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Amy DeBisschop
Director, Division of Regulations Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor Frances Perkins Building
Room S-3502
200 Constitution Ave., NW
Washington, DC 20210

RE: RIN 1235-AA41 — AGC Comments on Increasing the Minimum Wage for Federal Contractors

Ms. DeBisschop,

On behalf of the Associated General Contractors of America (AGC), thank you for the opportunity to submit the following comments on the Wage and Hour Division's (WHD) notice of Proposed Rulemaking on "Increasing the Minimum Wage for Federal Contractors" (Proposed Rule). For background, AGC is the leading association in the construction industry representing more than 27,000 firms, including union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, factories, warehouses, highways, bridges, tunnels, airports, water infrastructure facilities, locks, dams, defense facilities, multi-family housing projects, and more.

While the Proposed Rule will apply to many construction firms, very few construction workers wages would be affected due to the fact that the average construction salary is already well above the proposed increased wage level.¹ However, there are a few areas of the country where the prevailing wage rates are lower than the proposed increase in minimum wage of \$15. AGC does not advocate for repeal of the Davis-Bacon Act or its related Acts, but does seek sensible reforms. Construction contractors currently provide direct pathways to quality middle-class jobs and living wage careers.

Despite the ongoing economic recovery, construction workforce shortages continue to persist around the nation. The fact remains that not enough young people currently choose construction as their first-choice career, as our industry faces significant hurdles within the secondary and higher education systems regarding their role in providing career and technical training programming and connecting students to careers beyond those that require a four-year college degree.

Nevertheless, the new labor dynamic has created a unique opportunity for the construction industry to attract a significant portion of the newly unemployed into high-

Institute a Safe Harbor for Compliant Prime Contractors and Higher-Tier Subcontractors

The Proposed Rule explains that contractors and subcontractors must include the Proposed Rule in its contract clause with lower-tiered subcontracts. Depending on the size, a federal construction contract could include numerous subcontractors – dozens even. It is inequitable to hold the prime or any higher-tier subcontractor responsible for all tiers of subcontractors’ compliance with the requirement to flow down the contract clause. Likewise, it is inequitable to hold such contractors responsible for all lower-tier subcontractors’ noncompliance with the minimum wage requirements, particularly when the higher-tier contractor has complied with the language flow-down requirement.

Rather than holding higher-tier contractors responsible for lower-tier subcontractors’ violations, AGC asks WHD to include in the final rule a “safe harbor” for prime contractors and higher-tier subcontractors that properly flow down the required contract clause to their direct subcontractors with regard to lower-tier subcontractors’ violations.

Clarify Requirements on Multi-Year Contracts and Require Adjustments Clauses

WHD should strive to ensure that the roles and responsibilities of contractors and federal agencies are clearly articulated during the pre-contract award phase of the procurement process, and are not subject to change mid-performance. This will enable contractors to better understand the costs, risks, and responsibilities, leading to fewer claims and change orders that could cause project delays or cost overruns. For that reason, DBA wage determinations in effect at the time of contract award, and that are incorporated into a contract, generally remain in effect for the duration of the contract regardless of whether new wage determinations are issued while the contract is being performed.

Applying minimum wage increases after contract award would present uncertainty and problems in the

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IDIQ contracts awarded before that date would not be impacted. However, AGC seeks clarification as to whether the task order for contracts issued after January 1, 2022, under that IDIQ contract fall within the mandate of the rule. An example such as this could have significant impacts on price for contractors at all tiers of the contract. If a 2022 task order contracts issued under pre-2022 IDIQ contracts fall under this rule, WHD should explicitly state so in the final rule. Further, if such is the case, for reasons stated above, task orders should include an adjustments clause related to any increase of the minimum wage rate. This would, again, be an issue in future years where IDIQ contracts are awarded and the minimum wage is, perhaps, increased multiple times. Otherwise, confusion will exist not only for contractors but also for federal contracting agencies, which could 4 (r)7 (r)7ttoplira (l)-1 (c)a-1 (4 (de)-37

to be considered for debarment. Such violations would include innocent mistakes that could be redressed without what would be a punitive use of debarment.

The Federal Acquisition Regulation (FAR) cautions that “[t]he existence of a cause for debarment. . . does not necessarily require that the contractor be debarred; the seriousness of the contractor’s acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.” FAR 9.406-1(a). As such, AGC recommends that WHD, at a minimum, include “knowingly or recklessly” in front of the term “disregard” throughout the section on debarment to help ensure that minor and inadvertent mistakes do not lead to debarment proceedings.

Conclusion

AGC respectfully asks WHD to clarify the rule establishing a minimum wage for federal contractors for the reasons and in the manner discussed above.