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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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February 21, 2012

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 Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities
(RIN 1250-AA02)

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") notice of proposed rulemaking to implement affirmative action and nondiscrimination obligations of contractors and subcontractors regarding individuals with disabilities as published in the *Federal Register* on December 9, 2011.

AGC's Interest in the Proposed Regulations Regarding Individuals with Disabilities

AGC is among the oldest and largest of the nationwide trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms, both union and open shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for government agencies under contracts covered by the laws administered by OFCCP. Most are small and closely held businesses.

Request for Construction Industry Exemption

AGC and its members are firmly committed to the principles of equal opportunity employment and appreciate OFCCP's efforts to provide an effective pathway to employment for individuals with disabilities. However, when crafting the detailed requirements of this proposed rule, AGC believes that OFCCP failed to take into consideration the unique nature of the construction industry and the many obstacles that would challenge even the most sophisticated construction employer's ability to comply with the requirements of proposal, assuming compliance is even possible. Based on a survey of information gathered from members of AGC regarding this proposed rule, AGC believes it would be extremely difficult, if at all possible, for construction contractors to comply with the requirements of this rule due to the unique nature of the construction industry; therefore, AGC kindly asks OFCCP to exempt the construction industry from the requirements, or at minimum, exempt the construction industry from certain aspects of the rule, should a final rule be implemented.

If OFCCP decides to implement this rule, AGC believes the construction industry should be exempted for the following reasons:

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

When issuing the regulations implementing Executive Order 11246 (41 CFR 60-4), OFCCP recognized that it did not make sense to require construction contractors to meet the same affirmative action requirements of other contractors, since work in the construction industry is typically project-based, transitory, and seasonal. The need for the number of people in each job category varies from day to day, not to mention from project to project. During construction projects, union hiring halls that assign construction workers to various job sites may replace workers as often as daily. Workers directly employed by the contractor often relocate to another project for the same or a different employer, depending on labor needs, once a project is complete. This alone would make it extremely difficult for construction contractors to track statistical data and ensure the accuracy of such data. In short, construction contractors would not be able to provide valid and reliable data without undue burden, if at all.

2. The construction industry is a unique industry that is filled with safety-sensitive jobs that are very physical in nature. Because of this, the decision to hire or promote should be made on a case-by-case basis based on the individual's ability to perform the essential functions of a particular job safely, with or without a reasonable accommodation.

Construction work is typically performed outdoors on various formats of terrain and in various climates, each of which is uncontrollable by the employer. The possibility exists of working in extreme temperatures or during various types of precipitation, to which an individual with a disability might have a difficult time adapting. In addition, as work is performed on a jobsite, the jobsite itself perpetually changes as the project progresses. For some individuals with disabilities, the ever-changing environment will be challenging to adapt to, if it is accessible at

all. For example, an individual who is visually-impaired or has trouble walking or balancing may become familiar with a particular path that easily travelled on one day, but replaced by construction materials the next, and ultimately replaced by a wall, pillar or other part of the finished construction project.

Typically, construction workers need to be physically well-balanced and able to walk, lift and climb. For example, a person confined to a wheelchair may not be able to perform the job functions of a laborer because he or she may not be able to carry materials around a job site, even if a reasonable accommodation was considered.

Regarding safety, a construction company has the obligation to protect both its workers and the public while working on a construction project. AGC and AGC-member firms are strongly committed to this obligation. As a result, because of the physical tasks required, dangers presented, and safety regulations that must be followed in many construction craft positions, many disabled individuals are not qualified to perform the essential functions of the job with or without a reasonable accommodation. For example, some disabilities may hinder a worker from balancing appropriately while constructing a high-rise building. While AGC's members don't stereotype and assume that individuals with disabilities cannot perform the functions of *any* job, the reality is that there are fewer qualified individuals with disabilities in construction.

