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

September 2, 2009

Denise M. Boucher
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N–5609
Washington, DC 20210
Submitted online at http://www.regulations.gov

RE: RIN 1215–AB70 - Notification of Employee Rights Under Federal Labor Laws

Dear Ms. Boucher:

On behalf of the Associated General Contractors of America ("AGC"), I thank you for the opportunity to submit comments on the proposed rule issued by the U.S. Department of Labor ("the Department") Office of Labor-Management Standards to implement Executive Order 13496 ("EO 13496").

AGC is the leading association in the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC is now the nation's largest and most diverse trade association in the commercial construction industry, representing more than 33,000 firms in nearly 100 chapters throughout the United States, and proudly representing both union and open-shop companies. AGC members include approximately 7,500 of general contractors, 12,500 specialty contractors, and 13,000 suppliers and service providers working in the building, highway, heavy, industrial, municipal utility, and virtually all other sectors of the construction industry. Many of these firms regularly perform construction services for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration, among other federal departments and agencies, and will be directly affected by the proposed rule.

AGC respectfully acknowledges President Obama's interest in relying on contractors whose employees are informed of their rights under federal labor laws but expresses the following concerns with the proposed rule assertedly intended to further that interest.

Verbatim Inclusion of the Employee Notice in the Contract

Section 471.2 of the proposed rule requires contracting agencies to include in all covered government contracts, subcontracts, and purchase orders the exact text of the employee notice clause set forth in paragraph 1 of proposed Appendix A to Subpart A of Part 471, which includes the complete text of the employee notice (also known as the "Secretary's Notice"), and the

Department requests comment regarding the utility of setting out the language of the employee notice verbatim, as opposed to incorporation by reference.

AGC submits that not only is there little utility for including the entire text of the employee notice in the contract clause, such inclusion could be harmful. As the Department acknowledges, changes in the law may make modification of the contract provisions necessary. This is particularly applicable with regard to the employee notice provision of the contract clause, because the notice describes substantive rights under a statute – the National Labor Relations Act ("the Act") – whose interpretation frequently changes as new issues arise and as membership on the National Labor Relations Board ("Board") varies. When such changes take place, not only would the employee notice itself require modification but the standard contract clause as well. This would impose unnecessary burdens and lead to unnecessary confusion and error on the part of the contracting agencies and contractors required to insert the clause in contracts and subcontracts. For example, contracting officers and contractors might innocently use a recent contract as a template for a new contract without realizing that the text of the employee notice contained in the employee notice clause must be revised.

Presumably, this is why many other regulations requiring contract clauses that mandate posting requirements merely incorporate the posting requirement by reference without setting forth the full text of the notice that must be posted. Examples of such mandates include those requiring certain contractors to post Davis-Bacon notices, fraud hotline posters, and whistleblower protection notices.

AGC, therefore, recommends that the Department remove the text of the employee notice from the text of the employee notice clause found in proposed Appendix A and remove § 471.2(b) from the rule. AGC suggests retaining the remainder of paragraph 1 of proposed Appendix A with slight modification to clarify the purpose of the notice, as follows:

> During the term of this contract, the contractor agrees to post a notice informing employees of their rights under the National Labor Relations Act, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically.

Such a provision would adequately inform contractors of their obligation to post the employee notice and would remain valid regardless of changes in federal labor law or changes to the employee notice itself.

Length and Content of the Employee Notice

The Department also invites comment on the statement of employee rights proposed for inclusion on the required notice to employees, such as whether the notice contains sufficient information, effectively conveys information, and achieves the desired balance between providing an overview of rights and limiting unnecessary information. AGC believes that the proposed notice is too long and contains examples of illegal employer conduct that are arbitrary and too specific.

Traditional federal labor law is an extremely complex and dynamic body of law. Because interpretation of the Act is in constant flux, a list of specific examples of conduct considered illegal under the Act promises to confuse and mislead employees about their rights. This is particularly true when, with all due respect, the agency drafting the list lacks experience with, and expertise in, interpreting the Act. Instead of including a list of specific examples, the Department would better serve the objective of "best inform(ing) employees of their rights under the Act" by including a more general statement of the Act's protections and a list of general rights protected as expressly stated in the Act or in summaries drafted by the agency that does has authority over and expertise in the Act – i.e., the Board – along with information about how employees may obtain further information from the Board.

If, however, the Department insists on listing specific examples of illegal employer conduct, then AGC urges the Department to also list specific examples of illegal union conduct in a more balanced manner than set forth in the proposed rule. The Act is intended to protect employees from misconduct by both employers and labor organizations, yet the lengthy proposed employee notice contains only a single, general statement about union misconduct. A more balanced list of examples, such as the list provided on the Board's Web site at http://www.nlrb.gov/workplace_rights/nlra_violations.aspx, would better demonstrate that the Administration's true intent is to best inform workers of their rights under the Act rather than the furtherance of political objectives.

