



VIA ELECTRONIC SUBMISSION

February 21, 2012

Patricia A. Shiu
Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-3325
Washington, D.C. 20210

Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-3325
Washington, D.C. 20210

Re: Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (RIN 1250-AA02)

Dear Directors Shiu and Carr:

Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP, or Department) on Dec. 9, 2011, at 76 Fed. Reg. 77056.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing 22,000 contractors, subcontractors, materials suppliers and construction-related firms within a network of 74 chapters throughout the United States. ABC member contractors employ workers whose training and experience span all of the more than 20 skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. ABC's membership is bound by a shared commitment to the *merit shop philosophy*. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures taxpayers and consumers will receive the most for their construction dollar.

ABC is submitting these comments to make the Department aware of the adverse impact the NPRM will have on the construction industry and to request immediate withdrawal or modification of the proposal to maintain consistency with the Department's historic recognition of the unique employment features of the construction industry. Also, ABC seconds the comments of other organizations that represent government contractors generally, and small business contractors in particular, whose burdens the Department has failed to acknowledge or properly analyze.

ABC's Comments in Response to OFCCP's NPRM

ABC strongly supports OFCCP's longstanding regulatory goal of affirmative action and nondiscrimination regarding individuals with disabilities under Section 503 of the Rehabilitation Act. Of equal importance, however, is the longstanding recognition by the Department that the construction industry is different in many ways from other industries that contract with the government. ABC is concerned the NPRM fails to recognize the uniquely burdensome impact of the proposed data collection and reporting requirements on the construction industry and fails to acknowledge or explain the inconsistency between the proposed rule and OFCCP's longstanding differentiation of the construction industry from other industries with regard to affirmative action requirements.

As stated in OFCCP's own guide with regard to Executive Order 11246, "in order to take into account the fluid and temporary nature of the construction workforce, OFCCP does not require construction contractors to develop written affirmative action programs."¹ In particular, unlike the requirements of job group utilization analyses the Department has required of other industries under Executive Order 11246 for minorities and women, OFCCP has long recognized the collection and reporting of utilization data in such detail would be a wasteful and futile exercise for construction contractors, whose workforces ebb and flow much more frequently than other types of government contractors. Therefore, in lieu of extensive data analysis and reporting, OFCCP for decades has maintained a special set of regulations for the construction industry enumerating more practical good faith steps that covered construction contractors must take in order to increase their employment of minorities and women in the skilled trades.²

Unlike Executive Order 11246, construction contractors have not been specifically exempted from the provisions of Section 503 of the Rehabilitation Act of 1973, as implemented in 41 C.F.R. Part 60-741. Until now, this did not place an onerous burden on construction contractors because the provisions of Section 503 and OFCCP's implementing regulations did not mirror the job group utilization analyses and related data collection efforts required under Executive Order 11246 for non-construction contractors. Instead, prior to the NPRM, OFCCP regulations under Section 503 focused exclusively on good faith affirmative action efforts similar in scope to those already applicable to the construction industry under Executive Order 11246. Thus, no requirement exists under the current Section 503 regulations for any contractor to undertake burdensome job group utilization analyses of disabled workers, to document or report the

¹ OFCCP, *Technical Assistance Guide for Federal Construction Contractors*, May 2009.

² See 41 C.F.R. 60-4.

reasonable accommodations offered to such workers, or to meet any arbitrarily selected target goal for the number of disabled workers hired into the workplace.

All of that is about to change under the Department's NPRM. Notwithstanding the absence of any statutory authority under Section 503 itself, OFCCP is proposing to mandate arbitrary target quotas for the hiring of disabled workers by all contractors with a government contract or subcontract of \$50,000 or more and 50 or more employees—a threshold that will impact more than 20,000 small businesses in all industries that currently contract with the federal government. In the Department's own words, this is a “sea change” in the Department's affirmative action regulations.³

Not only has OFCCP failed to identify any statutory authorization for its radical new approach, but the Department has failed to compile any statistical or other evidence that federal contractors are failing to meet their affirmative action obligations towards the disabled community.⁴ Instead, the preamble to the NPRM relies exclusively on statistics purporting to show higher unemployment of workers with disabilities in the workforce as a whole, without any assessment of the employment rate of disabled vs. nondisabled workers employed by *government contractors*.⁵ In short, OFCCP has collected no data on which to support the premise that government contractors' affirmative action efforts are failing to meet their objectives. Under such circumstances, no justification exists for the Department's drastic changes to the affirmative action requirements of federal contractors generally.

