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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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November 3, 2014

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 Extension of the Approval of Information Collection Requirement for Executive Order 11246 – Construction Contracts (RIN 1250-0001)

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” or “the agency”) notice of proposed extension of the approval of information collection requirements (hereinafter “ICR”) with regard to construction contractors’ obligations under Executive Order 11246 (hereinafter “EO”) as published in the *Federal Register* on September 2, 2014.

AGC’s Interest in the Proposed ICR

AGC is the leading association for the construction industry. AGC represents more than 25,000 firms, including over 6,500 of America’s leading general contractors, and over 8,800 specialty contracting firms. 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. Many of these firms regularly perform construction services for government agencies under contracts covered by the laws enforced by OFCCP. Most are small and closely held businesses.

Unique Aspects of the Construction Industry

When issuing the regulations implementing Executive Order 11246, 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.

As a result of this fluid and temporary nature of the construction workforce, OFCCP currently does not require construction contractors to develop written affirmative action programs to track such data. Instead, OFCCP has established utilization goals based on civilian labor force participation rates, and has outlined in the regulations **good faith steps** (the 16 steps) for construction contractors to follow and document. Over the years, federal construction contractors have successfully implemented systems for complying with the good faith steps and have become familiar with the requirements for compliance.

Impact of ICR Underestimated

The ICR indicates that the EO impacts just 52,429 contractors. AGC would like to advise the agency that several groups appear to be excluded from this number, including subcontractors of direct federal contractors at all tiers, federally assisted contractors, subcontractors of federally assisted contractors at all tiers, and all establishments associated therein, including non-federal contracting establishments that are impacted because OFCCP's regulations may impact federal construction contractors company-wide. When adding these groups, the number of covered contractors is multiplied exponentially. And since OFCCP's compliance requirements are enforced per establishment, and not per company, stating that 52,429 construction contractors will be impacted by this ICR could be misleading when calculating the cost and time burden associated with compliance with the EO.

In the ICR, OFCCP used data from the General Services Administration's System for Award Management (SAM) to determine that 52,429 Federal construction contractors are covered by this ICR. However, AGC has learned that the SAM system only includes prime contractors and grant recipients. Subcontractors at all tiers as well as federally-assisted contractors and their subcontractors are not included in this number. And again, since OFCCP's compliance requirements may be enforced per establishment and company-wide, this number is severely underestimated.

With regard to determining the appropriate number of establishments impacted by the ICR, AGC recommends that OFCCP use, as a starting part, the number of establishments it identified as being covered by its recent changes to the regulations governing the Vietnam Era Veterans' Readjustment and Assistance Act (VEVRAA). According to the VEVRAA final rule, OFCCP based the range of the cost

of the rule based on a contractor establishment number of 251,300, derived from 2010 data from the Veterans Employment Training Services (VETS) annual report. This number should be used only as a starting point because federally assisted contractors and their subcontractors, and associated establishments are not covered by VEVRAA. An additional method must be used to determine the extent of such contractors.

With regard to subcontractors, the ICR estimates that there are just four subcontractors for each prime contractor, yet the EO has a flow down requirement that flows down to all tiers. In the ICR, OFCCP states that “there is no reliable source of data for subcontract awards.” While this may be the case for service and supply contracts, it is not the case for construction. Service and supply contractors are currently required to submit an Employer Information Report EEO-1 (EEO-1 Report) for only the prime and first-tier subcontracts. But federal construction contractors and subcontractors at all tiers are already required by OFCCP to file an EEO-1 Report annually. Therefore, AGC believes the best source of data for determining the number of subcontractors impacted by this ICR is the EEO-1 report.

