

February 21, 2012

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 Rule pertaining to Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities
(RIN 1250-AA02)

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") notice of proposed rulemaking Ir Fe prod (i)he followi Sod (i)he18y

Request for Construction Industry Exemption

AGC and its members are firmly committed to the principles of equal opportunity employment and appreciate OFCCP's efforts to provide an effective pathway to employment for individuals with disabilities. However, when crafting the detailed requirements of this proposed rule, AGC

all. For example, an individual who is visually-impaired or has trouble walking or balancing may become familiar with a particular path that easily travelled on one day, but replaced by construction materials the next, and ultimately replaced by a wall, pillar or other part of the finished construction project.

Typically, construction workers need to be physically well-balanced and able to walk, lift and climb. For example, a person confined to a wheelchair may not be able to perform the job functions of a laborer because he or she may not be able to carry materials around a job site, even if a reasonable accommodation was considered.

Regarding safety, a construction company has the obligation to protect both its workers and the public while working on a construction project. AGC and AGC-member firms are strongly committed to this obligation. As a result, because of the physical tasks required, dangers presented, and safety regulations that must be followed in many construction craft positions, many disabled individuals are not qualified to perform the essential functions of the job with or without a reasonable accommodation. For example, some disabilities may hinder a worker from balancing appropriately while constructing a high-rise building. While AGC's members don't stereotype and assume that individuals with disabilities cannot perform the functions of *any* job, the reality is that there are fewer qualified individuals with disabilities in construction.

The law recognizes the need to balance the interests of people with disabilities against the legitimate interests of employers in maintaining a safe workplace, and it permits employers to establish qualification standards that exclude individuals who pose a significant risk of substantial harm to the health or safety of the individual or of others, if that risk cannot be eliminated by reasonable accommodation. Adding additional equipment to the existing heavy machinery and equipment located throughout a construction job site may pose a significant danger to the disabled person, other workers and the public. While construction employers can, should, and do recruit and hire qualified individuals with disabilities, they must be able to consider the extent of a person's disability and whether or not it will affect the person's ability to safely perform the essential functions of the job on a case-by-case basis.

3. The construction industry, unlike other industries, has been particularly hard hit from the economic recession, falling into the recession a year and a half before the overall economy with delayed emergence.

Despite a recent modest upturn in construction employment, payroll employment in January 2012 was nearly 2.2 million, or 28% below the peak in 2006, and unemployment in the sector remains deplorably high. The industry's unemployment rate in January 2012 was 17.7%, not

has the demand for construction workers. Accordingly, federal construction contractors, on the whole, are not in a position to hire workers these days and, when they are, fairness and business needs dictate giving priority to unemployed workers who have previous experience and training in the types of jobs being filled.

In addition to reducing the number of construction workers, construction companies have also had to reduce HR and administrative staff, making it even more difficult to comply with these complex regulations. A survey conducted recently by AGC on the impact of this proposed rule indicated that 85% of companies have two or fewer employees devoted to HR matters company-wide. Of the 85%, 15% of the companies do not have any employees specifically devoted to handling HR matters. The survey also resulted in comments by several respondents stating that attempting to comply with the requirements of the proposed rule would require them to hire an additional full-time staff member specifically to handle these issues or spend thousands of dollars on HR consultants, medical experts and legal counsel – an expense that is just not affordable during these strained economic times. As a result, even well-intentioned construction companies that are model federal contractors would find it extremely time-consuming and financially burdensome to implement the changes required by this proposed rule.

4. The construction industry, unlike many other industries, mostly consists of small, family-owned businesses with multiple establishments.

Throughout the proposed rule, OFCCP uses “contractor” and “contractor establishment” interchangeably. This can be misleading when the proposal is not read in its entirety. In parts of the proposal, when OFCCP calculates the estimated time it would take to comply, “per contractor” is used which somewhat minimizes the time and cost burden to contractors. However, when establishing the specific requirements for compliance of the proposed rule, OFCCP uses “per contractor establishment,” to make the point that contractors must meet the requirements of the proposal for *each contractor establishment*. For example, OFCCP estimates that it will take 5.5 hours “per contractor” to establish one new linkage agreement without OFCCP’s assistance. The proposed rule suggests that OFCCP will require each “contractor establishment” to establish and maintain a minimum of three linkage agreements. Therefore, if one contractor has 50 contractor establishments, that will mean a total administrative burden of 825 hours, according to OFCCP’s estimate of 5.5 hours per agreement, that will be required to establish three linkage agreements for each of the 50 contractor establishments. (*50 contractor establishments x 5.5 hours x 3 agreements = 825 total hours*)