The law recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace, and it permits employers to establish qualification standards that exclude individuals who pose a significant risk of substantial harm to the health or safety of the individual or of others, if that risk cannot be eliminated by reasonable accommodation. Adding additional equipment to the existing heavy machinery and equipment located throughout a construction job site may pose a significant danger to the disabled person, other workers and the public. While construction employers can, should, and do recruit and hire qualified individuals with disabilities, they must be able to consider the extent of a person's disability and whether or not it will affect the person's ability to safely perform the essential functions of the job on a case-by-case basis.

3. The construction industry, unlike other industries, has been particularly hard hit from the economic recession, falling into the recession a year and a half before the overall economy with delayed emergence.

Despite a recent modest upturn in construction employment, payroll employment in January 2012 was nearly 2.2 million, or 28% below the peak in 2006, and unemployment in the sector remains deplorably high. The industry's unemployment rate in January 2012 was 17.7%, not seasonally adjusted—the highest of any industry and double the overall unemployment rate, according to data the Bureau of Labor Statistics released on February 3.

Although demand for private nonresidential and multifamily construction has revived modestly, the outlook for public construction is grim as agencies at all levels of government continue to cut construction spending. As the demand for construction services has plummeted, so, of course,

has the demand for construction workers. Accordingly, federal construction contractors, on the whole, are not in a position to hire workers these days and, when they are, fairness and business needs dictate giving priority to unemployed workers who have previous experience and training in the types of jobs being filled.

In addition to reducing the number of construction workers, construction companies have also had to reduce HR and administrative staff, making it even more difficult to comply with these complex regulations. A survey conducted recently by AGC on the impact of this proposed rule indicated that 85% of companies have two or fewer employees devoted to HR matters company-wide. Of the 85%, 15% of the companies do not have any employees specifically devoted to handling HR matters. The survey also resulted in comments by several respondents stating that attempting to comply with the requirements of the proposed rule would require them to hire an additional full-time staff member specifically to handle these issues or spend thousands of dollars on HR consultants, medical experts and legal counsel – an expense that is just not affordable during these strained economic times. As a result, even well-intentioned construction companies that are model federal contractors would find it extremely time-consuming and financially burdensome to implement the changes required by this proposed rule.

4. The construction industry, unlike many other industries, mostly consists of small, family-owned businesses with multiple establishments.

Throughout the proposed rule, OFCCP uses “contractor” and “contractor establishment” interchangeably. This can be misleading when the proposal is not read in its entirety. In parts of the proposal, when OFCCP calculates the estimated time it would take to comply, “per contractor” is used which somewhat minimizes the time and cost burden to contractors. However, when establishing the specific requirements for compliance of the proposed rule, OFCCP uses “per contractor establishment,” to make the point that contractors must meet the requirements of the proposal for *each contractor establishment*. For example, OFCCP estimates that it will take 5.5 hours “per contractor” to establish one new linkage agreement without OFCCP’s assistance. The proposed rule suggests that OFCCP will require each “contractor establishment” to establish and maintain a minimum of three linkage agreements. Therefore, if one contractor has 50 contractor establishments, that will mean a total administrative burden of 825 hours, according to OFCCP’s estimate of 5.5 hours per agreement, that will be required to establish three linkage agreements for each of the 50 contractor establishments. (*50 contractor establishments x 5.5 hours x 3 agreements = 825 total hours*)

While the majority of AGC’s members are small businesses, many still have a significant number of establishments, which is customary throughout the construction industry. Based on results of the same survey of AGC members regarding the proposed rule, more than 50% of respondents have between 11 and 99 contractor establishments, nationwide, including construction jobsites. Typically, there is only one office location, if any. In a comment letter submitted to OFCCP regarding this proposed rule, one of AGC’s larger member-companies, Kiewit Corporation, expressed that it has more than 900 establishments. These numbers represent the number of contractor establishments even in these poor economic times. When the

economy improves and the demand for construction increases, the number of establishments will surely increase as well.

