STEPHEN E. SANDHERR, Chief Executive Officer

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

March 6, 2015

The Honorable Phil Roe
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions
1433 Longworth House Office Building
Washington, DC 20515

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515

RE: "The Blacklisting Executive Order: Rewriting Federal Labor Policies through Executive Fiat" Joint Hearing

Dear Chairman Roe and Chairman Walberg,

The Associated General Contractors of America (AGC) firmly supports sensible and effective means to protect the health, safety and livelihood of construction contractors' most valuable asset: their employees. Perennial bad actors who willfully and pervasively jeopardize these employer responsibilities threaten the integrity of fair and open competition, stain the construction industry's professional reputation for excellence, and, most importantly, risk lives.

While the intent of the "Fair Pay and Safe Workplaces" Executive Order 13673 (herein "EO") may be to penalize bad-actor contractors, AGC strongly opposes the EO because it will not achieve this intent. Rather, the EO will function in an unreasonable, inconsistent and ineffective manner, excluding from service to the government not only bad-actor contractors but also well-intentioned, ethical contractors. The EO needlessly creates a new, complicated and unmanageable bureaucracy to address problems for which a host of federal laws, regulations and bureaucracies already hold jurisdiction. Furthermore, the EO will lead to crippling delays in federal contracting, encourage unnecessary litigation, and increase procurement costs to the government and taxpayers.

To provide some background, AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms, including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

The process established by the EO is unnecessary. AGC members are already subject to a multitude of federal laws, regulations and executive actions governing labor and employment. These laws include a host of exclusive penalties and remedies for violations. These statutes also provide exclusive remedies for violations. However, the EO provides an additional remedy not contemplated or addressed in these statutes. In addition, the Federal Acquisition Regulation (FAR) already provides a number of avenues, like suspension or debarment, for federal agencies to deal with bad actors that willfully or repeatedly violate the law. Reporting mechanisms for violations and performance issues already exist through the Federal Awardee Performance and Integrity Information System, the Contractor Performance Assessment Reporting System, Past Performance Information Retrieval System and System for Award Management, among others. If the Administration believes that the penalties in these laws and reporting mechanisms do

not sufficiently deter violations, it should work with Congress to address this within existing laws rather than create a new bureaucratic system that will subjectively and inconsistently penalize contractors and lead to increased costs and delays in federal procurement.

The EO calls for the creation of a new labor compliance advisor (LCA) position in federal agencies to advise contracting officers (COs) in their contractor responsibility determination decisions. Under the EO, COs may deny a contractor the right to compete for a contract over $500,000 when the CO finds that a contractor's violations of 14 federal laws—and an unspecified number of "equivalent" state laws—reflect an unsatisfactory record of integrity and business ethics. As referenced above, a federal agency already has the power to suspend or debar a bad actor under the FAR. The suspension and debarment process is long established and functions on a government-wide basis. Each contracting agency already has a suspension and debarment official with expertise to make such a decision. COs, however, generally lack the legal knowledge and experience to interpret the severity of violations or the jurisprudence of different federal and state courts to make such determinations. Even if an LCA with legal experience and knowledge advises the CO, the CO ultimately is charged with making the contractor responsibility determination.

Additionally, under the EO, COs can now effectively debar a contractor on an individual contract-by-contract basis. This means that a CO can deny a contractor the right to compete on one contract based on its record of integrity and business ethics, but could find that same contractor responsible enough to compete on another. Similarly, a CO in one agency or the same agency may have a different opinion of what violations—the number and severity—constitute an unsatisfactory record of integrity or business ethics than another CO. Likewise, a LCA in one agency could have a different opinion than another LCA. A contractor may be found to have an unsatisfactory record for a contract by one CO but a satisfactory record by another CO *in the same agency*. Considering that the federal government, let alone one agency, executes thousands of contracts over $500,000 per year, such a system will be unwieldy, highly subjective and incredibly inconsistent. Also, such a situation noted above could seriously impact contractors that do non-federal, i.e., state government or private work. For example, many state and private construction agencies will not contract with a construction company that has been suspended or debarred by the federal government. How would a contractor—or agency for that matter—determine if it could bid on the contract when one CO in a federal agency has found the contractor has an unsatisfactory record while CO another in the same agency finds it to be satisfactory?