Impact on Small Construction Contractors

According to the ICR, OFCCP has determined that entities with fewer than 500 employees are small entities. However, the ICR contains no information about how that number was derived. This number appears to be arbitrary and does not match the U.S. Small Business Administration’s (SBA) definition of small construction contractor. Because a construction contractor’s workforce fluctuates throughout the year, unlike other industries, SBA measures the size of a construction firm by the firm’s annual volume of business rather than the number of employees. Also, 500 employees is not in line with the threshold used in the past by OFCCP to identify small businesses. For example, for the VEVRAA rule, OFCCP saw fit to exclude businesses with fewer than 50 employees from compliance with certain parts of the rule in order to minimize the burden on small federal construction contractors. Another example includes OFCCP’s August 8, 2014, Notice of Proposed Rulemaking (NPRM) to require contractors to annually report summary data on employment compensation. In the NPRM, OFCCP references 2011 Census data that suggests that “over 90% of companies in the construction sector have less than 50 employees.” In furtherance of this theory, AGC’s findings from the Bureau of Labor Statistics Quarterly Census of Employment and Wages concludes that the average employment size (employees per establishment) of all non-residential construction firms is just 14.

OFCCP then uses the threshold of 500 employees as a cut-off for the number of employees a contractor should have before it is considered a small business under this ICR. The ICR then states that “based on May 2014 SAM data, there are 49,385 Federal Construction Contractors with fewer than 500 employees” and concludes that it impacts only 7.5% of small construction firms.

Because SAM is not the best resource for determining the number of covered contractors or establishments for this ICR and the threshold of 500 employees is not a proper measurement for the construction industry, AGC believes the ICR will impact significantly more contractors.

Exclusions from Cost Burden Calculations

The ICR states that “this clearance request covers the EO 11246 construction aspects of OFCCP’s program.” But it also states that because some contractors and subcontractors may be subject to the reporting requirements of its regulations regarding individuals with disabilities and veterans, OFCCP eliminated such burdens from the ICR because it is assumed that covered contractors are already required to meet this burden requirement. Several of OFCCP’s other rules do the same with regard to calculating the burden. Because this is done repeatedly, AGC is concerned that the specific cost burdens may not be calculated in any of OFCCP’s rules, or may be miscalculated. For example, this ICR covers EO 11246, which applies to federally-assisted construction contracts and subcontracts in addition to direct federal contracts and subcontracts. OFCCP has not considered the costs for federally assisted contractors and subcontractors throughout this rule, as they are not required to comply with the veterans or disabilities rules it also enforces. Therefore, the burden for those contractors is significantly greater than the estimated cost of \$0 provided in the ICR.

Use of Information Technology as a Means of Minimizing the Cost Burden

In the information technology section of the ICR, OFCCP assumes both that the vast majority of federal contractors and subcontractors are repeat contractors and that most have developed information technology systems to generate the data required by OFCCP’s regulations. AGC has concerns about both of those assumptions. First, while the vast majority of service and supply contractors may be repeat contractors, this is not the case in construction. Due to the unique nature of the construction industry, a construction contractor may sign on as a subcontractor for as little as one project, and its time as a federal contractor may end with the completion of the project -- or even sooner, if its work is completed before the project is finished. This is particularly possible with small specialty contractors.

Second, as mentioned previously, many construction contractors covered by the EO are small contractors. AGC believes that many such contractors still track data for compliance on a manual basis. For those companies that are sophisticated enough to have a robust applicant tracking system, such systems come at a cost. In a 2011 survey conducted by AGC on the use of applicant tracking systems in the construction industry, 62% of respondents stated that their company uses paper systems and Excel spreadsheets as the means to track applicant flow data. In the same survey, 63% of respondents stated that, if an electronic system were available, they were not prepared to pay for the use of such a system. Much of this is attributed to the fact that applicants may not use such a system to apply for construction work. 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, many applicants apply for work directly on the job site.