5. In the construction industry, most HR-related activities occur on the job site (a.k.a. in the field) by employees who are construction workers tasked with supervising the work being performed, not HR professionals.

While it may be easier to comply with the requirements of this proposed rule in an office environment, compliance in a construction environment would be most difficult to accomplish, if at all possible. Construction job sites typically are not technologically equipped for administrative purposes, and electronic equipment that is available is usually reserved to facilitate the construction work being performed. Project managers who are responsible for supervising the work being done on the construction project, while sometimes working as skilled workers themselves, typically handle any basic new-hire paperwork, such as completing the I-9 form. Creating and maintaining the proposed required number of linkage agreements and managing the proposed comprehensive reasonable accommodation process would be overly burdensome to a working project manager who already carries a heavy workload and who has not had sophisticated HR training.

Unique Nature of the Construction Industry as it Relates to the Specific Requirements of the Proposed Rule

In addition to the general aspects of the construction industry that make it unique and that dictate the need for an industry exemption from the rule, AGC would like to respond to OFCCP's request for feedback regarding specific requirements of the proposed rule.

Applicant Tracking and Other Data Collection and Recordkeeping Requirements

If implemented, the proposed rule would require covered contractors to maintain certain data related to applicants, new hires and employees, including the number of referrals received from organizations that aspire to find employment for individuals with disabilities, even before the applicants are considered qualified to perform the essential functions of the job. As the construction industry continues to struggle with record unemployment, the ratio of qualified applicants to job openings has significantly increased. For example, a respondent to AGC's survey stated that for the approximately 300 job openings the construction firm had in 2011, it yielded approximately 5000 applications. This is just one example. In addition, not all applicants are qualified to perform the essential functions of a job, and of those who are, they may choose not to self-identify as disabled, resulting in the submission of data that would be highly unreliable.

If implemented, AGC again recommends that the construction industry be exempted from meeting these data collection and recordkeeping requirements for the reasons listed below:

- Specifically, unlike work performed by service and supply contractors, once a construction project is complete, workers often relocate to another project for the same or

a different employer, depending on labor needs. This alone would make it extremely difficult for construction contractors to track statistical data and ensure the accuracy of such data. In addition, construction contractors could collect such data, but the data may significantly change as early as the next day because workers often move around to other projects or when workers are provided by union hiring halls, the workforce itself may change.

- Applicants who apply for construction trade jobs often lack the ability or desire to apply for work by using a company's electronic centralized hiring system or by travelling to the company's headquarters office where such data may be more accurately tracked. In construction, because a company may perform work in many different states and/or localities within a particular region, it may be to the benefit of the applicant to apply for work directly on the job site.

If a rule requiring construction contractors to track statistical data is implemented, construction contractors would be performing statistical analyses continuously because the workforce would be forever changing. Therefore, OFCCP's estimate of 60 minutes per contractor to perform a data collection analysis is very unrealistic for construction contractors – first, considering the number of contractor establishments a contractor may have, and second, because this analysis would be required daily, as the workforce may change daily. Also, depending on the date chosen to perform the analysis, construction work may be in or out of season. While the data can be collected, the numbers would be meaningless as the construction workforce changes with each project or even with each phase of a project. In short, construction contractors would not be able to provide valid and reliable data without undue burden, if at all.

There are several references throughout the proposed rule that would require covered contractors to maintain the data collected for a period of five years. Employers are required to comply with the recordkeeping requirements of other OFCCP regulations for a period of just two years. Creating a separate recordkeeping requirement for information solely pertaining to this proposed rule would invite confusion among contractors and create pitfalls for non-compliance, for even the most well-intentioned federal contractors, without any reasoned basis for treating individuals with disabilities differently from other protected classes. If implemented, AGC recommends that OFCCP keep the recordkeeping requirements for this proposed rule at two years, as with other regulations enforced by OFCCP.

