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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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August 15, 2016

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

Mr. Joseph B. Nye
Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Re: Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1) [RIN 3046-007]

Dear Mr. Nye:

On behalf of the Associated General Contractors of America (AGC), let me thank you for the opportunity to submit the following comments on the Equal Employment Opportunity Commission's (EEOC or "the agency") notice of submission for OMB review of the revised Employer Information Report (EEO-1). The report intends to collect data on employees' W-2 earnings and hours-worked. The EEOC's proposal was published in the *Federal Register* on February 1, 2016.

AGC is the leading association for the construction industry, representing more than 26,000 firms, including over 6,500 of America's leading general contractors and over 9,000 specialty contracting firms. In addition, more than 10,500 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. These firms regularly perform construction services for private owners as well as government agencies. Many are also small and closely held businesses.

The Agency's Collection of Wage and/or Hours-worked Data is Not Needed

Agency data show lack of need for collection of wage data

The EEOC's proposal references wage discrimination as the basis of the need to collect compensation data from employers in accordance with the EEO-1 report. AGC appreciates the EEOC's efforts to protect workers from possible wage discrimination. AGC also commends the EEOC's and the Office of Federal Contract Compliance Program's (OFCCP) effort to work inter-agency to create a process

that avoids employer redundancy. However, AGC does not believe new wage or hours-worked reporting and disclosure requirements for employers are necessary or reasonable.

The EEOC's own data support AGC's position that there is no need for the eradication of wage discrimination in construction because there is scant evidence that such discrimination exists. 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.

With regard to those federal construction contractors that would be covered, OFCCP data show that there is no need for this effort to combat wage discrimination in federal construction contracting, again, because there the administration has failed to show evidence that such discrimination exists. 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 proposal to revise the EEO-1 report to collect compensation data is a "solution in search of a problem."

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

Better Suited Tools Already Exist to Assist with Compensation Benchmarking

The proposal states that EEOC and OFCCP plan to "compare the firm's or establishment's data to aggregate industry data or metropolitan-area data." AGC believes the collection and analysis of compensation data for benchmarking purposes is not necessary because resources establishing such standards already exist. For example, wage determinations issued by the U.S. Department of Labor 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 the EEOC or OFCCP to subject contractors to the proposed new compensation data reporting requirement.

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 is 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.

Moreover, 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.

Since wage data will not provide value for national benchmarking purposes, AGC believes that the collection of compensation data for national benchmarking is unnecessary.

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

AGC does not believe the collection of compensation data in conjunction with data collected on the current EEO-1 report is necessary for the EEOC'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.

In these scenarios, employees performing the same or similar jobs will fall within a particular EEO-1 category but under different pay bands without an explanation for the difference. As a result, a review of the data could lead to an erroneous analysis by wage analysts.

Aggregate data are not useful or transparent, yet transparent data place employers' proprietary information at risk

Should this proposal be unnecessarily implemented, AGC would support and appreciates the agency's decision to use of the current EEO-1 form to collect additional data from employers as this form is already familiar to them. It is clear to AGC that the decision to use the EEO-1 form and its job categories was selected as a means of making the collection of such data less burdensome for employers. However, AGC struggles to understand the value and utility of data placed in such broad categories. With the use of broad job categories and wide pay bands, coupled with the release of only aggregate data, how will the public know what data are used to establish the summary data to be released by the either the EEOC or OFCCP? Theoretically, interested parties should be able to see raw data for the purposes of transparency, but that in itself creates privacy concerns for contractors – particularly small contractors – and their employees. Furthermore, the use of such broad job categories will result in data that are misleading and meaningless with regard to what the agencies are trying to accomplish with the revised form.

While having to choose between broad and narrow categories is a catch-22 for the reasons stated above, should be proposal be implemented, AGC prefers the use of the broad EEO-1 categories over a process that could increase already-taxing reporting requirements that employers face across a growing number of federal mandates.

The Collection of Hours-Worked Data is Overly Burdensome for Construction Employers and Should Not Be Required, Regardless of Worker FLSA Status

According to a survey of AGC members, 88% of respondents stated that the reporting of hours-worked data by pay band would be burdensome with nearly 40% stating it would be extremely burdensome to track hours-worked data for non-exempt employees – particularly due to the unique nature of the construction industry.

As previously mentioned, the construction industry is project based, transitory and often seasonal, which makes it difficult to collect and track hours-worked data in the way the EEOC suggests. Unlike work performed in other industries, 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 hours-worked 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.

Omit the Requirement to Report Hours-worked Data

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 and incredibly misleading. 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 hours-worked data for all workers be excluded from the required report because tracking hours-worked data for non-exempt construction workers is overly burdensome and mixing the data of exempt and non-exempt workers in each pay band – even if using a basis of 40 hours for exempt workers – will cause the data to be inaccurate and skewed.