Further, following the unsupported assumption that most federal contractors and subcontractors are repeat contractors, OFCCP states that the average response time for contractors to operate and maintain compliance with the requirements of the EO is just 16 hours annually, yet states that the total capital/startup cost for compliance is \$0. OFCCP has excluded cost considerations for new contractors

entering the federal market for the first time. Because of such statements, many contractors enter the federal market unaware of the additional costs associated with becoming a federal contractor or subcontractor and end up with the unintended consequences of non-compliance. Moreover, the time and cost of compliance with this EO is cumulative with the time and cost of compliance with several other labor and employment mandates particular to federal contractors, such as other OFCCP-administered equal employment opportunity laws, the Davis-Bacon Act, the Federal Acquisition Regulation's ethics and compliance program and E-Verify requirements, and the Drug-Free Workplace Act, just to name a few. Accordingly, for many companies, becoming a federal contractor requires adding additional staff to assist with compliance efforts. It also requires setting up or expanding systems – whether manual or electronic –for record-keeping purposes. The time and costs to set up such systems, hire staff and/or pay external vendors and consultants is costly for new contractors.

Cost of Training Programs in Construction

No time burden is included in the ICR for the development of tools and systems required to comply with the training requirements of the EO. While these have been excluded from many parts of the ICR, one example to note is the annual review of the EEO policy with employees who have hiring responsibilities. OFCCP estimates it will take an average of two hours to develop, deliver and document the annual training. While it may take two hours to deliver and document the training at one establishment, developing a meaningful training program of any kind for employees takes time and thoughtful planning. Also, for most construction companies, there are additional costs associated with travel time and resources due to the multiple establishments that must comply.

Cost of New Rules

The ICR does not consider time and cost burdens that contractors will incur as a result of President Obama's recent expansion of the EO through Executive Order 13665, Executive Order 13672, and an April 8, 2014, Presidential Memorandum. These presidential actions, and pending regulations implementing them, create new obligations for contractors related to the reporting of summary data on employee compensation, non-retaliation for disclosure of compensation, and non-discrimination based on sexual orientation and gender identity. Of course, contractors are also in the midst of efforts to comply with new regulations that have already been finalized in recent months, such as the revised VEVRAA and Section 503 regulations that went into effect just eight months ago, the final rule implementing Executive Order 13658 establishing a minimum wage for contractors, and various regulations implementing the complex Affordable Care Act. The onslaught of new regulations over such a short period of time has contractors overwhelmed financially and with regard to staff time. Noting that a proposed rule implementing Executive Order 13672 is presently overdue, AGC infers that perhaps OFCCP staff is likewise overwhelmed by the cumulative burden of these new rules and can understand contractor concerns.

Necessity of the Proposed Collection of Information

In the ICR, OFCCP asks whether or not the proposed collection of information is necessary for the compliance and enforcement functions of the agency, including whether the information will have practical utility. The ICR states that “DOL seeks the approval of the renewal of this information in order to carry out its responsibility to enforce the anti-discrimination and affirmative-action provisions of the three legal authorities it administers.” AGC appreciates the agency’s responsibility of protecting the rights of individuals in protected classes who work for federal contractors. However, AGC does not believe the collection of such information is necessary from federal construction contractors at this time because construction companies are desperate to hire qualified workers due to a construction industry labor shortage and because the data, in general, do not support the need for the information collection.

Construction Industry Labor Shortage

Generally speaking, the construction industry needs workers. According to AGC’s 2014 National Worker Shortage Survey of construction contractors, 83% of contractors report having trouble finding qualified craft workers to meet the growing demand for construction. As a result, there have been numerous reports of contractors that have been forced to turn down work due to the lack of qualified skilled labor available in the region. This means a loss of revenue for the firm and, in some cases, could lead the firm to go out of business. As a result, companies are seeking ways to recruit skilled laborers regardless of their protected or unprotected status.