Even worse, OFCCP has ignored or unfairly minimized the regulatory burdens that the NRPM will impose on government contractors, particularly small business contractors. The Department has thereby acted in a manner inconsistent with the congressional mandate that federal agencies should encourage and give preference to small and disadvantaged businesses in procurement of government contracts, as set forth in the Small Business Act.⁶

ABC is deeply concerned about each of the failures identified above as they appear in the NPRM. But ABC's greatest concern is that OFCCP has apparently failed to notice, and has certainly failed to analyze or justify, the draconian impact of its proposal on the construction industry. In particular, as further discussed below, the NPRM gives no attention at all to the historical reasons why the construction industry has been exempted from being forced to engage in the sort of wasteful and fruitless job group utilization analysis and other data collection and reporting that will now be required if the proposal is finalized.

³ Bureau of National Affairs (BNA), *OFCCP Proposal Includes 'Utilization' Goal for Contractors Employing Disabled Workers*, Dec. 8, 2011.

⁴ 76 Fed. Reg. at 77074: “DOL is not aware of any existing data that show the number or percentage of federal contractor employees with disabilities....”

⁵ 76 Fed. Reg. at 77069.

⁶ 15 U.S.C. 637(d).

1. The NPRM Ignores the Unique Aspects of Construction Industry Employment, Contradicting Decades of Regulation by OFCCP

As noted above, OFCCP has for many decades recognized the unique employment challenges facing construction contractors, resulting in a separate set of regulations governing construction contractors' affirmative action requirements.⁷ While these unique regulations have traditionally applied only in the context of minorities and women, as opposed to disabled workers, the reasons underlying the longstanding differentiation between construction contractors and other industries apply with even greater force to the proposal. Specifically, the fluid and temporary nature of employment in the construction industry renders most forms of job category utilization analysis futile and wasteful. Given that OFCCP has repeatedly recognized this fact with regard to the employment of minorities and women, it makes no sense for the Department to suddenly require construction contractors to engage in the much more difficult analysis of the utilization of disabled workers. It is obvious the analysis called for in the NPRM will be much more difficult for employment of disabled workers than minorities and women because of the need to make numerous difficult judgments regarding reasonable accommodations, undue hardships and direct threats to safety, none of which are necessary in analyzing the employment of minorities and women. The Department gives no attention to these proposed new burdens on the construction industry in the proposal.

The Department should also be aware that the construction industry is one of the most physically demanding and hazardous industries, which renders many of the assumptions underlying the NPRM irrelevant and incorrect. For example, in support of the need for strengthening the affirmative action rules, the Department cites the fact that employment rate disparities continue to persist in the entire workforce "despite years of technological advancements that have made it possible to apply for and perform many jobs from remote locations, and to read, write, and communicate in an abundance of ways."⁸ Yet the overwhelming majority of construction work cannot be performed anywhere except the jobsite, so the ability to perform other types of jobs from remote locations is of little or no value to the construction industry. Even the ability to read, write and communicate through technological advances, while somewhat more helpful to construction workers, is often not the primary consideration in determining whether a disabled individual is able to perform the essential elements of a construction job requiring physical and hazardous labor, with or without reasonable accommodation.

The point is not that construction contractors should be entitled to shirk their duty to take affirmative steps to recruit and accommodate disabled workers when such accommodations do not create undue hardships or direct threats to health and safety on construction sites. Rather, the point is that a "one size fits all industries" rule, such as the one being proposed by the Department, is arbitrary and capricious because it fails to take into account the very real differences between industries and the unique challenges confronting construction contractors in particular. Again, there has been no showing by the Department that construction contractors

⁷ 41 C.F.R. Part 60-4.

⁸ 76 Fed. Reg. at 77056.

have significantly failed to meet the affirmative action requirements of Section 503 on government projects that would call for imposition of the additional burdens by the NPRM.

