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May 14, 2020

The Honorable Nancy Pelosi
United States House of Representatives
Washington, D.C 20515

RE: H.R. 6800, the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act

Dear Speaker Pelosi,

The Associated General Contractors (AGC) of America appreciates continued congressional efforts to address the novel coronavirus (COVID-19) pandemic and its impacts on the construction industry. Although the latest COVID-19 relief measure—H.R. 6800, the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act—addresses some important construction industry concerns, it falls short in how or if it addresses critical others.

Below, AGC puts forth its priorities for improving H.R. 6800 in a manner that could receive bipartisan support and help provide immediate relief to construction firms that collectively shed nearly 1 million jobs in April 2020 and anticipate more job losses ahead.

- I. AGC-Supported Pandemic Relief Measures to Include or Improve upon in H.R. 6800**
 - a. Liability Protections for Good Actor Construction Firms**
 - b. Robust Infusions of Federal Investment to Allow Planned Infrastructure Projects to Move Forward and Protect Jobs**
 - c. Investments in Career and Technical Education**
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- II. AGC-Opposed Pandemic Relief Measures in H.R. 6800**
 - a. New, Expansive Employer Mandates that Threaten Construction Business Continuity**
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- III. AGC-Supported Pandemic Relief Measures in H.R. 6800**
 - a. Flexibility for the Construction Industry’s Use of the Paycheck Protection Program and Employee Retention Tax Credit**
 - b. Policies Protecting the Viability and Funding of Multiemployer Pension Plans**
 - c. Contracting Protections for Direct Federal Contractors**

I. AGC-Supported Pandemic Relief Measures to Include or Improve upon in H.R. 6800

a. Liability Protections for Good Actor Construction Firms

Thanks to the safe and essential work of construction firms throughout the nation, emergency hospitals and medical facilities, drinking water and wastewater treatment, transportation, energy and communication, affordable multifamily housing and the rest of the nation's critical infrastructure continue to be built, maintained and improved.

Nevertheless, without reasonable liability safe harbors for good actor construction firms following recognized safety and health protocols, the uncertainty surrounding COVID-19 and the sheer weight of anticipated litigation could hinder the essential work that the nation needs the construction industry to perform for many years to come.

While **we are disappointed that H.R. 6800 does not include such protections**, we hope to work in a bipartisan manner on:

- **Targeted and reasonable liability protections against legal claims arising from the current pandemic to protect construction firms following recognized safety and health protocols to guard against the spread of COVID-19; and**
- **Barring legal presumptions that a construction employee with COVID-19 contracted the virus from exposure while at work.**

b. Robust Infusions of Federal Investment to Allow Planned Infrastructure Projects to Move Forward and Protect Jobs

AGC appreciates that H.R. 6800 provides an immediate infusion of \$15 billion for state departments of transportation (DOTs). Current projections show that state transportation revenues will decline by 30 percent on average over the next 18 months, which threatens the ability of state DOTs to carry out their core functions, including capital construction programs.

Already, some state DOTs are delaying critical transportation projects, which puts construction jobs at risk. As a result, the American Association of State Highway and Transportation Officials identified that **state DOTs will need an additional \$49.95 billion in federal funding**. Of that amount, approximately \$33.2 billion is needed to combat the estimated losses in state transportation revenues from March 2020 to September 2020.

As the legislative process moves forward, **AGC strongly urges Congress to increase the amount of funding for state DOTs in order to allow planned transportation projects to move forward and protect construction jobs**. This funding will also help ensure that the future enactment of bipartisan, multi-year infrastructure legislation can facilitate economic recovery and create new jobs.

c. Investments in Career and Technical Education

COVID-19 has upended much in the way the construction industry now operates. Despite an anticipated contraction in economic output along with higher unemployment, the industry will continue to depend on a skilled workforce to repair, maintain and improve our nation's critical infrastructure.

Unfortunately, federal investment in workforce and career education have lagged for decades behind traditional education resulting in record worker and skills shortages earlier this year. A skilled workforce is the key to helping our economy recover, putting Americans back to work, and improving worker and public safety.

