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RE: Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

Dear Members of the Safer Federal Workforce Task Force and FAR Council:

As the Safer Federal Workforce Task Force (Task Force) drafts guidance on and the Federal Acquisition Regulations Council (FAR Council) writes regulations to implement the *Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors* (Order), the Associated General Contractors of America (AGC) respectfully puts forth the construction industry's deep concerns with and sensible recommendations for carrying out this Order.

For background, AGC is the leading association in the construction industry representing more than 27,000 firms, including America's leading 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, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, levees, locks, dams, water conservation projects, defense facilities, multi-family housing projects, and more.

Since the onset of the pandemic, AGC and its members have strived to ensure the safety and health of the greatest construction industry asset: its more than seven million employees. As COVID-19 vaccines became available, AGC provided resources to its members about the vaccines, their safety, and their effectiveness. In addition, the association created an industry-specific public service message, tools to assist with employer vaccine policies, and more.¹ AGC members used those resources in their educational efforts to encourage voluntary employee vaccinations.

¹ Associated General Contractors of America. *COVID-19 Vaccine Toolkit*. September 13, 2021, <https://www.agc.org/covid-19-vaccine-toolkit>

Assuming the Order is legally viable, AGC puts forth the following for your review and consideration:

I. The Vaccine Mandate for Federal Contractor Employees Could Exacerbate the Industry's Workforce Shortage and Significantly Increases Federal Project Costs and Delays to the Detriment of Meeting Vast Federal Government Infrastructure Needs

The COVID-19 pandemic has taken its toll on the construction industry and its markets. The delta variant of the virus has the vast majority of construction firms facing renewed economic uncertainty and hardship. An AGC survey² conducted in August 2021 found that 89 percent of construction contractors are having a hard time finding craft workers. Meanwhile, 88 percent of firms are experiencing project delays and 93 percent are affected by rising materials.

Looking specifically at the federal construction contractor data, the survey found that:

- 92 percent of federal construction contractors have craft worker positions open;
- 93 percent of federal construction contractors are having difficulty filling those craft worker positions; and
- 58 percent of their recent federal projects were canceled, postponed or scaled back.

The survey results underscore how the coronavirus pandemic has created constraints on the demand for work even as it limits the number of workers available to hire. Because of the pandemic, many construction firms are dealing with the impacts of delayed or canceled projects, suffering from construction materials shortages, delivery delays and lagging demand.

In other words, market conditions are nowhere near as robust as they were prior to the onset of the pandemic. Prior to the pandemic, contractors worried either about finding enough work to keep their workers busy or about finding enough workers to keep pace with busy demand.

But now, largely because of the pandemic, many contractors worry about finding enough work even as they struggle to find enough workers. Many of the challenges affecting contractors are being driven by the pandemic and policy responses to it, instead of typical market conditions. Unfortunately, AGC and its members fear this federal contractor vaccination mandate could further exacerbate the industry's workforce and significantly increases federal project costs and delays to the detriment of meeting vast federal government infrastructure needs.

Despite continued efforts to promote or incentivize voluntary vaccination of construction workers, AGC and its members have faced vaccine skepticism among too many. In April 2021, researchers from the University of Pittsburgh and Carnegie Mellon University found that 46 percent of construction workers did not plan to get vaccinated.³ As such, AGC members justifiably fear that many of those workers, when faced with the choice between the vaccine and their job with a federal contractor, will quit and go to work for another contractor that does not have such a mandate. Because the vast majority of the construction industry is comprised of small businesses of fewer than 100 employees, and so many firms are looking for workers, those workers could very well go elsewhere and avoid both this federal contractor mandate and the testing mandate being put forth in regard to employers with 100 or more employees by the U.S. Occupational Safety and Health Administration.

