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



October 11, 2011

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: Advance Notice of Proposed Rulemaking pertaining to Non-Discrimination in Compensation; Compensation Data Collection Tool (RIN 1250-AA03)**

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") advance notice of proposed rulemaking regarding the development and implementation of a compensation data collection tool to provide insight into potential problems of pay discrimination by contractors as published in the *Federal Register* on August 10, 2011.

AGC is among the oldest and largest of the nationwide trade associations in the construction industry. It is a non-profit corporation founded in 1918 at the express request of President Woodrow Wilson, and it now represents more than 32,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,000 of the nation's leading general contractors, more than 12,000 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. 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 administered by OFCCP. Most are small and closely held businesses.

AGC is not aware of, and would be surprised to hear of pay disparities in the construction industry. Like OFCCP, AGC and its members are firmly committed to the principles of equal opportunity employment both in hiring and in pay practices, and we appreciate OFCCP's efforts to ensure that the nation's federal contractors are providing equitable compensation to all of their workers, regardless of race or gender. However, by creating and requiring contractors to use a complex compensation data collection tool, AGC believes that OFCCP would no longer meet the objectives

mentioned above, and instead, would create additional, unnecessary administrative burdens for employers while potentially making critically private information available to the public, all of which would have a significant economic impact on a substantial number of small businesses.

The requirement to use such a tool would be detrimental to all industries that do business with the federal government, including the construction industry; and, therefore, AGC kindly asks OFCCP to withdraw the above-referenced ANPRM, at minimum until such time that OFCCP, in conjunction with AGC and other construction industry stakeholders, determines whether there is an actual need for such a tool to collect compensation data and, if so, the least burdensome means for doing so.

### **Unique Nature of the Construction Industry as it Relates to the Proposed Rule**

Particularly at a time when the construction industry is still in the midst of a recession, no rule should be implemented without taking into consideration the unique nature of the industry. For example, compensation for federal contracting construction employers is already regulated by the U. S. Department of Labor (DOL) pursuant to the Davis-Bacon Act. In addition, administrative departments within construction companies are short staffed and the affect on small construction companies will be enormous.

#### *Compensation is Already Regulated in the Construction Industry*

Echoing a recent letter submitted jointly on this subject by the Equal Employment Advisory Council on behalf of several industry organizations, including AGC of America, AGC notes that President Obama, in his recent jobs speech to a joint session of Congress stated that “[w]e should have no more regulation than the health, safety and security of the American people require. Every rule should meet a common sense test.” This ANPRM makes the assumption that the need for a new compensation data collection tool has already been established, of which AGC respectfully disagrees. OFCCP already collects compensation data from thousands of contractor establishments each year, and there is nothing in the agency’s enforcement procedures and compliance data to suggest that the current laws and enforcement mechanisms are failing to achieve their stated objectives.

Furthermore, a compensation data collection tool is not necessary for the construction industry since compensation for federal contracting construction employers is heavily regulated by the Davis-Bacon Act. As a result, construction employers are required to sign and submit, under penalty of perjury, weekly certified payrolls detailing the identification of the workers, their job classifications, hours worked and rates of pay. Since DOL (via OFCCP) already collects data from federal contractors that identifies each worker’s race and gender, and DOL also establishes and regulates the pay rates of these same workers (via the Wage and Hour Division’s enforcement of the Davis-Bacon Act), is another such rigorous process to provide the same information also required?

#### *Administrative Departments within Construction Companies are Short Staffed*

Two years since the recession officially ended, the construction unemployment rate remains at 13.5 percent, far above the all-industry rate of 9.1 percent. Today, there are 2.2 million (28 percent) fewer construction workers than in 2006. Construction spending is down 35 percent – over \$420 billion – from the markets 2006 peak. Furthermore, while more than \$100 billion was earmarked for stimulus

construction activity, the market was overwhelmed by overall shrinking demand. As a result, construction companies have not only had to cut its construction trade workforce, but also HR and administrative staff, making it even more difficult to comply with the reporting requirements suggested in the ANPRM. Even well-intentioned construction companies that are model federal contractors would find it extremely time-consuming, costly and burdensome to use such a tool.

### *Impact on Small Construction Companies*

In 2009, the United States had 713,000 construction firms, of which 92 percent were small businesses that employed fewer than 20 workers. Within those firms, there were a total of six million paid employees. Thus, average employment was less than nine per firm. It is, therefore, important for OFCCP to consider the confidentiality of the data associated with a new data collection tool. While not stated directly in the ANPRM, OFCCP has stated separately to Congress that it “will design a web-based, searchable database system comprised of aggregated data from the Compensation Data Collection Tool.” With so many small businesses in the industry, AGC is deeply concerned that individual employee compensation data – which is usually very privately-held data – will be easily identifiable by others within the same organization and those of competing organizations. In a competitively-bid environment where a contractor assumes the financial risk of project completion, and receives no guarantee from the project owner of profitability or sustainability, requiring contractors to publicly disclose their compensation structure is unnecessary interference with privacy rights that have little, if any, benefit for the government or the public.

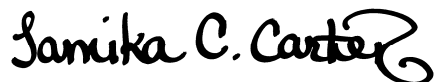
Federal contracting construction firms, like any other businesses, must be allowed to maintain a business model that works best for each individual company. A privately-held company should not be punished for organizing itself in a manner that best suits its needs, nor should it be punished for having a successful business model.

### **Conclusion**

As stated earlier, AGC is not aware of and would be surprised to learn of pay disparities in construction due to an employee’s race or gender. And for the reasons outlined above, we respectfully ask OFCCP to withdraw its ANPRM, unless and until such time as there is evidence to show that a new compensation data collection tool is needed.

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

Sincerely,



Tamika C. Carter  
Director, Construction HR