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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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January 5, 2015

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

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

Re: Proposed Rule Pertaining to the Requirement to Report Summary Data on Employee Compensation (RIN 1250-AA03)

Dear Ms. Carr:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), let me thank you for the opportunity to submit the following comments on the Office of Federal Contract Compliance Program's (hereinafter "OFCCP" or "the agency") notice of proposed rulemaking (hereinafter "NPRM" or "proposed rule"). The NPRM requires government contractors to report summary data on employee compensation in a newly established Equal Pay Report (hereinafter "EPR") and was published in the *Federal Register* on August 8, 2014.

AGC is the leading association for the construction industry, representing more than 25,000 firms, including over 6,500 of America's leading general contractors and over 8,800 specialty contracting firms. In addition, 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 agencies under contracts covered by the laws enforced by OFCCP. Most are small and closely held businesses.

OFCCP's Collection of Summary Compensation is Not Needed

The proposed rule references compensation discrimination as the basis of the need for summary compensation data collection from federal contractors. AGC appreciates OFCCP's efforts to protect workers from possible compensation discrimination. However, AGC does not believe new compensation reporting or disclosure requirements for federal construction contractors are necessary or reasonable for the reasons indicated below:

1. Data do not support the need for such requirements;
2. Compensation is already regulated in the construction industry;
3. Construction contractors are actively increasing wages for *all* workers;
4. Private-sector tools already exist to help the agency and construction companies benchmark compensation by industry;
5. Requested data do not account for a wide variety of factors used to determine compensation;
6. National wage data are useless for benchmarking purposes in construction; and
7. Proprietary company information and employee privacy may be compromised.

1. Data Do Not Support the Need for Such Requirements

OFCCP's own data show that there is no need for new regulations to eradicate compensation discrimination against women in federal contracting. In an April 2014 paper titled *President Obama, OFCCP, and Wage Discrimination by Government Contractors: A Case of Smoke and Mirrors*, David Copus (former director of the Equal Employment Opportunity Commission's systemic discrimination division) points out that, of the 4,007 audits conducted by OFCCP in 2012 as part of its top priority effort to ferret out pay discrimination against women, OFCCP found pay discrimination against women in only 13 facilities or 0.03% of all the facilities audited. A finding that 99.7% of audited contractor facilities were found to have fairly compensated female employees in 2012 is a strong indication that the proposed rule is a "solution in search of a problem."

Equal Employment Opportunity Commission (EEOC) data also support AGC's position. For example, EEOC charge data from 2013 reveal that only 1,049 (or 1.11%) of 94,351 total charges filed across all types of discrimination involved claims of unequal pay. Of the 1,049 claims of discrimination on the basis of equal pay, only 11 were identified as from the construction industry. That is just 1.05% of the total number of equal pay claims, and just 0.12% of claims overall. And, of course, the filing of a claim does not necessarily mean that a violation actually took place.

Given these data, AGC believes that new compensation data collection mandates for federal construction contractors are not needed.

2. Compensation is Already Regulated in the Construction Industry

The collection of compensation data from federal construction contractors is not necessary since compensation paid by such contractors is heavily regulated by the Davis-Bacon Act. The Davis-Bacon Act and implementing regulations already require federal construction contractors to sign and submit, under penalty of perjury, weekly certified payrolls detailing the identification of the workers, their job classifications, hours worked and rates of pay. Since the Department of Labor (via OFCCP) already collects from federal contractors data that identify each worker's race and gender, and (via the Wage and Hour Division) data that identify rates of pay, another rigorous requirement to provide the same information is unnecessary.

3. *Construction Contractors are Actively Increasing Wages for All Workers, Both Involuntarily and Voluntarily*

In addition to prevailing wage statutes, federal contractors are now subject to a special new minimum wage mandate pursuant to Executive Order 13658. The new law raises wages for a broad range of covered workers and will adjust annually for inflation. According to the Department's web page regarding the Executive Order, "Raising wages will improve the quality and efficiency of services provided to the government." This new mandate already protects workers and dictates against the need for the additional burdens placed on contractors by the present proposed rule.