H.R. 6800 provides more than \$2 billion to existing federal workforce programs including significant increases in safety training grants that have the potential to reach many workers who would not otherwise have had the opportunity to receive the training and education. **While the workforce investment is much needed, unfortunately, not a lot of the funding goes to core worker training. Congress should look for opportunities to better provide skills training directly to workers.**

d. Sensible Federal Relief for State and Local Governments

State and local governments across the nation are collectively projecting tens of billions of dollars in revenue losses for the current fiscal year and beyond. While all levels of government must make difficult budget decisions in these unprecedented times, state and local governments need some form of federal relief to help ensure essential services, including construction, can continue. **AGC appreciates the federal funding proposals put forth in H.R. 6800 and looks forward to bipartisan efforts to ensure sensible federal relief for state and local governments is included in a final bill.**

II. AGC-Opposed Pandemic Relief Measures in H.R. 6800

a. New, Expansive Employer Mandates that Threaten Construction Business Continuity

H.R. 6800 includes several provisions that establish new mandates and extends others on employers that could stymie initiatives to safely return to work and jeopardize efforts to lessen the rate of sustained economic and job losses. These provisions include:

- The extension of weekly pandemic unemployment insurance through December 31, 2021. Instead, AGC recommends Congress consider a return-to-work bonus for Americans reentering the workforce to avoid any perverse incentive for some to choose to remain unemployed due to the existing unemployment benefits;

- The extension of emergency paid family and sick leave mandates to more employers and expansion of allowable reasons for such leave. Such policies would further complicate employer efforts to survive;
- The repeal of small business safe harbor flexibilities from the new federal emergency leave mandates. At a time when the nation's small businesses are at risk of economic ruin, providing less flexibility for them is counterintuitive;
- The allowance for employees to take both paid emergency family and medical leave and unpaid, non-emergency family and medical leave protections under federal statute. This would amount to 24 weeks—6 months—of federal family and medical leave (not counting the two weeks of federal emergency sick leave). For contractors whose workforces' employment periods are regularly fluctuating depending on the project and time of year, this could present significant hardships to their ongoing operations; and
- A temporary standard that could force employers to record and document illnesses like the common cold or seasonal flu. Such a standard would expose employers to additional liabilities and litigation amid the greatest economic disaster since the Great Depression. In addition, it could negatively impact employer experience modification rates, which would result in untenable workers compensation insurance premiums. All of this further jeopardizes the ability of employers to weather this unprecedented economic decline and maintain current levels of employment.

For the reasons articulated above, AGC opposes these provisions that establish new and expand recent federal mandates. The association will work to address them accordingly as the legislative process moves forward.

b. Revisions to Essential Tax-Relief Measures that Protect Construction Business Cash Flows

H.R. 6800 repeals and modifies provisions from the CARES Act impacting net operating loss (NOL) carrybacks for corporations and pass-through businesses that are a vital tool for the construction industry during an economic downturn.

NOL carrybacks allow companies who experience a loss to claim a tax refund against their prior years' taxes paid. It is a common-sense countercyclical tax policy that provides needed resources to struggling businesses during an economic downturn and has been utilized in economic relief packages in 2001, 2006, 2009 and 2011, under both Republican and Democratic control of Congress and the presidency.

During economic decline, many construction firms take advantage of this provision to help stay afloat as the economy recovers. Unfortunately, the Tax Cuts and Jobs Act (TCJA) amended the tax code to disallow NOL carrybacks and placed limits on the amounts that pass-through businesses can claim as losses. Congress sensibly reversed this decision with the passage of the CARES Act. The CARES Act reinstated an allowance for five-year NOL carrybacks. In addition, it removed the limitation on losses for pass-through business that would otherwise prevent them from fully accessing the benefits of NOL carrybacks.

Regrettably, despite a long history of bipartisan support for NOL carrybacks during economic downturns, H.R. 6800 reinstates tax code section 461(l) loss limitation for pass-through businesses, shortens the length of time that businesses can carryback losses, and adds significant new restrictions on businesses able to qualify for the provision. The collective effect of these provisions would inhibit cash flow for struggling construction firms, put further strain on their balance sheets and increase unemployment in the industry.

The consideration of these provisions during traditional economic downturns would be tantamount to economic policy malpractice. However, singling out businesses who are, by definition, experiencing heavy losses in 2020 for punishment in the context of a bill expected to cost northward of \$3 trillion is particularly egregious. As such, **AGC recommends that the NOL carryback provisions in H.R. 6800 be removed from any final bill.**

III. AGC-Supported Pandemic Relief Measures in H.R. 6800

a. Flexibility for the Construction Industry’s Utilization of the Paycheck Protection Program (PPP) and Increased Employee Retention Tax Credit

The PPP has proven to be extremely popular with construction firms. According to AGC’s latest nationwide survey, 80 percent of respondents reported that their firms have, at a minimum, been approved for a PPP loan. Unfortunately, due to both changing economic conditions since the passage of the CARES Act, as well as recent administrative actions by the Treasury Department and the Small Business Administration (SBA), the program needs to be amended and additional relief measures should be explored.