While the majority of AGC’s members are small businesses, many still have a significant number of establishments, which is customary throughout the construction industry. Based on results of the same survey of AGC members regarding the proposed rule, more than 50% of respondents have between 11 and 99 contractor establishments, nationwide, including construction jobsites. Typically, there is only one office location, if any. In a comment letter submitted to OFCCP regarding this proposed rule, one of AGC’s larger member-companies, Kiewit Corporation, expressed that it has more than 900 establishments. These numbers represent the number of contractor establishments even in these poor economic times. When the

economy improves and the demand for construction increases, the number of establishments will surely increase as well.

5. In the construction industry, most HR-related activities occur on the job site (a.k.a. in the field) by employees who are construction workers tasked with supervising the work being performed, not HR professionals.

While it may be easier to comply with the requirements of this proposed rule in an office environment, compliance in a construction environment would be most difficult to accomplish, if at all possible. Construction job sites typically are not technologically equipped for administrative purposes, and electronic equipment that is available is usually reserved to facilitate the construction work being performed. Project managers who are responsible for supervising the work being done on the construction project, while sometimes working as skilled workers themselves, typically handle any basic new-hire paperwork, such as completing the I-9 form. Creating and maintaining the proposed required number of linkage agreements and managing the proposed comprehensive reasonable accommodation process would be overly burdensome to a working project manager who already carries a heavy workload and who has not had sophisticated HR training.

Unique Nature of the Construction Industry as it Relates to the Specific Requirements of the Proposed Rule

In addition to the general aspects of the construction industry that make it unique and that dictate

a different employer, depending on labor needs. This alone would make it extremely difficult for construction contractors to track statistical 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.

- 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, it may be to the benefit of the applicant to apply for work directly on the job site.

If a rule requiring construction contractors to track statistical data is implemented, construction contractors would be performing statistical analyses continuously because the workforce would be forever changing. Therefore, OFCCP's estimate of 60 minutes per contractor to perform a data collection analysis is very unrealistic for construction contractors – first, considering the number of contractor establishments a contractor may have, and second, because this analysis would be required daily, as the workforce may change daily. Also, depending on the date chosen to perform the analysis, construction work may be in or out of season. While the data can be collected, the numbers would be meaningless as the construction workforce changes with each project or even with each phase of a project. In short, construction contractors would not be able to provide valid and reliable data without undue burden, if at all.

There are several references throughout the proposed rule that would require covered contractors to maintain the data collected for a period of five years. Employers are required to comply with the recordkeeping requirements of other OFCCP regulations for a period of just two years. Creating a separate recordkeeping requirement for information solely pertaining to this proposed rule would invite confusion among contractors and create pitfalls for non-compliance, for even the most well-intentioned federal contractors, without any reasoned basis for treating individuals with disabilities differently from other protected classes. If implemented, AGC recommends that OFCCP keep the recordkeeping requirements for this proposed rule at two years, as with other regulations enforced by OFCCP.

Invitation for Individuals with Disabilities to Self-Identify Pre-Offer

As mentioned above, hiring in construction is typically handled at individual job sites, not at a headquarters office or electronically. Often, available construction workers “walk up” to the job site inquiring about work opportunities and with the number of potential job sites a construction company may have at any given time, it would be necessary for construction companies to revise and make available to each job site updated hard copies of applicant flow logs in order to comply with this proposed rule, which would not only be an administrative burden for construction

employers, but also a financial and environmental burden for construction companies as they are more fiscally conscious and strive to become more environmentally friendly.

In addition, federal contractors are required to invite all job applicants to voluntarily and confidentially identify their race and gender pre-offer; however, unlike with race or gender self-identification, when a person self-identifies as an individual with a disability, there is an additional burden on employers to evaluate each response and conduct an individual analysis of

may be irrelevant to the requirements of the job. Changing the Section 503 regulations to require contractors to invite all applicants to self-identify if they have a disability prior to receiving an offer of employment would be counterproductive and would discriminate against the very people the law is trying to protect.

Invitation for Employees to Self-Identify as Having a Disability Annually

The proposed rule, if implemented, would require contractors to anonymously survey all employees annually, re-inviting them to self-identify as having a disability. OFCCP estimates that it will take employers five minutes to conduct such a survey. AGC believes that any employee survey that requests such private information would produce inquiries from employees that would have to be addressed individually, due to the private nature of the survey request. In addition, such a survey would have to be conducted at each job site, then submitted to headquarters for analysis. Therefore, it is AGC's belief that five minutes is grossly underestimated.

