christianson
Director, Government Affairs
Federal & Heavy Construction Division
The Associated General Contractors of America

[14] The FAR Council's proposed rule states that contractors must provide the notice "prior to commencement of work or at the time a contract is established with the individual," but DOL's proposed guidance states contractors must provide the notice "each time that he or she is engaged to perform work under a covered contract (and certainly before he or she performs any work under the contract)."