² AGC of America. *Construction Workforce Shortages Reach Pre-pandemic Levels Even as Coronavirus Continues to Impact Projects & Disrupt Supply Chains*. Available at: <https://www.agc.org/news/2021/09/02/construction-workforce-shortages-reach-pre-pandemic-levels-even-coronavirus-0>

³ Lawrence, Robyn. *Construction Dive. It's complicated: Vaccine hesitancy continues among contractors*. Retrieve on September 16, 2021. Available at: <https://www.constructiondive.com/news/its-complicated-vaccine-hesitancy-continues-among-contractors/602300/>

AGC wants to underscore that this scenario and risk is very real and could lead to serious consequences for federal construction contractors to meet contractual obligations and deliver projects that help ensure our national security and federal governmental functions. It must be added that this risk appears to be without any thought towards mitigating its impact in any reasonable way, placing all the risk on the federal contractor. Below, AGC recommends some actions the Task Force and FAR Council can take to sensibly mitigate these risks, again, assuming the Order withstands legal challenge.

II. The Task Force and FAR Council Should Mitigate the Unintended Consequences of the Vaccine Mandate on Federal Construction Contractors and their Capacity to Build the Nation’s Defense and Civil Infrastructure

a. Define “Workplace Locations” Based on the Federal Construction Industry’s Record of Safety and Health and Low-Risk Transmission Status throughout the Pandemic

The construction industry is the delivery tool for building and maintaining critical infrastructure and facilities used to deliver clean water and electricity, protect our national security, and transport essential goods and services like medical supplies, groceries and, most recently, COVID-19 vaccines. Equally important, the construction industry has a long history of working to ensure the safety and health of their employees, even before the COVID-19 pandemic. Given the many precautions already in place on construction jobsites, the uniqueness of construction projects and their environment—which is completely different from an office workplace—AGC holds that applying the vaccination mandate universally across all types of construction does not make sense.

Most construction operations are low risk with respect to the transmission and spread of COVID19. Early in the pandemic, OSHA explained that the level of risk of occupational exposure to COVID-19 “depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2.”⁴ According to OSHA’s own assessment, most construction work poses “low exposure risk”; construction work only crosses into “high exposure risk” when it takes place at indoor work sites occupied by people such as other workers, customers, or residents suspected of having or known to have COVID-19, including when an occupant of the site reports signs and symptoms consistent with COVID-19. Therefore, construction work is unlikely ever to pose a “high exposure risk” or “very high exposure risk” (a risk category which OSHA does not believe is applicable for most anticipated construction work tasks).⁵

AGC respectfully requests that such vaccine mandate should not apply to every employee of every type of federal construction where outdoor construction takes place, e.g., heavy civil and new building projects. Reasonable exceptions can be made. For example, many health care owners have already required vaccinated workers on their construction jobsites. Such an exception for federal medical facilities would be reasonable as something the industry has dealt with since the time vaccines were first made available. There may also be exceptions for national security interests, and interior renovations where either federal employees do not work in the building or military families’ children—who are too young to receive a vaccine—attend school.

Such an unintended consequence would jeopardize the effective delivery of federal infrastructure. It could make it even more difficult for federal agencies to meet their missions and support important initiatives like increasing small business participation, where agencies currently struggle to meet their goals for groups such

⁴ Guidance on Preparing Workplaces for COVID-19, OSHA (2020) (available at <https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf>).

⁵ COVID-19 Control and Prevention: Construction Work, OSHA (available at <https://www.osha.gov/coronavirus/control-prevention/construction>) (last visited Feb. 23, 2021).

as Historically Underutilized Business Zone (HUBZone) small businesses and women-owned small businesses (WOSBs).⁶

- b. Charge One Federal Agency with Collecting Federal Contractor Employee Vaccination Disclosures from Prime Contractors and Subcontractors; Neither hold Prime Contractors Liable for Subcontractors' Compliance at any Tier nor Subcontractors Liable for their Subcontractors and Lower-Tier Subcontractors' Compliance

AGC respectfully requests that you make clear the roles and responsibilities of prime contractors and subcontractors. Specifically, any reporting requirement should explicitly state that a prime contractor should not be held liable for subcontractors and lower-tier subcontractors' compliance with the vaccination requirements. Similarly, subcontractors should not be liable for their subcontractors and lower tier subcontractors' compliance.