Additional Considerations Should the Proposal be Unnecessarily Implemented

Use Box 5 W-2 Data Instead of Box 1 Data Along with Post-Annual Reporting

AGC supports and appreciates the agency’s thoughtfulness in choosing to use total W-2 earnings as the measure of pay for the purpose of completing the revised EEO-1 report as this method could minimize the reporting burden for employers. Additionally, AGC supports and appreciates the EEOC accepting its suggestion to implement a post-annual reporting date of March 31 – a date that occurs after W-2 earnings are calculated. However, the EEOC is proposing to use Box 1 of Form W-2 instead of Box 5.

Box 1 should not be used for employees’ annual earnings as it does not reflect the total amount of compensation paid to an employee. The wages in Box 1 are reduced by pre-tax options such as 401k contributions, pre-tax healthcare premiums, etc. For example, if Box 1 is used, an employee who chooses not to contribute to his or her retirement plan will reflect significantly higher earnings than one who contributes on a pre-tax basis. Additionally, if Box 1 is used, an employee who does not participate in the company’s health plan and therefore does not contribute to the health care premium because he or she may be covered by a spouse’s health plan will reflect significantly higher wages than one who does participate in the company-offered health plan.

While Box 3 is a better option than Box 1, Box 3 is capped at the maximum social security wage base which for 2015 and 2016 was \$118,500, and therefore it should not be used.

Box 5 is the best representation of an employee's earnings including retirement benefits but is reduced by pre-tax health care benefits.

Although none of the boxes on Form W-2 represent an employee's total compensation, it is a consistent method that can be used by all employers to provide wage information and should be the easiest for an employer to provide as it is already being provided for Form W-2 purposes.

Allow Construction Employers to Choose a Workforce Snapshot Period that Falls Between the Months of May and October

The EEOC is proposing to modify the "Workforce Snapshot Period" during which employers must identify the workforce that must be included on the EEO-1 report. If implemented, the EEOC will modify the snapshot period to include employment data for any one pay period between October 1 and December 31. Currently, the snapshot period must fall between July 1 and September 30. Because of the construction industry's project-based, transitory, and often seasonal workforce, the use of a snapshot period, in itself, is problematic because does not reflect the overall workforce of a construction company as it would for other companies. Therefore, if a snapshot period *must* be used, since construction work typically peaks during warm weather months, AGC recommends allowing construction employers to choose a workforce snapshot period that falls between the months of May and October to more accurately reflect the totality of a construction company's workforce.

Clearly Define "Contractor" on the Revised EEO-1 Form

For federal construction contractors, AGC supports and appreciates the agency's effort, in conjunction with OFCCP, to minimize the burden on federal and federally assisted construction employers by limiting the requirement to provide compensation data to only prime contractors and first-tier subcontractors with 100 or more employees. However, should the EEOC find it necessary for construction employers to submit the report, further clarification is needed on the revised form.

Specifically, AGC requests that language be inserted directly onto the revised form that boldly states that neither contractors with only federally assisted contracts nor federal subcontractors at the second tier or lower are required to submit compensation data if they have fewer than 100 employees. Failing to make this statement bold and clear will cause confusion for government contractors. It will also inadvertently increase the overall burden for compliance as those who are not required to complete the form will take the time and incur the expense to do so.

Take All Measures to Ensure Confidentiality Prior to the Release of a Revised EEO-1 Report


The proposal states that the EEOC intends to "re-examine the rules for testing statistical confidentiality for publishing aggregate data to make certain that tables with small cell-counts are not made public." AGC agrees that this practice must be completed. However, AGC recommends that the EEOC conduct

this analysis and subject the results of such analysis to public comment prior to implementing the use of the revised EEO-1 form. Additionally, to further mitigate the risks associated with providing transparent data, AGC urges the agency to allow employers to exclude workers from any EEO-1 job categories that result in fewer than ten workers, so that wages will not be identifiable to individual employees against the employees' will.

Conclusion

AGC appreciates the OMB's efforts to review the EEOC's proposal that is intended to protect workers from possible wage discrimination. However, AGC does not believe new compensation reporting requirements for construction employers are necessary or reasonable for the reasons stated in this letter. If implemented, AGC kindly asks the EEOC to consider the suggestions outlined herein.

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter". The signature is written in a cursive, flowing style with a large, decorative flourish at the end.

Tamika C. Carter
Director, Construction HR

cc: Janis C. Reyes, Assistant Chief Counsel
SBA Office of Advocacy
Janis.reyes@sba.gov