Data Do Not Support the Need for Information Collection

While any act of intentional employment discrimination based on sex, race, or other protected status is a wrong that must be addressed and prevented, data from reliable sources demonstrate that such discrimination is not, in fact, prevalent in the construction industry. For example, as OFCCP announced the need for a new rule to eradicate discrimination of individuals with disabilities in 2012, the Center for Corporate Equality issued a report that analyzed OFCCP enforcement data between 2004 and the first half of 2012. OFCCP identified 63 total instances of possible discrimination against veterans or people with disabilities among more than 285,000 federal contractor establishments (not including federally assisted contractors and subcontractors) over which OFCCP has jurisdiction. The report found that federal officials, when responding to reported complaints, determined that 0.02% of all federal contractors could be seriously suspected of having discriminated against veterans or people with disabilities. The agency found discrimination among on 0.01 % of firms it audited each year as part of its routine compliance review process. That rule later imposed new burdens on more than 285,000 federal contractors to address possible discrimination that has been identified among only 0.02% of them. Most were technical violations, such as failure to keep required records, as opposed to violations indicating systemic discrimination, such as in hiring.

While AGC does not have on hand an analysis of OFCCP data related to the enforcement of the EO, AGC has obtained data from the Equal Employment Opportunity Commission data that supports our position. For example, EEOC charge data from 2013 reveal that only 815 of 94,351 total charges filed across all types of discrimination – less than 1% – were identified as from the construction industry.

When the large number of charges for which no industry was identified is deducted from the total, the percentage of charges in construction is still below 2%. The percentage of sex-based claims and of race-based claims in construction are each also below 2%. And, of course, a significant number of those charges were resolved without any finding of merit.

As these and other statistics illustrate, the low number of women working in construction is not the result of high discrimination on the part of employers but of low interest on the part of potential employees. Historically speaking, construction is a non-traditional career for women. Even today, getting large numbers of women interested in working in the construction trades is a tremendous challenge. The bottom line is that the majority of women do not want to work in construction as craft workers for a variety of reasons unrelated to unlawful discrimination.

With regard to minorities in construction, the above-cited and other statistics indicate that there is neither a high incidence of race discrimination in construction nor a low incidence of minority employment. According to the Bureau of Labor Statistics data, 38.8% of employees in construction and extraction occupations in 2013 were minorities identified as Black or African American (6.2%), Asian (1.6%), or Hispanic or Latino (31%).

Given these data, AGC believes that the information collection – along with any new burdens concerning the employment of women and minorities in construction that OFCCP might be considering – is not needed. If OFCCP takes a contrary position, then AGC respectfully requests an opportunity to receive and review OFCCP's data with regard to its compliance evaluations involving women and minorities in construction.

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:

- Developed a new construction-themed training DVD called “Diversity Rules: Harassment Prevention, Sensitivity & Correction Training for Construction Workers and Supervisors”;
- Hosted a webinar called “Building the Best Harassment Prevention Training Program for Your Construction Company”;
- Committed to Hiring 100,000 veterans over the next five years, and subsequently partnered with the U.S. Chamber of Commerce's Hiring Our Heroes Programs;
- Hosted a webinar on Best Practices for Veteran Recruitment in Construction;

- 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 HR Professionals Conference where a representative from OFCCP presented on the affirmative action requirements of construction contractors;
- Coordinated a Federal Construction HR Workshop in 2011, 2012 and 2014 that featured 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 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;

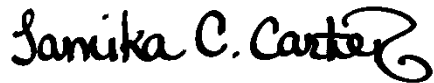
- Review job descriptions periodically to make sure that all physical and mental requirements are of a business necessity; and
- Educate and require subcontractors and vendors to comply with the company's anti-discrimination policies.

Conclusion

AGC understands that there may have been a need for regulations of this nature at the time the EO was originated in 1965. AGC also understands that there are still some bad actors who may discriminate against individuals in protected classes. However, based on reliable data, AGC believes that this is no longer occurring in wide-spread numbers. AGC also believes that the cost and burden estimates for compliance with the EO of \$479 and 16 hours per contractor are grossly underestimated based on the findings throughout this comment letter. Therefore, AGC recommends that OFCCP re-evaluate the cost and time burdens accordingly and focus its time on the few bad actors that give the entire industry a bad name.

AGC would be happy to provide more detailed data with regard to this ICR as derived from a construction contractor survey if given an additional 90 days to prepare, collect responses, and analyze the results.

Sincerely,

A handwritten signature in black ink that reads "Tamika C. Carter" with a stylized 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