Invitation for Individuals with Disabilities to Self-Identify Pre-Offer

As mentioned above, hiring in construction is typically handled at individual job sites, not at a headquarters office or electronically. Often, available construction workers “walk up” to the job site inquiring about work opportunities and with the number of potential job sites a construction company may have at any given time, it would be necessary for construction companies to revise and make available to each job site updated hard copies of applicant flow logs in order to comply with this proposed rule, which would not only be an administrative burden for construction

employers, but also a financial and environmental burden for construction companies as they are more fiscally conscious and strive to become more environmentally friendly.

In addition, federal contractors are required to invite all job applicants to voluntarily and confidentially identify their race and gender pre-offer; however, unlike with race or gender self-identification, when a person self-identifies as an individual with a disability, there is an additional burden on employers to evaluate each response and conduct an individual analysis of the applicant's ability to perform the job, perform the job safely, and consider the accommodation requested.

For individuals with disabilities, disclosure may be very personal. Individuals with disabilities may be less willing to self-identify pre-offer because of the stigma that may have previously been associated with being disabled. For many, it may result from a fear that they would not be hired. Also, with the adoption of the definition of disability from the Americans with Disabilities Act Amendments Act (ADAAA), many applicants may not be aware that they have a disability, without a pre-established list of covered disabilities from which to choose. So, while there would be an extra burden on employers – with administrative staff already overwhelmed and thinly stretched – to do additional analyses when an applicant self-identifies as having a disability, an added burden would also rest on the applicant who must choose whether or not to self-identify. It is already difficult for contractors to get applicants to self-identify as a member of any protected class in general, so the new burden for contractors would be to encourage applicants to self-identify as an individual for tracking that is *required*, and *before* they are even determined to be qualified for the job. If the applicant chooses not to self-identify, the data may become unreliable because it would be provided inconsistently and therefore may erroneously look like non-compliance.

Furthermore, the requirement to obtain disability status pre-offer seems contradictory to the cause for which it is being required. For example, how can a person's status as an individual with a disability be used for affirmative action purposes if it cannot be used by hiring managers in the decision-making process? Also, since the self-identification form that will be used is to be detachable from the application, once it is detached, how is the hiring manager supposed to determine which of the qualified applicants has the disability for affirmative action purposes? If an individual who has self-identified as having a disability has been denied a position, how is the hiring manager to know which applicant requires a response letter or consideration for a reasonable accommodation? It is the decision-maker who will also initially be responsible for analyzing the ability of the company to provide the requested reasonable accommodation, therefore, the challenge lies in keeping the identification information away from the hiring manager, who will in fact, need the information for affirmative action purposes.

During OFCCP's recent webinar on the proposed rule, OFCCP stated that the Equal Employment Opportunity Commission allows pre-offer questions regarding an individual's status as having a disability if it is for affirmative action purposes or when it is required by another federal law or regulation. While it appears, based on this information, that OFCCP might have a right to do this, is it the right thing to do? Implementing this requirement would be invasive into the lives of people with disabilities, inviting them to give personal information that

may be irrelevant to the requirements of the job. Changing the Section 503 regulations to require contractors to invite all applicants to self-identify if they have a disability prior to receiving an offer of employment would be counterproductive and would discriminate against the very people the law is trying to protect.

Invitation for Employees to Self-Identify as Having a Disability Annually

The proposed rule, if implemented, would require contractors to anonymously survey all employees annually, re-inviting them to self-identify as having a disability. OFCCP estimates that it will take employers five minutes to conduct such a survey. AGC believes that any employee survey that requests such private information would produce inquiries from employees that would have to be addressed individually, due to the private nature of the survey request. In addition, such a survey would have to be conducted at each job site, then submitted to headquarters for analysis. Therefore, it is AGC's belief that five minutes is grossly underestimated.

As mentioned earlier, work in the construction industry is project-based, transitory or often-seasonal. Once a construction project is complete, workers often relocate to another project for the same or a different employer, depending on labor needs. Depending on the date chosen to collect this data, construction work may be in or out of season or between projects. In short, construction contractors would not be able to provide meaningful, reliable data regarding the disability status of their employees obtained via an annual survey.