Chief among the additional burdens, as noted above, is the requirement that all government contractors above a minimal size (contracts of \$50,000 or more and 50 or more employees) must perform a job group utilization analysis for disabled workers comparable to, and even more extensive than, the analysis required for non-construction industries regarding minorities and women. What is most striking about the NPRM in this regard is the assumption that all industries already routinely engage in such analysis.^{9,10} In other words, the drafters of the proposal appear to have forgotten that construction contractors *have never been required to perform such analyses as to minorities and women under Executive Order 11246*, so the newly proposed analysis will be a drastic and burdensome change.

The 7 percent target goal arbitrarily adopted for all industries by the Department is flawed on many levels; but limiting our focus to construction, OFCCP erroneously assumes contractors will use their “existing job groups” for analysis, a shortcut not available to construction contractors who have not previously been required to conduct such analyses under Executive Order 11246. Even worse is the 2 percent sub-goal that the Department is considering. OFCCP offers no consideration as to how construction contractors can safely target workers, except in rare circumstances, who suffer from total deafness, blindness, paralysis, epilepsy and severe intellectual disability, to name only a few of the severe disabilities referenced in the NPRM. Again, a one-size-fits-all approach makes no sense for the construction industry and must be withdrawn as arbitrary and capricious.

2. OFCCP’s Initial Analysis Under the Regulatory Flexibility Act (RFA) is Deeply Flawed

The RFA requires all agencies conducting rulemakings to “prepare and make available for public comment an initial regulatory flexibility analysis,” which “shall describe the impact of the proposed rule on small entities.”¹¹ As part of its analysis, the agency is required to consider other significant alternatives to the rule that could affect the impact on small entities, and explain any rejection of such alternatives in its final regulatory flexibility analysis.¹² The sole relevant exception to this requirement arises if “the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”¹³

⁹ 76 Fed. Reg. at 77067: “Although measurements specific to disability are new requirements of this proposed regulation, the non-disability-specific data, such as the total number of applicants, the total number of job openings, and the number of jobs filled is information that contractors are already required to maintain pursuant to Executive Order 11246....”

¹⁰ See also 76 Fed. Reg. at 77075: “OFCCP expects that contractors will conduct this assessment in conjunction with the correlating assessments required under [Executive Order] 11246....”

¹¹ 5 U.S.C. § 603(a).

¹² *Id.* at § 604. A “significant regulatory alternative” is defined as one that: 1) reduces the burden on small entities; 2) is feasible; and 3) meets the agency's underlying objectives. See *A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, June 2010, p. 73-75 (available at <http://www.sba.gov/advo/laws/rfaguide.pdf>).

¹³ *Id.* at § 605(b).

The agency must provide a factual basis for its certification, the determination of which is subject to judicial review for correctness under a non-deferential standard.¹⁴

Reports from ABC members and our knowledge of the construction industry lead ABC to respectfully submit that OFCCP has significantly understated the costs of compliance with its proposal. The time for compliance with the paperwork burdens (repeatedly cited by the Department as taking anywhere from five minutes to 30 minutes) has been understated by several decimal points. In other words, ABC is reliably informed by its members that the time spent on training managers; interacting with applicants about the self-identification process; analyzing, documenting, and reporting on the number of disabled individuals recruited, hired and laid off; and the time spent analyzing, documenting, and reporting the reasonable accommodations, undue hardships and direct threats to safety are more likely to take hundreds, if not thousands, of hours. Most small contractors will be unable to perform the analysis required at all, and will no doubt instead be compelled to turn to outside consultants at significant additional costs in order to comply. OFCCP's erroneous cost estimates must be entirely reconsidered and the NPRM withdrawn for further study in order to determine the unique impact it will have on the construction industry and on small federal contractors generally.

####

For each of the reasons set forth above and in the comments of other organizations representing construction contractors and small businesses generally, the NPRM should be withdrawn, or significantly modified and republished for public comment.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



Geoffrey Burr
Vice President, Federal Affairs

Of Counsel: Maurice Baskin, Esq.
Venable LLP
575 7th St., NW
Washington, D.C. 20004

¹⁴ *North Carolina Fisheries Association v. Daley*, 27 F. Supp. 2d 650 (E.D. Va. 1988); *Aeronautical Repair Station Assn, Inc. v. FAA*, 449 F. 3d 161, 175-177 (D.C. Cir. 2007), reversing agency certification of lack of impact on small entities.