August 27, 2021

Amy DeBisschop
Director, Division of Regulations Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor Frances Perkins Building
Room S-3502
200 Constitution Ave., NW
Washington, DC 20210

RE: RIN 1235-AA41 — AGC Comments on Increasing the Minimum Wage for Federal Contractors

Ms. DeBisschop,

On behalf of the Associated General Contractors of America (AGC), thank you for the opportunity to submit the following comments on the Wage and Hour Division's (WHD) notice of Proposed Rulemaking on "Increasing the Minimum Wage for Federal Contractors" (Proposed Rule). For background, AGC is the leading association in the construction industry representing more than 27,000 firms, including union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, tunnels, airports, water infrastructure facilities, locks, dams, defense facilities, multi-family housing projects, and more.

While the Proposed Rule will apply to many construction firms, very few construction workers wages would be affected due to the fact that the average construction salary is already well above the proposed increased wage level.[1] However, there are a few areas of the country where the prevailing wage rates are lower than the proposed increase in minimum wage of $15. AGC does not advocate for repeal of the Davis-Bacon Act or its related Acts, but does seek sensible reforms. Construction contractors currently provide direct pathways to quality middle-class jobs and living wage careers.

Despite the ongoing economic recovery, construction workforce shortages continue to persist around the nation. The fact remains that not enough young people currently choose construction as their first-choice career, as our industry faces significant hurdles within the secondary and higher education systems regarding their role in providing career and technical training programing and connecting students to careers beyond those that require a four-year college degree.

Nevertheless, the new labor dynamic has created a unique opportunity for the construction industry to attract a significant portion of the newly unemployed into high-paying construction careers with the

[1] U.S. Bureau of Labor Statistics. Occupational Employment and Wages, May 2020. Retrieved August 25, 2021, from https://www.bls.gov/oes/current/oes472061.htm.

opportunity for advancement. The good news is Congress can help address this problem by passing legislation like the bipartisan JOBS Act of 2021 (H.R. 2037/S. 864). And to the extent it does not, AGC looks forward to working with the U.S. Department of Labor and this Administration to do help connect young people and the newly unemployed with careers in construction.

For the reasons stated above, the vast majority of construction contracts will be unaffected by the new wage standard, however the Proposed Rule should be clarified for the few contraction contracts that will be affected.

Retain Consistency in Requirements

AGC appreciates the WHD for generally following the provisions of the previous rulemaking increasing the minimum wage for federal contractors and supports the retention of the existing guidelines and definitions. Clarity and consistency are necessary for contractors to easily come into compliance with the rulemaking, plan for the future of their businesses, and deliver quality fiscally accurate, and timely projects for federal owners.

Federal construction contracting—in general—is a challenging marketplace. Businesses participating in the federal arena must comply with numerous regulations, reporting requirements, security clearances, small business participation plans, cybersecurity requirements, and so on. It is important to ensure that federal regulations do not create unnecessary barriers for businesses, especially for small businesses with limited resources. Transparency and clear requirements are important to providing for free and open competition to our nation's businesses and accountability to the American people. However, unpredictability and vague requirements will undermine any infrastructure investments and will preclude many businesses from participating in the federal market.

It is important to note that the federal construction industry has long been a well-regulated industry, ensuring that workers are safe, taxpayer dollars are properly spent, and the environment is protected. Businesses of all types—especially small businesses—are confronted with an unparalleled crisis that threatens them both financially as well as the health, safety, and welfare of themselves and employees. These businesses should not be burden or distracted with vague regulations and requirements, especially during current crisis brought about by the COVID-19 pandemic.

It is AGC's understanding that in order for a contract to be covered by the Proposed Rule, the contract must qualify as one of the specifically enumerated types of contracts set forth in the Proposed Rule. In addition, under such contracts or contract-like instruments, the wages of workers which are governed by the Fair Labor Standards Act (FLSA), the Service Contract Act (SCA) and the Davis-Bacon Act (DBA) are impacted. Independently, each of these three laws is extremely complex. The level of complexity is multiplied when there are overlapping requirements for compliance. Like other industries, there are times when construction employers must navigate the ins-and-outs of all three laws simultaneously, in addition to state and local wage and other laws.