Job Postings and Linkage Agreements with Recruitment Sources

The proposed rule would also require each contractor establishment to have "linkage agreements" with three organizations. Again, a typical construction company may be working on several federal construction projects at one particular time throughout the country. For example, a company with 15 federal projects may be required to sign and follow-through with the requirements, including formal meetings, of up to 45 linkage agreements. Since the requirement to comply with OFCCP's regulations is company-wide, it is unclear if the requirement to establish these agreements, among other parts of the regulations, would apply company-wide as well, exponentially increasing the administrative and cost burden for federal contractors who also perform private work. This requirement would be extremely burdensome both administratively and financially on any construction company, large or small.

Furthermore, in the construction industry, a job site is typically *not* staffed with an HR professional, leaving the administrative and HR-related tasks to be conducted by a project supervisor. The requirement to establish and maintain three linkage agreements with external organizations will be overly burdensome on an already very busy project supervisor.

Training Requirements

The proposed rule would require covered contractors to host annual training programs with employees, including a thorough discussion during new hire orientations, the company's obligations to individuals with disabilities. AGC believes it is unnecessary to separate these individuals from other protected groups because of the appearance of preferential treatment over the other groups and the cost associated with providing such training throughout the construction industry.

Currently, OFCCP does not require special training to educate employees on the hiring and treatment of any other group, such as women, minorities, veterans, immigrants and others. Therefore, elevating the hiring and training process for individuals with disabilities could potentially be at the expense of other protected groups, ultimately having a negative effect on many populations OFCCP seeks to protect.

AGC also appreciates OFCCP's offer to create a training program to be used for this purpose in an effort to reduce the time and cost burden on employers for providing such training. However, OFCCP has not considered the cost associated with planning and coordinating each training program for each office, and consequently, each and every construction job site where federal work is being performed. For example, OFCCP estimates that there is a one-time administrative burden of 40 minutes and a recurring administrative burden of 20 minutes for contractors to provide training for those involved with recruitment, screening, hiring, promotion and related processes. 40% of respondents to AGC's member survey estimated that it would take between 30 minutes and an hour to conduct such a training program, while an additional 48% estimated that it would take more than one hour. Because such training would have to be performed on the job site, there may be additional costs associated with providing facilities along with the appropriate resources to carry out each training program. Without including these additional costs in the calculation, for a contractor with 50 job sites, it is estimated that it would take a minimum of 1500 hours and, in some cases, more than 2500 hours for each company to comply with this one requirement of the proposed rule. Regarding the requirement to train all employees on the subject, 57% of survey respondents estimated that it would take more than 30 minutes to conduct the training (excluding preparation, administrative and travel costs) compared to OFCCP's estimate of a one-time 20-minute burden and a recurring five-minute burden.

According to the Bureau of Labor Statistics' most recent report of labor force characteristics by race and ethnicity, Hispanics represent 44% of construction laborers in the United States. AGC is concerned that many of these workers may lack proficiency in English and as a result, covered contractors would need to provide the proposed training programs in both English and Spanish, in addition to providing a Spanish-speaking trainer. Costs for providing training in both languages, as well as travel to and from each job site, would be an enormous financial and administrative burden on construction contractors, particularly considering the number of job sites each company might have.

It is also important for OFCCP to understand that many construction employers already provide diversity training programs that include *all* protected groups, using products such as AGC's "Crossing the Line: What Can Create a Hostile Work Environment" video.

Annual Evaluation of Job Descriptions

The proposed rule would require covered contractors to conduct an annual analysis of all job descriptions, including details about physical and mental job requirements, along with statements regarding why the requirements are necessary to perform each job. In addition, covered contractors would be required to describe and maintain information regarding how the review was conducted, the results of the review, and any actions taken in response. OFCCP estimates that 90% of contractors would have no changes to their job descriptions in a given year and, for those that do need updating, it would take only 0.5 minutes (30 seconds) per job title to update and an additional one minute per job qualification to save the information for recordkeeping purposes. AGC respectfully disagrees with the estimation.