Further, as OFCCP notes in the NPRM, "Employers will not want to be identified as having pay standards that are significantly lower or different from those of their industry peers, since this may encourage valuable employees to consider moving to other employers, or discourage applicants who see that higher paying jobs may be available elsewhere." AGC agrees that the need to keep up with industry peers and other motives related to employee recruitment and retention are driving construction contractors to voluntarily increase wages. According to AGC's 2014 National Worker Shortage Survey of construction contractors, 83% of construction contractors report having trouble finding qualified craft workers to meet the growing demand for construction. As a result, construction companies are seeking ways to recruit and retain skilled workers, including by voluntarily increases wages as an incentive for employment. This, too, dictates against the need for the proposed reporting requirement.

4. *Private-Sector Tools Already Exist to Assist with Compensation Benchmarking*

The NPRM states that "OFCCP will collect and analyze contractor summary compensation data to establish objective industry standards for identifying potential discrimination in employee compensation." However, it is not necessary for OFCCP to collect compensation data from contractors for this purpose because resources establishing such standards already exist. For one, wage determinations issued by the Department's Wage and Hour Division pursuant to the Davis-Bacon and Service Contract Acts ostensibly manifest the prevailing wages paid for many job classifications in a particular area. The Department's Bureau of Labor Statistics also provides compensation data useful for identifying industry standards. In addition, various private-sector resources offer compensation benchmarking data. For example, in the construction industry, the nonprofit Construction Labor Research Council and consulting firms such as PAS, Inc. and FMI, Inc. publish such data. Many of these resources segment the data by geographic location, company size, industry sector, and other useful factors. Given all of the compensation data resources already available, AGC believes that it is unnecessary for OFCCP to subject contractors to the proposed new compensation data reporting requirement.

5. *Requested Data Do Not Account for a Wide Variety of Factors Used to Determine Compensation*

Under the proposed rule, OFCCP plans to collect summary data on employee compensation by sex, race, ethnicity, specified job category and relevant data points. However, AGC does not believe the collection of compensation data relative to these categories is necessary for OFCCP's intended purpose because such data do not account for a wide variety of factors used to determine employee compensation such as

education, training, experience, industry accreditations, tenure, attitude and job assignment, to name a few. For example, two employees performing the same job may receive different rates of pay simply because one worker has more tenure than the other, or perhaps one has a four-year degree and the other one does not. In construction, job assignments are also considered when determining compensation for an employee. For example, two project managers may be compensated differently for the reasons indicated above, or because the value and responsibility of the contract he or she is managing may vary greatly. For example, it would not be uncommon to see a large difference in compensation between a project manager for a company who is responsible for an \$80 million project versus a project manager for the same company who is responsible for managing a \$5 million project.

6. National Wage Data are Useless for Benchmarking Purposes in Construction

Construction is not a uniform, national industry. Rather, the construction industry in the United States is highly fragmented, regionalized and project driven. As such, national wage data are useless for benchmarking purposes. For example, carpenter wage rates in the Northeast may differ greatly from carpenter wage rates in the Southeast based on the local and regional economy, the demand for construction work, seasonal and weather factors, and fragmentation of the industry. A highway construction worker in Maine may work fewer hours than a highway construction worker in Georgia simply because the construction season is shorter in Maine than in Georgia because of weather. Specifically, in highway construction, neither asphalt nor concrete may be transported or poured when the temperature falls below freezing. This climate impact could lead to a great discrepancy in the overall earnings of the same position in different regions within a year.