As mentioned earlier, work in the construction industry is project-based, transitory or often-seasonal. Once a construction project is complete, workers often relocate to another project for the same or a different employer, depending on labor needs. Depending on the date chosen to

Training Requirements

The proposed rule would require covered contractors to host annual training programs with employees, including a thorough discussion during new hire orientations, the company's obligations to individuals with disabilities. AGC believes it is unnecessary to separate these individuals from other protected groups because of the appearance of preferential treatment over the other groups and the cost associated with providing such training throughout the construction industry.

Currently, OFCCP does not require special training to educate employees on the hiring and treatment of any other group, such as women, minorities, veterans, immigrants and others. Therefore, elevating the hiring and training process for individuals with disabilities could potentially be at the expense of other protected groups, ultimately having a negative effect on many populations OFCCP seeks to protect.

AGC also appreciates OFCCP's offer to create a training program to be used for this purpose in an effort to reduce the time and cost burden on employers for providing such training. However, OFCCP has not considered the cost associated with planning and coordinating each training program for each office, and consequently, each and every construction job site where federal work is being performed. For example, OFCCP estimates that there is a one-time administrative burden of 40 minutes and a recurring administrative burden of 20 minutes for contractors to provide training for those involved with recruitment, screening, hiring, promotion and related processes. 40% of respondents to AGC's member survey estimated that it would take between 30 minutes and an hour to conduct such a training program, while an additional 48% estimated that it would take more than one hour. Because such training would have to be performed on the job site, there may be additional costs associated with providing facilities along with the appropriate resources to carry out each training program. Without including these additional costs in the calculation, for a contractor with 50 job sites, it is estimated that it would take a minimum of 1500 hours and, in some cases, more than 2500 hours for each company to comply with this one requirement of the proposed rule. Regarding the requirement to train all employees on the subject, 57% of survey respondents estimated that it would take more than 30 minutes to conduct the training (excluding preparation, administrative and travel costs) compared to OFCCP's estimate of a one-time 20-minute burden and a recurring five-minute burden.

According to the Bureau of Labor Statistics' most recent report of labor force characteristics by race and ethnicity, Hispanics represent 44% of construction laborers in the United States. AGC is concerned that many of these workers may lack proficiency in English and as a result, covered contractors would need to provide the proposed training programs in both English and Spanish,

It is also important for OFCCP to understand that many construction employers already provide diversity training programs that include *all* protected groups, using products such as AGC's "Crossing the Line: What Can Create a Hostile Work Environment" video.

Annual Evaluation of Job Descriptions

The proposed rule would require covered contractors to conduct an annual analysis of all job descriptions, including details about physical and mental job requirements, along with statements regarding why the requirements are necessary to perform each job. In addition, covered contractors would be required to describe and maintain information regarding how the review was conducted, the results of the review, and any actions taken in response. OFCCP estimates that 90% of contractors would have no changes to their job descriptions in a given year and, for those that do need updating, it would take only 0.5 minutes (30 seconds) per job title to update and an additional one minute per job qualification to save the information for recordkeeping purposes. AGC respectfully disagrees with the estimation.

For employers who seriously undertake this process, it takes time to do so in a thoughtful way. It is likely that all job descriptions selected for changes would have to be thoroughly reviewed and edited by the human resources department, if such a department exists, with additional conference with the company's legal department or outside counsel. The scheduling and performance of interviews with both workers and their supervisors regarding each worker's job responsibilities might also be needed. This process would clearly take more than 30 seconds. In fact, the HR professional of one of our member-companies explained that his company's process of reviewing job descriptions periodically simply as a "best practice" takes well over a year to complete.

Requirement to Meet a National Utilization Goal and Sub-Goal

The proposed rule would require covered contractors to meet a national utilization goal for hiring individuals with disabilities for each job category. In general, while a goal may be achievable for office personnel, because the construction industry contains very safety-sensitive jobs that are physical in nature, neither a general utilization goal nor a sub-goal for individuals with severe disabilities will work for construction employees working on a job site.

AGC agrees that the ADAAA's broad definition of disability may make compliance with the proposed 7% utilization goal obtainable, assuming individuals know they have a disability and

enormous burden to implement all of the affirmative action requirements proposed in this rule for these individuals.