The EO adds further significant subjectivity to these determinations in its requiring the reporting of violations of "equivalent" state laws. For example, different states may have the exact same statutory language for a pay or safety law, but their courts could interpret that language differently. It is probably safe to say that a state court in California may interpret the same statutory language found in a South Carolina law differently than a South Carolina court. Accordingly, a contractor's consistent employment practices in the two states could be treated inconsistently by state courts. For example, the South Carolina court might deem a practice to be lawful, whereas the California court might deem it to be unlawful and effectively prevent the contractor from receiving or retaining a federal contract or subcontract. No CO or LCA will conceivably understand the jurisprudence of 50 state laws and how those law may differ by court decision. The result will be vast inconsistency and unfairness.

Furthermore, federal acquisition personnel are already overworked and undertrained. COs oversee construction contractor compliance with not only individual contract specifications, but also general FAR provisions mandating environmental, safety, bonding, past performance evaluation, small business participation, and performance of work requirements. The EO will further burden COs at both the pre-award and post-award stages, as prime and subcontractors must make reports before contract award and

every six months on a per-contract basis. This will add time to an already slow procurement process. Additionally, the EO mandates the creation of a new LCA position in each agency who will compete for acquisition training resources. Consequently, the EO will place a significant burden on federal coffers through procurement delay and acquisition staff training and resources.

The EO's reporting of subcontractor violations and prime contractor responsibility determinations of those subcontractors could significantly delay projects and deleteriously impact the prime/subcontractor working relationship. Subcontractors with subcontracts of $500,000 and above must report their violations every six months through the prime contractor to the CO. If a subcontractor has a violation during that period whereby a CO finds that subcontractor to have an unsatisfactory record, the CO can require the prime contractor to terminate the subcontractor. This could be incredibly problematic on a construction project. For example, take a disadvantaged, minority 8(a) small business subcontractor on an inland waterway lock project that specializes in lock mechanical work. During the project, the subcontractor is found to have violated safety laws on a separate but concurrent project. However, there is no other qualified mechanical contractor available to complete the work on the project for one year. If the subcontractor is terminated under the EO, the prime contractor must wait one year to continue work on the project, which could require complete demobilization of equipment. This will cost time, money and, if we are talking about a major waterway, possible delays of millions of tons of cargo traveling on barges up and down the river. Furthermore, the fact that this 8(a) small business subcontractor is terminated could now jeopardize the prime contractor's small business goals by no fault of the prime contractor. This would negatively impact the prime contractor's past performance review, which it needs to attain new work. Additionally, the EO establishes a precarious relationship between prime and subcontractors. As with the COs, the prime contractor determination of a subcontractor's record will be subjective and could vary from region to region, and office to office. Furthermore, the EO places the prime contractor at risk of violating the False Claims Act in the event a subcontractor misrepresents its violations in any report to the prime contractors therein reported to the CO.

Lastly, the EO will encourage litigation in at least two respects. First, contractors would fully litigate alleged violations. As noted, the EO establishes a bureaucratic system with a wide degree of individual subjectivity and apparently little due process protection. Operating in such a reality, contractors will seek to fully litigate (rather than settle) many more alleged violations to protect their business from an uncertain "blacklisting" determination. Second, contractors found to have unsatisfactory records are likely to appeal that decision. Such outcomes will increase the caseloads on court dockets, delay adjudications, and further strain judicial resources.

Again, AGC strongly opposes this EO. It is unnecessary and will function in an unreasonable, inconsistent and ineffective manner, excluding from service to the government not only bad-actor contractors but also well-intentioned, ethical contractors. Consequently, AGC looks forward to working with you and other members of Congress to curtail implementation of this EO.

Sincerely,

Stephen E. Sandherr
Chief Executive Officer