For employers who seriously undertake this process, it takes time to do so in a thoughtful way. It is likely that all job descriptions selected for changes would have to be thoroughly reviewed and edited by the human resources department, if such a department exists, with additional conference with the company's legal department or outside counsel. The scheduling and performance of interviews with both workers and their supervisors regarding each worker's job responsibilities might also be needed. This process would clearly take more than 30 seconds. In fact, the HR professional of one of our member-companies explained that his company's process of reviewing job descriptions periodically simply as a "best practice" takes well over a year to complete.

Requirement to Meet a National Utilization Goal and Sub-Goal

The proposed rule would require covered contractors to meet a national utilization goal for hiring individuals with disabilities for each job category. In general, while a goal may be achievable for office personnel, because the construction industry contains very safety-sensitive jobs that are physical in nature, neither a general utilization goal nor a sub-goal for individuals with severe disabilities will work for construction employees working on a job site.

AGC agrees that the ADA's broad definition of disability may make compliance with the proposed 7% utilization goal obtainable, assuming individuals know they have a disability and will self-identify as having one. This will greatly increase the number of individuals with disabilities who are covered by OFCCP's mandate. Unfortunately, that will also mean employers will spend valuable administrative time inviting applicants and workers to self-identify as having disabilities such as high blood pressure and diabetes, whether or not an accommodation is needed. Is this broad group of individuals the group that OFCCP is intending to help? Given the vast numbers of those who are now disabled by this definition, it would be an

enormous burden to implement all of the affirmative action requirements proposed in this rule for these individuals.

Historically, regarding compliance with the laws enforced by OFCCP, goals are often misunderstood by contractors to be quotas, leaving contractors to feel the need to meet such data requirements by hiring individuals with disabilities who may not be as qualified as other applicants in order to meet the goal. OFCCP says the goal is neither a quota nor a hiring ceiling and failure to attain the goal does not constitute a violation of the regulations, however, OFCCP also says that the primary indicator of effectiveness is whether qualified individuals with disabilities have been hired. Pushing employers to meet a utilization goal for hiring individuals with disabilities may have adverse consequences and may put too much pressure on applicants and employees to feel they must disclose a disability that they would prefer to remain private.

Furthermore, OFCCP currently requires construction employers to meet utilization goals regarding minorities and women, and OFCCP is considering such goals for the utilization of veterans as well. OFCCP should take into consideration that due to the current economic situation, there is only a limited number of available jobs to go around. For small companies with few job opportunities and low turnover, has OFCCP considered how they should remain in compliance with each of these separate utilization goals?

Regarding the requirement to meet the goals “per job group”, if applicants and employees are self-identifying as having a disability anonymously, has OFCCP considered how the employer should know which employee to put into which job category in order to determine if it is meeting the goal? Often employees do not know which category they might fit. Also, for small job groups or groups that consist of only one person, the potential for discrimination claims exist if the employee is accidentally identified. OFCCP must carefully consider the fundamentals of what the agency is asking federal contractors to accomplish before a final rule is implemented.

Inclusion of the Equal Opportunity Clause, Verbatim, in All Federal Contracts

AGC commends OFCCP’s efforts to ensure that subcontractors are informed of their affirmative action obligations as federal subcontractors; however, it should first be the responsibility of the contracting agency to insert the equal opportunity clause into the contract, verbatim. This responsibility should not begin with the prime contractor. OFCCP should, first, work to make this a requirement of federal contracting agencies. Furthermore, to minimize the additional burden of adding this language to existing contracts, OFCCP should select a future date for compliance, after implementation of a final rule, by which contractors will need to comply with this requirement for agreements entered into in the future. Again, the construction industry is different in that multiple subcontracts are required to complete a construction project, and there are many projects occurring simultaneously across the country. The requirement to edit and redistribute each contract would be extremely burdensome.