To further elucidate the uselessness of national compensation standards for the construction industry, consider an example of two workers in the same position and regional area who work in different segments of the construction industry – building construction and highway construction. A building construction worker in Maine could likely work for more months within a year than a highway construction worker also in Maine. The building construction worker could work during the winter months because there may be some parts of the project that are enclosed, allowing work to be completed in a safe, temperature-controlled environment for the worker. The highway construction worker may not be able to work outside during the winter months due to unsafe cold-weather temperatures or the impact temperature and weather may have on construction materials. As a result, the building construction worker could work more hours, including overtime, than the highway construction worker. Again, this would impact the overall earnings of both workers. As noted, the construction industry is highly fragmented with regard to the various types of construction. Aside from building and highway construction, the industry also encompasses dredging of ports and harbors, building of docks, dams and levees, and municipal and utility work, to name a few.

Furthermore, construction is a regional business that is highly subject to regional and local economic trends. The demand for construction workers may be greater in areas where demand for construction services is higher, in general. This is true for different regions of the country as well as for urban versus rural suburban areas.

Furthermore, regional differences between union and non-union areas could impact workers' wages. In addition to the workers themselves, construction managers who are responsible for labor-relations issues,

in many cases, receive higher compensation due to the increased level of responsibility when managing workers in a union environment.

7. *Proprietary Company Information and Employee Privacy may be Compromised*

OFCCP is proposing to release “summary data” provided by federal contractors. If only summary data is released, how will the public know what data are used to establish the summary data? Theoretically, interested parties should be able to see raw data for the purposes of transparency, but that in itself creates concerns for contractors, particularly small contractors. For a business owner, revealing the structure of ones company, including how resources are allocated, is proprietary information.

AGC recently provided comments to OFCCP with regard to another new mandate that prohibits federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss, or voluntarily disclose their own compensation or the compensation of another employee or applicant. In the case of this NPRM, workers’ wages will be involuntarily disclosed. Is it necessary for OFCCP to infringe on the privacy rights of employers as well as employees who may not *want* their wages disclosed, involuntarily, in such a manner?

If, in spite of AGC’s concerns, OFCCP insists on requiring contractors to complete and submit summary data to be disclosed by OFCCP, AGC kindly asks OFCCP to allow contractors to exclude workers from any EEO-1 job categories with fewer than ten workers, so that competing employers, and employees will not be able to easily identify the wages of others.

OFCCP Should Exempt Federal Construction Contractors from the EPR requirements or At Least Simplify the Requirements for Compliance

While AGC does not believe that the newly-proposed compensation reporting requirements for federal contractors, specifically for federal construction contractors, are necessary or reasonable, AGC understands OFCCP’s responsibility to issue regulations in response to President Obama’s Presidential Memorandum directing OFCCP to take action. However, when issuing final regulations, AGC respectfully asks OFCCP to exempt federal construction contractors from the requirement to submit the EPR for the seven reasons stated above. Also, if it is determined by the Office of Management and Budget that the cost of compliance with the proposed regulations will have a significant negative impact on the economy, exempting the construction industry will reduce the overall economic burden. Should OFCCP decide not to honor this request, AGC respectfully asks OFCCP to simplify the requirements for compliance by strictly following the directions penned by the President.

The Presidential Memorandum reads as follows:

Therefore, I hereby direct you to propose, within 120 days of the date of this memorandum, a rule that would required Federal contractors and subcontractors to submit to [the U.S. Department of Labor (DOL)] summary data on the compensation paid their employees, including data by sex and race. In doing so, you shall consider

approaches that: (1) maximize efficiency and effectiveness by enabling DOL to direct its enforcement resources toward entities for which reported data suggest potential discrepancies in worker compensation, and not toward entities for which there is no evidence of potential pay violations; (2) minimize, to the extent feasible, the burden on Federal contractors and subcontractors and in particular small entities, including small businesses and small nonprofit organizations; and (3) use the data to encourage great voluntary compliance by employers with Federal pay laws and to identify and analyze industry trends. To the extent feasible, you shall avoid new record-keeping requirements and rely on existing reporting frameworks to collect the summary data. In addition, in developing the proposal you should consider independent studies regarding the collection of compensation data.

