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June 7, 2019

VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Harvey D. Fort
Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Room S-3325
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Construction Compliance Check Letters; New Information Collection Requirements; Comment Request (OMB Number: 1250-XXXX)

Dear Mr. Fort:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Department of Labor’s (hereinafter “DOL” or “Department”) Office of Federal Contract Compliance Programs’ (hereinafter “OFCCP”) notice of proposed information collection request (hereinafter “ICR”) on Construction Compliance Check Letters; New Information Collection Requirements; Comment Request. The ICR was published in the Federal Register on April 8, 2019.

AGC is the leading association for the non-residential construction industry, representing more than 27,000 firms, including over 6,500 of America’s leading general contractors and over 8,800 specialty contracting firms. More than 11,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 90 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 and most are small and closely held businesses.

AGC applauds the OFCCP’s recent efforts and focus on compliance and compliance assistance over strict enforcement. Like OFCCP, AGC and its members are firmly committed to complying with legal requirements to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. At the same time and while facing a booming economy, the non-residential construction

industry is currently facing a historical workforce crisis. According to a recent AGC survey, seventy-nine percent of construction firms plan to expand their payrolls in 2019 to keep pace with growing demand, but an almost equal percentage are worried about their ability to locate and hire qualified workers.¹ Seventy-eight percent report they are having a hard time filling salaried and hourly craft positions. That share was down slightly from eighty-three percent at the start of 2018. In addition, forty-two percent expect it will continue to be hard to hire in the next twelve months and twenty-six percent expect that it will become harder to hire in 2019. As previously reported to OFCCP staff even as far back as 2017², members continue to testify that with the current labor shortage along with increasing demand for new construction they do not have the luxury to discriminate in hiring practices as workers are increasingly empowered to set their own terms of employment. Firms are also increasing their diversity efforts either by intent and/or necessity. OFCCP should be pleased that considering this workforce climate, economics and demand are naturally working together to assist the OFCCP in its mission, which is evident in its focus on compliance initiatives instead of unnecessary and burdensome enforcement.

AGC and its members would prefer actual narrower and shorter compliance checks that result in assistance as described in the ICR versus full evaluations that result in unnecessary enforcement actions. As previously described, firms are doing everything they can within their resources to meet their workforce and legal demands. Many who misstep, do so out of mistake or lack of resources so it is appreciative that OFCCP has dedicated itself to assist first instead of reprimand. AGC is also thankful that OFCCP is proposing to not only follow the requirements of the Government Paperwork Elimination Act (GPEA), in which government agencies must provide the option of using and accepting electronic documents and signatures, and electronic recordkeeping, where practicable, but go even further to require that contractors submit the requested information in an electronic format. Electronic disclosure would be the least disruptive method of delivery for the highly demanding and typically multi-site workplace in the construction industry. Electronic submission is a simple compliance solution that has proven to ease burden and costs to both agencies and contractors.

In addition to the previous general comments, AGC would like to comment specifically on the following specific topics addressed in the ICR:

Methodology for Developing the Construction Scheduling List Should be Produced First

OFCCP's methodology for developing the supply and service contractor scheduling list for focused reviews and compliance checks for establishments has been published for several years now, but AGC and its members eagerly await transparency around and the opportunity to provide input on the development of a selection methodology for construction. The recent methodology for service and supply is currently used to select establishments for compliance checks³, but nowhere in this

¹ Associated General Contractors of America and Sage Construction and Real Estate. (2019). *Contractors Remain Confident About Demand, Worried About Labor Supply: The 2019 Construction Hiring and Business Outlook Report*. Retrieved from <https://www.agc.org/news/2019/01/02/2019-sage-construction-hiring-and-business-outlook-survey>

² AGC Member Focus Group Meeting with OFCCP Policy Staff. (June 14, 2017)

³ Office of Federal Contract Compliance Programs. (2019). *Methodology for Developing the Supply & Service Scheduling List FY 2019*. Retrieved from <https://www.dol.gov/ofccp/scheduling/SL19R1-Methodology-Final-FEDQA508C.pdf>

ICR does OFCCP address how it plans to select construction contractors for compliance checks. Additionally, apart from the transparency provided through the Baker DC, LLC v. Acosta⁴ ruling, the methodology of selecting construction contractors for focused reviews has not been shared publicly either. Whether the methodology for selection of construction contractors for scheduling either focused reviews and/or compliance checks is the same, or different, AGC urges transparency and the opportunity for input in its development. AGC also urges the OFCCP to develop and share the methodology for selection of construction contractors for focused reviews and compliance checks prior to implementing of this RFI and issuance of compliance check letters. Otherwise, the process would obviously be out of order. AGC looks forward to assisting the OFCCP in its development of its selection methodology for construction contractors.

Confidentiality of Information is Paramount

AGC understands the OFCCP's responsibility to abide by the requirements of the disclosure provisions pursuant to the Freedom of Information Act (FOIA) and potential requests. AGC also appreciates the OFCCP's promise to notify and not make any decisions to disclose any records subject to a disclosure request until that contractor has the opportunity to object. But, while allowing a contractor "that is concerned with the confidentiality of personally identifiable information such as lists of employee names, reasons for termination, or pay data, to use alphabetic or numeric coding or an index" is helpful for more sophisticated contractors and systems, the bulk of AGC's membership is made up of small and closely held businesses and may not have the resources and ability to utilize this option.

Scope of Review is not Necessarily Narrow and Burden Estimate Could be Low (Small Businesses Especially Impacted)

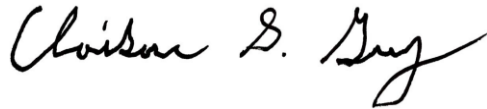
Again, AGC appreciates the OFCCP's focus of the RFI to aid in compliance, but if the department's intent is to create a narrower review than that of the scope of a compliance review, it may not be, especially for small businesses. The information required for disclosure in the ICR appear to be very similar in substance and amount to that required for a full compliance review. Additionally, the information may be stored in different departments and systems, making it excessively difficult to quickly gather for submission, especially for small contractors with less resources and sophisticated systems. While OFCCP estimates that the burden to be 8 hours for direct federal (5.5 for federally assisted) contractors to gather and submit the required documentation, AGC believes that burden estimate to be inaccurately low. AGC members have testified that the collection and submission of the first point of information in both letters could vary substantially because of many factors, such as size of project, number and types of employees, sophistication of systems, etc. AGC members estimate that the first point of information alone could easily take eight hours and the total collection and submission of all points in either letter could take two to three times the EEOC's original estimate, dependent on other constraints as described. Additionally, personnel and applicant systems are typically separate, and payroll is an accounting function, not HR, which is many times outsourced, especially for small businesses. The coordination and collection across systems and departments could take much longer than estimated depending on the size and resources of the business. AGC hopes the OFCCP will reevaluate its burden estimates and consideration of the scope of the proposed compliance checks to truly make it less burdensome in reporting than a compliance review, especially with the broad scope intended to cover the industry.

⁴ Baker DC, LLC v. Acosta, 2018 BL 122252, S.D. Ohio, No. 1:17cv-530

Conclusion

AGC reiterates our appreciation for OFCCP's focus on compliance assistance versus unnecessary enforcement and its attempt to reduce the burden of compliance reviews for construction contractors. AGC also appreciates the opportunity to engage in the development process and looks forward to working with OFCCP as it continues to amend requirements, methodologies, and regulations that impact construction contractor employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Claiborne S. Guy". The signature is written in a cursive, flowing style.

Claiborne S. Guy
Director, Employment Policy & Practices