Reasonable Accommodation Requirements

The proposed rule would require contractors to establish a written accommodation request policy that must be distributed to all employees, meet specific requirements and require contractors to respond, in writing, to the requestor within five to ten business days if no medical documentation is necessary. This requirement does not take into consideration that every employer is different, and in the construction industry, each project and each job site is different. For these reasons, how should a construction contractor respond when a reasonable accommodation that might work one day does not work the next, due to the ever-changing job site environment?

Furthermore, this requirement would require construction contractors to establish a separate policy for each job site, which is unrealistic for many companies. In addition, this will mean that construction job site supervisors at each job site, who are often construction craft workers themselves, would be required to monitor this very sensitive and delicate process. Construction job site supervisors should not have to manage this process. It would also be extremely difficult to comply with the timing of the communication requirements of the proposed rule because it will take time to communicate with a headquarters office and gather management together to discuss the possibilities and costs for providing a reasonable accommodation.

Generally speaking, OFCCP has failed to consider that contractors are already handling this process, without being mandated to do so in a particular way. For example, during a recent conference call to discuss the effects of this proposed rule on the industry, an HR professional of one of our member-companies shared a story of an applicant applying for a construction trade position at a job site. After the applicant was hired, the worker self-disclosed a disability which caused the worker to occasionally lose consciousness. Due to the qualifications of the job, which required the operation of machinery, it was necessary for the contractor to consult with medical experts regarding the candidate's ability to perform the requirements of the job and perform them safely, with or without a reasonable accommodation, and if so, with what type of accommodation. This contractor thoroughly completed this process, while the worker was working, without being mandated to do so in a particular way within a particular time frame.

Effect on Small Construction Contractors

Of major concern to construction contractors is the potential for these proposed regulations to apply company-wide, particularly for contractors that perform both public and private work. If this is OFCCP's intent, the added cost for compliance would render contractors unable to compete for private construction contracts with contractors who do not perform federal work. Private contractors that are interested in becoming federal contractors would be forced to do so exclusively, therefore inhibiting the growth and development of small construction contractors. In addition, placing such a burden on small contractors, in general, would discourage small businesses from entering into the federal market, making it possible for only large construction companies with well-established resources to comply with these proposed regulations. Of AGC's 32,000 member-companies, most are small and closely held businesses, and these

complex and cost-intensive regulations would increase costs and reduce the competition of doing federal work, particularly for small construction companies (including minority and disadvantaged business enterprises).

Cost of Compliance

OFCCP estimates that the total cost required to comply with the proposed rule is \$473 per contractor establishment. AGC believes that this estimate is grossly underestimated. For contractors with double- and triple-digit establishments, even this low amount will be multiplied to thousands of dollars for compliance. Complying with these proposed requirements will have a huge impact on the administrative costs that will increase the cost of federal contracting, ultimately having a negative effect on tax payers. Has OFCCP considered that tax payers are the ultimate owners of these projects and bearer of all costs when it comes to federal projects? In calculating the cost burden, did OFCCP consider the increased cost for conducting private work as well, since contractors may be required to apply the requirements of this proposed rule company-wide? Contractors will be faced with the decision to abandon federal contracts or attempt to comply with the extensive, enormously expensive, and overly exacting requirements proposed by OFCCP.

Construction Industry Efforts to Promote Equality and Diversity

AGC and other construction industry organizations support and encourage compliance with OFCCP's overall mission of ensuring that federal contractors offer *all* individuals an equal opportunity for employment, without regard to race, color, religion, sex, national origin, status as disabled or status as a protected veteran. Among the many efforts to recruit and retain members of all protected classes, as well as ensure a safe workplace for all construction employees, AGC of America has:

- Provided training and reference materials to construction professionals on affirmative action requirements, preventing on-the-job harassment of any type, and creating a model hiring program;
- Hosted a library of information on AGC's website which includes links to OFCCP's Technical Assistance Guide for Construction Contractors and all OFCCP-hosted compliance assisted webinars and national events;
- Developed and conducted AGC's Project Manager Development Program, Supervisory Training Program and Project Manager Series, all of which offer modules on ethics, leadership, working in teams, team building, and motivation that promote the values of skill, integrity, and responsibility espoused by AGC and its member firms;

- Hosted a session at AGC's 2009 HR Professionals Conference where a representative from OFCCP presented on the affirmative action requirements of construction contractors;
- Coordinated a Federal Contracting Compliance Construction HR Workshop for AGC's 2011 and 2012 HR Professionals Conferences that feature sessions on complying with the affirmative action requirements of construction contractors;
- Conducted a live webinar series on OFCCP compliance techniques where two OFCCP representatives were speakers, and made a recording of the event available to the public;
- Published AGC's *Affirmative Action Manual for Construction*, a book that covers the affirmative action requirements that are unique to contractors working under federally funded and federally assisted construction contracts;
- Conducted a live audio conference on compliance with the OFCCP's "Internet applicant" rule and the EEOC's revised EEO-1 reporting requirements, and made a recording of the event available to the public; and
- Promoted all OFCCP-sponsored compliance assistance webinars and teleconferences to the HR professionals of AGC's member firms.

In addition, many of our member firms that are federal contractors voluntarily or in accordance with other federal, state or local laws:

- Promote diversity throughout the company by making a concerted effort to seek out candidates from all protected classes;
- Dedicate an Affirmative Action Officer to insure that no protected classes of workers are discriminated against;
- Provide management and supervisory training to ensure that candidates and workers who are members of protected classes are not discriminated against;
- Review job descriptions periodically to make sure that all physical and mental requirements are of a business necessity;
- Educate and require subcontractors and vendors to comply with the company's anti-discrimination policies.

Disregard of Comments Submitted Regarding OFCCP's Almost Identical Proposed Rule Regarding Veterans

AGC was deeply disappointed when the proposed rule regarding individuals with disabilities was published before a final rule regarding protected veterans was issued. The concern stems from

the similarities of the rules and OFCCP's apparent disregard for the comments submitted on behalf of the industry stating the obstacles for compliance.

The proposed rule regarding individuals with disabilities states throughout that OFCCP concludes that "no additional contractor burden exists" for compliance with most of the proposed requirements because OFCCP has "counted these hours in its Notice of Proposed Rulemaking revising regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act." This conclusion is premature and demonstrates a lack of regard for the purposes of the public comment period. OFCCP appears to be relying on its own preliminary findings without consideration of the comments submitted on the impact that the proposed Veterans rule would have on the contractor community and without deference for the full regulatory process. AGC would like to believe that OFCCP cares about contractor burdens and the regulatory process more than this.

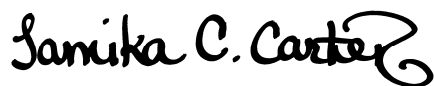
Conclusion

AGC appreciates OFCCP's efforts to help individuals with disabilities become gainfully employed, but AGC believes that this proposed rule would fail to meet those objectives by overshadowing OFCCP's overall mission of promoting equal opportunity employment for all people. There are only so many jobs the economy can create and the protected groups that OFCCP advocates for would ultimately end up in competition with each other. The bottom line is that you can't get more equal than equal; therefore, individuals with disabilities should have the same opportunities to work as other protected groups such as minorities, women, and veterans – not be placed on a pedestal above them. If implemented, OFCCP needs to consider that the requirements of this proposed rule may have an overall negative effect on the populations it is trying to serve while also diverting resources from job creation to regulatory reporting.

AGC recommends that OFCCP make hiring easier for employers in order to meet the agency's goals. However, if OFCCP decides to implement this proposed rule despite AGC's concerns, AGC urges the agency to exempt the construction industry from the new requirements due to the unique nature of the industry.

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

Sincerely,



Tamika C. Carter
Director, Construction HR