When reviewing the President's directive, it is clear that he does not want to increase the compliance burden on federal contractors because he encourages DOL to first "direct its enforcement resources toward entities for which reported data suggest potential discrepancies in workers compensation and not toward entities for which there is no evidence of potential pay violations." This statement alone supports AGC's request for exemption since, according to the EEOC data presented earlier, only 1.05% of total equal pay claims filed in 2013, and just 0.12% of claims overall, were identified as from the construction industry.

While AGC believes that a construction industry exemption is necessary, a less desirable alternative for the industry consistent with the President's directive is to "rely on existing reporting frameworks to collect the summary data." For construction contractors, the best reporting framework that already exists is the Davis-Bacon certified payroll form. As mentioned previously, construction employers are already required to sign and submit, under penalty of perjury, weekly certified payrolls detailing the identification of the workers, their job classifications, hours worked and rates of pay. If this method of compliance is chosen by OFCCP for construction contractors, AGC kindly suggests that OFCCP use its own data received from federal contractors that identifies each worker's race and gender to match it with the Davis-Bacon certified payroll data to which DOL already has access. If coordinating the linkage of such data proves to be impossible for DOL, AGC suggests that OFCCP work directly with the WHD to amend the Davis-Bacon certified payroll form to include the categories of race and gender. This would eliminate new recordkeeping requirements and rely on an existing reporting framework as directed by the President.

Another reason OFCCP may consider, as a second option, using Davis-Bacon certified payroll data to analyze the compensation trends of federal construction contractors is because doing so will allow OFCCP to exclusively compare the wages of construction workers working on federal projects with the wages of other construction workers working on federal construction projects. In most cases, wages paid on federal construction projects are higher than those paid on non-federal projects because of the increased regulations associated with compensating workers on federal projects. As a result, federal contractors that complete the Employer Information Report EEO-1 (EEO-1 report) may have a mix of workers who work on federal and non-federal projects with varying wage rates, but performing the same type of work. By exclusively using Davis-Bacon certified payrolls to analyze wage data, OFCCP will ensure that it is collecting and comparing the wages of workers in a particular job category working only on federal construction projects.

Additional Clarification is Needed in the Final Rule

AGC would be disappointed should OFCCP decide not to exempt the construction industry from the requirements of the EPR. However, should OFCCP find it necessary for contractors to submit the report, further clarification is needed in the final rule. Specifically, AGC requests that language be inserted directly into the final rule clarifying that, while federal construction subcontractors at all tiers are required to complete and submit the annual EEO-1 report, only prime and first-tier subcontractors are required to complete and submit the EPR. In addition, AGC requests that language be inserted directly into the final rule clarifying that federally assisted construction contractors are not required to complete nor submit the EPR.

With regard to the EEO-1 Report, the proposed rule states that:

“Provided, that any subcontractor below the first tier that performs construction work at the site of construction shall be required to file such a report if it meets the requirements specified in paragraph (a)(1) of this section.”

With regard to subcontractors and the EPR, the proposed rule states that:

“The EPR must be filed by each prime contractor and first tier subcontractor that is required under paragraph (a)(1) of this section to file the EEO-1 Report(s) with the Joint Reporting Committee that has more than 100 employees, and a contract, subcontract, or purchase order amounting to \$50,000 or more that covers a period of at least 30 days, including modifications.”

The FAQs issued by OFCCP on its website state that:

“The proposed rule applies to prime contractors and first tier subcontractors who are required to file EEO-1 Report(s), have more than 100 employees, and have a federal contract, subcontract, or purchase order amounting to \$50,000 or more that covers a period of at least 30 days (including modifications). Construction contractors, including construction subcontractors of any tier, are subject to the proposed rule if they meet the requirements described above.”

Clearly there is some ambiguity here that must be clarified. Compliance with the EEO-1 requirements of the rule is different from the compliance requirements of the EPR requirements of the rule, and, as such, clarification for construction contractors is needed. Should OFCCP choose not to implement AGC’s request to exempt the construction industry from the requirement to complete the EPR or to use Davis-Bacon certified payroll records, AGC asks OFCCP to insert language into the final rule that explains that only prime federal construction contractors and their first-tier subcontractors are required to comply with the requirements of the EPR. Doing so will ensure that the burden on small contractors is minimized due to the exclusion of companies with fewer than 100 employees, as promised to the Office of Management and Budget in the Information Collection Request associated with the proposed rule.