Likewise, the employee notice would better inform workers of their rights under the Act and support the Administration's stated objective if it included information about employees' rights with respect to union membership and the payment of union dues and agency fees under *Communication Workers v. Beck,* 487 U.S. 735 (1988), and its progeny. While the employee notice appropriately informs employees of their right to choose not to join or remain a member of a union, the notice fails to inform them about additional, valuable information, such as: that employees represented by a union lawfully may be required to join a union and pay union dues; that, in states without right-to-work laws, such a requirement lawfully may be imposed as a condition of employment; that union-represented employees have the right to opt out of union membership and the payment of union dues but must file an objection in order to invoke that right; and that such objectors cannot be required to pay union dues or fees for activities that are not germane to collective bargaining, grievance adjustment, or contract administration but that they still may be required to pay agency fees equivalent to the cost of such representational activities.

Authority to Enforce Compliance with the Content of the Employee Notice

Paragraph 2 of the employee notice clause set forth in proposed Appendix A requires the contractor to "comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor." Thus, it seems that the proposed rule not only requires covered contractors to post a notice informing employees of their rights under federal labor laws but also to abide by the federal labor laws described in that notice. Section 471.21 of the proposed rule states, "Rulings under or interpretations of Executive Order 13496 or the regulations contained in this part will be made by the Assistant Secretary or his or her designee." Read together, these statements seem to be an assertion of Department authority to determine whether an employer-contractor has complied with the National Labor Relations Act.

Such an assertion would constitute an assumption of broad, new powers in the Department and a misappropriation of authority over areas in which the Board has primary jurisdiction. The assumption would constitute a major shift of power from an independent agency to an executive department, would constitute an undertaking of responsibilities over a complex area of law outside the Department's expertise, and would create the potential for dangerous and wasteful dual and conflicting interpretations and enforcement of the Act. As the Supreme Court explained in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, 245 (1959):

> Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:
>
> 'Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. * * * A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. * * * Garner v. Teamsters, etc. Union, 346 U.S. 485, 490—491, 74 S.Ct. 161, 165, 98 L.Ed. 228.

While the Court in *Garmon* was addressing the problem of "the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes," the same concerns arise in the context of two law-enforcing authorities within the federal executive branch. (See *UAW-Labor Employment and Training Corporation v. Chao*, 325 F.3d 360 (D.C. Cir. 2003)).

Accordingly, AGC urges the Department to abstain from assuming any authority to administer the Act or determine when violations of substantive rights conferred by the Act have occurred, to allow such authority to lie where it properly rests – i.e., with the Board, and to modify the language of the proposed rule to avoid even the appearance of any such assumption of authority by the Department.

Sanctions and Penalties Imposed for Noncompliance

Section 471.14(d) of the proposed rule sets forth sanctions and penalties for contractor noncompliance with the contractual provisions mandated by the rule, including contract cancelation, termination, suspension, and even debarment. While AGC commends the Department for establishing procedures that allow a contractor the opportunity for a hearing prior to the imposition of such sanctions and allows the contracting agency the opportunity to object to the imposition of such sanctions, AGC maintains that the sanctions made available are unduly extreme for what could simply be a first-time, unintentional failure to post a notice, to realize that a poster has fallen and to repost it, or to include the employee notice clause in a subcontract.

Contract cancellation, termination, and debarment can be the death knell for a federal contractor's business, especially in these economically challenging times. Therefore, such sanctions should be available only in cases of willful and repeated offenses (as determined after an opportunity for a full and fair hearing). AGC urges the Department to expressly provide such a standard in the final rule.

Exceptions for Subcontracts for Purchases Below the Simplified Acquisition Threshold

The Department maintains that, because EO 13496 explicitly exempts contracts involving purchases below the simplified acquisition threshold but does not explicitly exempt subcontracts involving such purchases, the Department has defined "subcontract" in the definitional section of the proposed rule to include only those subcontracts that are necessary to the performance of the government contract. Acknowledging that this rule "may result in coverage of subcontracts with relatively *de minimis* value in the overall scheme of government contracts," the Department invites comment "on whether a further limitation on the application of the rule to subcontracts is necessary, and if it is, whether such a limitation is best accomplished through the application of this or another standard, for instance, a threshold related to the monetary value of the subcontract."

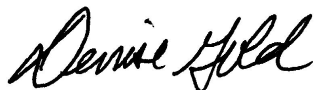
AGC believes that this provision in the proposed rule will lead to confusion and inefficiencies in government contracting. No rationale is provided or value explained for applying the new rule to subcontracts for purchases below the simplified acquisition threshold; nor can AGC fathom one, particularly when prime contracts for such purchases are appropriately exempted. Furthermore, the Department has defined "contract" in the definitional section of the proposed rule to include both contracts and subcontracts, which will only lead to further confusion about the application of the rule to subcontracts for purchases above the simplified acquisition threshold.

Therefore, AGC recommends that the Department limit the rule to subcontracts that are for purchases above the simplified acquisition threshold *and* are necessary to the performance of the prime contract.

Conclusion

Thank you for considering AGC's views on the proposed rule concerning Notification of Employee Rights Under Federal Labor Laws. The association would welcome the opportunity to provide additional information to the Department on this matter and is available for discussion.

Sincerely,



Denise S. Gold
Associate General Counsel