H.R. 6800 makes some significant, positive changes to the criteria for PPP loan use and loan forgiveness eligibility. Although the bill does not include an AGC-supported policy change to waive the complex affiliation rules that bar many construction firms from qualifying for PPP loans, the bill importantly:

- Extends the covered period for the loan from eight to 24 weeks and extends the covered period from June 30 to December 31. This will provide additional flexibility to construction firms who may still be working, but have had future construction backlog projects cancelled or postponed;
- Eliminates the “75/25” administrative rule—which does not exist in statute—mandating that 75 percent of PPP loan amounts be used for payroll. This will provide additional flexibility to borrowers who have higher rent, mortgage and utility costs to help them stay in business; and
- Clarifies legislative intent that PPP loan forgiveness does not count as taxable income, overruling a recent ruling by the Internal Revenue Service that disallowed tax deductions for expenses paid for with PPP forgiven loan funds.

Beyond these and other positive changes to the PPP loan and loan forgiveness programs, H.R. 6800 also includes a significant expansion of another CARES Act provision—the Employee

Retention Tax Credit (ERTC). The bill clarifies that employers can utilize both PPP loans and the ERTC to help retain jobs and maintain operations with appropriate safeguards against “double dipping.”

As the economy struggles to regain its footing due to COVID-19, **the expanded ERTC in H.R. 6800 would be a valuable option for struggling business owners to retain employees and stay afloat** as they deal with project cancellations and other consequences of the global pandemic.

b. Ensuring the Viability and Funding of Multiemployer Pension Plans

Congress must enact policies to shore up the multiemployer pension system so plans can continue to provide a secure retirement for workers and retirees. Market and contribution losses are building as construction markets have faced slowdowns and shutdowns. Meanwhile, future work is projected to slow. **Amid these unparalleled times, H.R. 6800 helps ensure the viability of multiemployer pension plans** by:

- Allowing actuarial smoothing so plans can better weather the impacts of the pandemic;
- Creating a special partition program for eligible plans;
- Reforming funding rules;
- Giving plans faster access to funding tools; and
- Authorizing a new hybrid plan design—composite plans—which are better structured to withstand market downturns in the future, while simultaneously protecting both employers and participants.

AGC appreciates these provisions and emphasizes that any final bill must keep the Giving Retirement Options to Workers Act provisions that would authorize composite plans. Such composite plans offer the multiemployer pensions system a viable future as the economy and contributing employers recover.

c. Contracting Protections for Direct Federal Contractors

It is important that direct federal construction contractors maintain mission readiness to meet the challenges our country may face in the months and years to come. To do so, H.R. 6800 includes AGC-supported provisions that:

- Mandates federal contracting officers **pay prime contractors within 15 days from invoice submission.** Cash flow is critical to every construction business. Ensuring timely payment for work performed is necessary for federal contractors and subcontractors to maintain mission readiness and ongoing operations; and
- Requires the Office of Management and Budget (OMB) to issue **governmentwide guidance to implement section 3610 of the CARES Act**, which allows federal agencies to reimburse contractors for employee paid leave due to federal agency implemented restrictions related to COVID-19. Federal contractors often work for

- different federal agencies. Having a single, unifying set of guidance for section 3610 will reduce a chaotic patchwork of guidance from agencies; and
- Establishes **protections for contractors from penalization by adverse performance evaluation ratings due to COVID-19-related contract disruptions**. In these extraordinary times, federal contractors should not be punished through the past performance evaluation process for pandemic-related impacts that could negatively influence a federal agency's consideration of that contractor for future contracts.

As Congress considers further pandemic relief measures, initiatives set forth here should be considered for federal-aid transportation construction contractors as well as other public works construction contractors.

In conclusion, AGC appreciates your effort to address this unprecedented pandemic our country is facing and looks forward to working with you to further ensure the construction industry is safeguarded from the effects of this outbreak.

Sincerely,

A handwritten signature in cursive script that reads "James V. Christianson".

James V. Christianson
Vice President, Government Relations

cc: All members of the U.S. House of Representatives