

MARK KNIGHT, President
ART DANIEL, Senior Vice President
B.E. STEWART, JR., Vice President
SCOTT WILLIAMS, Treasurer
STEPHEN E. SANDHERR, Chief Executive Officer
DAVID LUKENS, Chief Operating Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



April 1, 2016

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

Ms. Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission (EEOC)
131 M Street NE
Washington, DC 20507

Re: Proposed Revision of the Employer Information Report (EEO-1) [RIN 3046-0007]

Dear Ms. Wilson:

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 Equal Employment Opportunity Commission's (hereinafter "EEOC" or "the agency") information collection and comment request (hereinafter "proposal"). The proposal intends to revise the Employer Information Report (hereinafter "EEO-1") to collect data on employees' W-2 earnings and hours-worked. The proposal was published in the *Federal Register* on February 1, 2016.

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. 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 Data is Not Needed

Agency data show lack of need for collection of wage data

The 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 (hereinafter "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 no 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 the eradication of wage discrimination in federal construction contracting, again, because there is no 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 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.

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.

The EEOC's Collection of Hours-worked Data Is Not Needed and Should Not Be Considered

The proposal states that the revised EEO-1 report will collect the total number of hours worked by employees included in each EEO-1 pay band cell. While the EEOC specifically asked for employer input with respect to how to report hours-worked for salaried employees, no regard was taken with respect to how reporting would occur for *any* employees, regardless of overtime eligibility status. The proposed new EEO-1 report does not, at all, address hours worked for hourly *or* salaried employees. Therefore, it would be inappropriate for the agency to consider changes to a form that have not been evaluated by stakeholders for public comment.

As a result, AGC kindly asks the EEOC to withdraw consideration for including hours worked on the revised EEO-1 form until at such time it can provide a sample form for public review and comment showing how this information would be provided by employers and used by the EEOC.

If Re-evaluated at a Later Date, Hours-worked Data for Salaried Workers Should Be Excluded

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. If, at a later date, the inclusion of hours-worked is considered for a further revised EEO-1 report, AGC recommends that hours-worked data for salaried workers be excluded because most employers do not currently track the actual hours worked by such workers and adding this element of tracking will be difficult and burdensome for employers to implement and using a basis of 40 hours will cause the data to be inaccurate and skewed.

Additional Considerations Should the Proposal be Unnecessarily Implemented

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.

Change the EEO-1 Reporting Date to Allow for Post-Annual Reporting

Should this proposal be unnecessarily implemented, AGC would support 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. However, as the proposal states, W-2 data may not be routinely compiled until the end of the calendar year, and EEO-1 reports are due on September 30th. Assuming that most companies have a formal Human Resource Information System, the EEOC suggests an onerous method for calculating W-2 data for the September 30th reporting date. If the proposal is implemented, to ease the burden on construction employers, AGC kindly asks the EEOC to change its EEO-1 reporting data from September 30th of the current year to a post-annual reporting date, such as March 30th of the following year. Changing the reporting date will decrease the reporting burden significantly for employers while providing the EEOC with data that will not be subject to administrative error due to cumbersome manual calculations.

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. Not making 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 to do so. Additionally, by unconsciously submitting such information to the government, employers may unknowingly increase their risk for an unwarranted audit.

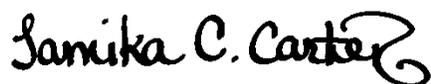
Take All Measures to Ensure Confidentiality Prior to the Release of a Revised EEO-1 Report

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 EEOC’s efforts 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,



Tamika C. Carter
Director, Construction HR

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