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

Institute a Safe Harbor for Compliant Prime Contractors and Higher-Tier Subcontractors

The Proposed Rule explains that contractors and subcontractors must include the Proposed Rule in its contract clause with lower-tiered subcontracts. Depending on the size, a federal construction contract could include numerous subcontractors – dozens even. It is inequitable to hold the prime or any higher-tier subcontractor responsible for all tiers of subcontractors' compliance with the requirement to flow down the contract clause. Likewise, it is inequitable to hold such contractors responsible for all lower-tier subcontractors' noncompliance with the minimum wage requirements, particularly when the higher-tier contractor has complied with the language flow-down requirement.

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

Clarify Requirements on Multi-Year Contracts and Require Adjustments Clauses

WHD should strive to ensure that the roles and responsibilities of contractors and federal agencies are clearly articulated during the pre-contract award phase of the procurement process, and are not subject to change mid-performance. This will enable contractors to better understand the costs, risks, and responsibilities, leading to fewer claims and change orders that could cause project delays or cost overruns. For that reason, DBA wage determinations in effect at the time of contract award, and that are incorporated into a contract, generally remain in effect for the duration of the contract regardless of whether new wage determinations are issued while the contract is being performed.

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

Further, it is unclear how the Proposed Rule applies to "indefinite delivery, indefinite quantity" (IDIQ) contracts that have already been awarded. IDIQ contracts can last many years in construction. These types of contract vehicles allow for agency issuance of contracts—in the form of task orders—stemming from the original IDIQ contract from a limited pool of contractors. Consequently, the original IDIQ contract acts as a "master contract" that delineates the scope of a project and the responsibilities of the parties to the contract—the contractor and the federal government. The proposed rule clearly states that it would not impact contracts awarded before January 1, 2022. As such,

IDIQ contracts awarded before that date would not be impacted. However, AGC seeks clarification as to whether the task order for contracts issued after January 1, 2022, under that IDIQ contract fall within the mandate of the rule. An example such as this could have significant impacts on price for contractors at all tiers of the contract. If a 2022 task order contracts issued under pre-2022 IDIQ contracts fall under this rule, WHD should explicitly state so in the final rule. Further, if such is the case, for reasons stated above, task orders should include an adjustments clause related to any increase of the minimum wage rate. This would, again, be an issue in future years where IDIQ contracts are awarded and the minimum wage is, perhaps, increased multiple times. Otherwise, confusion will exist not only for contractors but also for federal contracting agencies, which could lead to litigation and project delays. Such an adjustments clause would provide the flexibility for both federal agencies and contractors to deal with any price increases stemming directly from this federal action.

The Proposed Rule gives the example of GSA Schedules and states that "…agencies are strongly encouraged to bilaterally modify existing contracts, as appropriate, to include the minimum wage requirements of this rule even when such contracts are not otherwise considered to be a 'new contract' …" However, to avoid such issues, AGC recommends that WHD, in the present rulemaking, establish a mandatory clause that will allow for contract adjustments based on wage rate increases. Such an approach will reduce the risks associated with forecasting operational costs in the pre-award phase of federal construction projects as well as reduce confusion, delay, cost overruns, and possible litigation during the project delivery phase.

Additionally, the Proposed Rule states, "the language of the contract clause contained in appendix A requires contracting agencies, if appropriate, to ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023." AGC requests that WHD clarify what constitutes "if appropriate" and recommends that there be a provision in the contract to allow for cost adjustments based on potential minimum wage rate increases throughout the life of the contract. This type of general flexibility allowed of the contracting agencies would only add confusion to the federal contracting process, especially for those contractors who regularly bid on and provide work for various agencies. AGC advises the WHD to remove the term "if appropriate."

WHD Should Restrict Use of the Debarment Process

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

AGC is concerned that, as written, the Proposed Rule's debarment process could be instated for any and every violation, including innocent paperwork mistakes. The Proposed Rule allows the Secretary of Labor to debar for a period of up to three years any contractor found to have "disregarded its obligations to workers or subcontractors." The term "disregarded" could mandate a strict liability standard for violation of the rule; meaning that any and all violations of the rule would lead a contractor

to be considered for debarment. Such violations would include innocent mistakes that could be redressed without what would be a punitive use of debarment.

The Federal Acquisition Regulation (FAR) cautions that "[t]he existence of a cause for debarment. . . does not necessarily require that the contactor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision." FAR 9.406-1(a). As such, AGC recommends that WHD, at a minimum, include "knowingly or recklessly" in front of the term "disregard" throughout the section on debarment to help ensure that minor and inadvertent mistakes do not lead to debarment proceedings.

Conclusion

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

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

Sincerely,

James V. Christianson
Vice President, Government Relations