Historically, regarding compliance with the laws enforced by OFCCP, goals are often misunderstood by contractors to be quotas, leaving contractors to feel the need to meet such data requirements by hiring individuals with disabilities who may not be as qualified as other applicants in order to meet the goal. OFCCP says the goal is neither a quota nor a hiring ceiling and failure to attain the goal does not constitute a violation of the regulations, however, OFCCP also says that the primary indicator of effectiveness is whether qualified individuals with disabilities have been hired. Pushing employers to meet a utilization goal for hiring individuals with disabilities may have adverse consequences and may put too much pressure on applicants and employees to feel they must disclose a disability that they would prefer to remain private.

Furthermore, OFCCP currently requires construction employers to meet utilization goals regarding minorities and women, and OFCCP is considering such goals for the utilization of veterans as well. OFCCP should take into consideration that due to the current economic situation, there is only a limited number of available jobs to go around. For small companies with few job opportunities and low turnover, has OFCCP considered how they should remain in compliance with each of these separate utilization goals?

Regarding the requirement to meet the goals “per job group”, if applicants and employees are self-identifying as having a disability anonymously, has OFCCP considered how the employer should know which employee to put into which job category in order to determine if it is meeting the goal? Often employees do not know which category they might fit. Also, for small job groups or groups that consist of only one person, the potential for discrimination claims exist if the employee is accidentally identified. OFCCP must carefully consider the fundamentals of what the agency is asking federal contractors to accomplish before a final rule is implemented.

Inclusion of the Equal Opportunity Clause, Verbatim, in All Federal Contracts

AGC commends OFCCP’s efforts to ensure that subcontractors are informed of their affirmative action obligations as federal subcontractors; however, it should first be the responsibility of the contracting agency to insert the equal opportunity clause into the contract, verbatim. This

Reasonable Accommodation Requirements

The proposed rule would require contractors to establish a written accommodation re

complex and cost-intensive regulations would increase costs and reduce the competition of doing federal work, particularly for small construction companies (including minority and

- Hosted a session at AGC's 2009 HR Professionals Conference where a representative from OFCCP presented on the affirmative action requirements of construction contractors;
- Coordinated a Federal Contracting Compliance Construction HR Workshop for AGC's 2011 and 2012 HR Professionals Conferences that feature 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 all 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;
- Educate and require subcontractors and vendors to comply with the company's anti-discrimination policies.

Disregard of Comments Submitted Regarding OFCCP's Almost Identical Proposed Rule Regarding Veterans

AGC was deeply disappointed when the proposed rule regarding individuals with disabilities was published before a final rule regarding protected veterans was issued. The concern stems from

the similarities of the rules and OFCCP's apparent disregard for the comments submitted on behalf of the industry stating the obstacles for compliance.

The proposed rule regarding individuals with disabilities states throughout that OFCCP concludes that "no additional contractor burden exists" for compliance with most of the proposed requirements because OFCCP has "counted these hours in its Notice of Proposed Rulemaking revising regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act." This conclusion is premature and demonstrates a lack of regard for the purposes of the public comment period. OFCCP appears to be relying on its own preliminary findings without consideration of the comments submitted on the impact that the proposed Veterans rule would have on the contractor community and without deference for the full regulatory process. AGC would like to believe that OFCCP cares about contractor burdens and the regulatory process more than this.

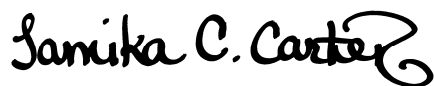
Conclusion

AGC appreciates OFCCP's efforts to help individuals with disabilities become gainfully employed, but AGC believes that this proposed rule would fail to meet those objectives by overshadowing OFCCP's overall mission of promoting equal opportunity employment for all people. There are only so many jobs the economy can create and the protected groups that OFCCP advocates for would ultimately end up in competition with each other. The bottom line is that you can't get more equal than equal; therefore, individuals with disabilities should have the same opportunities to work as other protected groups such as minorities, women, and veterans – not be placed on a pedestal above them. If implemented, OFCCP needs to consider that the requirements of this proposed rule may have an overall negative effect on the populations it is trying to serve while also diverting resources from job creation to regulatory reporting.

AGC recommends that OFCCP make hiring easier for employers in order to meet the agency's goals. However, if OFCCP decides to implement this proposed rule despite AGC's concerns, AGC urges the agency to exempt the construction industry from the new requirements due to the unique nature of the industry.

AGC would welcome the opportunity to provide additional information or support for the rulemaking process.

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