Unlike other reporting requirements, the uniqueness of the COVID-19 vaccination mandate could have implications under Health Insurance Portability and Accountability Act (HIPPA), the Americans with Disabilities Act (ADA), and other federal, state and local medical and health privacy protections for employees if certain information is shared among different employers. A simple and effective solution to such challenges would be allowing prime and subcontractors to make, and be solely liable for, detailed disclosures of compliance directly to one federal agency—such as OSHA or other agency at the U.S. Department of Labor.

Importantly, the FAR Council has ruled direct reporting by subcontractors to a single federal agency before as being effective. In final guidance for E.O. 13673, *Fair Pay and Safe Workplaces*, the FAR Council “decided to adopt the proposed alternative structure under which subcontractors will be able to make detailed disclosures to the Department instead of to prime contractors directly.”⁷ Such direct reporting allowance should be applied in this case.

Moreover, the language of the Order clearly intends to make each business singularly responsible for complying with the Task Force guidance, and subsequent FAR rule, mandating vaccination against COVID-19. Throughout the Order, contractors and subcontractors are referenced as separate entities and the vaccination requirements are directed at both contractors and subcontractors (at any tier). In fact, there is not a single sentence that mentions the prime contractor without the qualifying “and” “or” subcontractor. At no point does the Order direct prime contractors or subcontractors to enforce the requirements on other contractors.

- c. Consideration for Collective Bargaining

AGC represents federal construction contractors that are signatory to collective bargaining agreements (CBAs) and those who are not. For those signatory contractors, this vaccine mandate could have implications that would normally be subject to collective bargaining with their union partners. Given that many likely have CBAs that do not expire for years, AGC recommends that the Task Force and FAR Council take similar action as has previously been taken regarding federal contractor labor mandates implemented under executive order. For example, Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors* considered the impact that extending paid sick leave could have on CBAs and could provide a pathway for consideration in this case. AGC recommends that the vaccine mandate should not apply until a CBA expires and the collective bargaining process can occur.

⁶ For additional information, see CRS Report R45576, *An Overview of Small Business Contracting*, by Robert Jay Dilger.

⁷ 81 Fed. Reg. 58653 (08/25/2016)

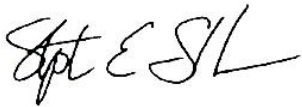
d. Provide Grace Period that is Equal to or Greater than the Grace Period Given to Federal Employees

The Order directing that the standard given to federal employees should be extended to employees of federal contractors and subcontractors. The Task Force has stated in its *COVID-19 Workplace Safety: Agency Model Safety Principles* that federal employees should be vaccinated by November 22, 2021. This period represents a 75-day grace period for federal employees to comply with the executive order. Given the Administration's efforts to align the executive order directed at federal employees and this Order directed at federal contractors and subcontractors, it is only equitable that such a grace period—of at least 75 days—be given to federal contractors and subcontractors.

The Order directs the FAR Council to amend the FAR and begin including the vaccine requirements to apply to new contracts, renewals, and exercises of options on or after October 15, 2021, a mere 21 days after the Task Force releases its guidance and draft contract clause. AGC respectfully requests that federal contractors and subcontractors be given a similar grace period—of at least 75 days—beginning on or after October 15, 2021 or when the FAR clause is included in new contracts, renewals, and exercises of options.

AGC appreciates your efforts in addressing this unprecedented pandemic our country is facing and looks forward to working with you to ensure a safe and effective work environment.

Sincerely,

A handwritten signature in black ink, appearing to read "Sgt E SHL". The signature is written in a cursive, somewhat stylized font.

Stephen E. Sandherr