With regard to the coverage of federally assisted construction contractors, the proposed rule, if implemented, will amend Executive Order 11246, which applies to both federal and federally assisted construction

contractors. However, the summary of the proposed rule contains language that asserts that federally assisted contractors are excluded from coverage by the rule. Specifically, footnote 102 states that:

“Note that there are some construction contractors also covered by this proposal (those who fall within the requirements for filing and EEO-1 Report). This would not, however, include federally assisted construction contractors. OFCCP intends to analyze Equal Pay Report data by industry; therefore, construction contractors will only be compared with other construction contractors.”

AGC supports OFCCP’s exclusion of federally assisted contractors and subcontractors, but kindly asks OFCCP to insert definitive language into the final rule that will clarify this decision rather than relegating the information to a footnote. If it is not OFCCP’s intent to exclude federally assisted contractors, AGC asks that any references to “affirmative action programs” in the final rule reflect as “affirmative action programs and/or good faith efforts” in order to avoid confusion amongst construction contractors, particularly federally assisted contractors. Federally assisted contractors are not required to establish affirmative action programs and may inadvertently certify to having developed such a program, as required by the proposed rule, when they are, in fact, referring to compliance with OFCCP’s 16 steps.

General Considerations for OFCCP

As a member of the U.S. Chamber of Commerce (the Chamber), AGC strongly supports the Chamber’s comments related to the proposed rule. Specifically, AGC supports the Chamber’s comments related to the economic burden associated with compliance, the confidentiality of proprietary data, the advantages and disadvantages of using Form W-2 data as a basis for compensation, the EPR reporting date, and the definition of the term “compensation.” In addition to these issues that apply across all industries, AGC would like to specifically address the possibility of excluding non-hourly workers from the EPR.

FLSA-Exempt Workers Should Not be Included in the EPR

In addition to excluding all EEO-1 job categories with fewer than ten individual’s wages – as mentioned previously – workers who are exempt under the Fair Labor Standards Act (FLSA) should also be excluded from the EPR. The EEO-1 job categories relevant to the construction industry include job classifications that may have varying wage rates. For example, the “Skilled Trades” category includes both skilled construction trades workers and the first-line supervisors of such trades. The same occurs for the “Laborers” category. Including the hourly wages of supervisors with the hourly wages of non-supervisors will inadvertently raise summary wage data, causing it to be flawed. Alternatively, when the wages of supervisors who are paid on a salary basis, where the number of hours worked isn’t tracked, is included with the wages of hourly workers, the summary data will be skewed in the opposite direction, inadvertently decreasing summary wage data. AGC recommends that contractors be permitted to eliminate workers from the EPR who are exempt from the overtime rules of the FLSA because most contractors do not currently track the actual hours worked by such workers and adding this element of tracking will be difficult and burdensome for contractors to implement. Eliminating this group of workers would also decrease the overall compliance burden for all contractors.

Conclusion

AGC appreciates OFCCP's efforts to protect workers from possible compensation discrimination. However, AGC does not believe new compensation reporting requirements for federal construction contractors are necessary or reasonable for the reasons stated in this letter.

While AGC does not support the need for new regulations or the required use of a new compensation data collection tool, AGC, again, understands that OFCCP is required to issue regulations as a result of a Presidential Memorandum. As OFCCP prepares to issue a final rule, AGC asks OFCCP to exempt the construction industry from the EPR requirements, or at least, work with WHD to use data already submitted by federal construction contractors for the agency's needs.

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

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter" with a stylized flourish at the end.

Tamika C. Carter
Director, Construction HR

cc: Janis C. Reyes, Assistant Chief Counsel
SBA Office of Advocacy
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