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Advocacy: the voice of small business in government

January 16, 2009

BY ELECTRONIC MAIL
The Honorable Thomas M. Stohler
Acting Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: www.regulations.gov (Docket ID-OSHA-2007-0066)

Re: Comments on OSHA's Proposed Cranes and Derricks in Construction Rule

Dear Acting Assistant Secretary Stohler:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the Occupational Safety and Health Administration's (OSHA's) *Proposed Cranes and Derricks in Construction Rule*.[1] The proposed rule would impose new obligations on employers in the construction industry to ensure the safe operation of cranes and hoisting equipment used in construction, including assessment of ground conditions, power line safety, assembly/disassembly, inspections, controlling entities, and third-party operator certification.[2] The proposed rule also has special provisions concerning the operation of tower cranes.[3]

The proposed rule was the subject of a negotiated rulemaking by the Cranes and Derricks Negotiated Rulemaking Advisory Committee (C-DAC) in 2002[4] as well as a Small Business Advocacy Review Panel (SBAR Panel) in 2006 created in accordance with the Regulatory Flexibility Act (RFA),[5] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)[6] (discussed below). Further, Advocacy hosted two small business roundtables (on November 21, 2008 and January 8, 2009) to discuss the proposed rule and obtain additional input from small business representatives. While many small business representatives support the proposed rule in concept, others have raised a number of concerns that are reflected in the comments below.

[1] 73 Fed. Reg. 59714 (October 9, 2008).
[2] Id.
[3] Id. at 59945.
[4] Id. at 59715.
[5] 5 U.S.C. § 601 et seq.
[6] Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by SBREFA, gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.[7] Moreover, Executive Order 13272[8] requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Small Business Advocacy Review Panel

As indicated above, this proposed rule was the subject of a SBAR Panel convened by OSHA on August 16, 2006 in accordance with the requirements of the RFA, as amended by SBREFA. OSHA is required to convene a SBAR Panel for any proposed rule that is expected to "have a significant economic impact on a substantial number of small entities."[9] The SBAR Panel was assisted in its review of the draft rule by a number of "small entity representatives" (SERs) from the construction industry who took time from their busy schedules to review the draft rule and provide advice and recommendations to the SBAR Panel. The SER's comments are summarized in the preamble of the proposed rule[10] and cover a wide range of topics from third-party certification of operators to the projected costs of the rule.

In establishing the negotiated rulemaking committee, OSHA committed to publishing the draft rule prepared by the C-DAC as the proposed rule. However, OSHA has requested comment on all of the issues raised by the SERs and OSHA is not required to finalize the C-DAC rule as drafted. In fact, OSHA is specifically required by the RFA to "consider any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[11] A copy of the final report of the SBAR Panel (including a full

[7] 5 U.S.C. § 603 (c).
[8] Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking (67 Fed. Reg. 53461) (August 16, 2002).
[9] 5 U.S.C. § 609 (b).
[10] 73 Fed. Reg. 59723 – 59727.
[11] 5 U.S.C. § 603 (c). The RFA further states that: Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as -- (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements

discussion of the recommendations of the SERs) is available in the OSHA docket and on Advocacy's website at http://www.sba.gov/advo/laws/is_crane.html.

Advocacy's Comments on the Proposed Rule

1. **OSHA should consider eliminating the requirement for third-party certification of crane operators – at least for some small cranes or routine lifts.** The proposed rule requires third-party certification of all crane operators.[12] However, it is clear from the SBAR Panel process and subsequent discussions with small business representatives that some small business representatives favor third-party certification of operators while others strenuously oppose it. However, all small business representatives favor requiring operators to be fully trained and competent. Accordingly, OSHA should consider feasible alternatives to mandating third-party certification for all operators, such as by exempting some small cranes (based on vehicle weight or boom length) or routine lifts. OSHA should also assess whether it is feasible to allow small employers to "self-certify" that an operator is trained and competent to operate the equipment and perform the tasks being conducted (similar to OSHA's Forklift/Powered Industrial Trucks standard[13]). Such an approach might be appropriate for small cranes used in residential construction or for routine, redundant operations. If third-party certification is to be required for all operators, OSHA should expand the number of entities that can provide such certification (such as community colleges or any other accredited educational institution) in order to reduce the cost and ensure the availability of these services.

2. **OSHA should exempt equipment used solely to deliver materials to a construction site by placing or staking the materials on the ground.** This issue was raised during the SBAR Panel process by at least one SER whose company delivers bricks and other building materials to construction sites, but who is not operating what one normally thinks of as a crane[14] or engaging in construction work. Because this activity is of low risk and beyond the intended scope of the rulemaking, Advocacy recommends OSHA specifically exclude this type of equipment and activity from the rule.

3. **OSHA should clarify the meaning of "construction.**" OSHA should be more specific about what is and what is not deemed to be "construction" within the scope of the proposed standard.[15] Activities such as routine maintenance are not defined as

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under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

[12] 73 Fed. Reg. 59936.

[13] 29 CFR 1910.178.

[14] Arguably, these small boom trucks meet the technical definition of a crane because they are capable of hoisting, lowering, and horizontally moving a suspended load.

[15] OSHA defines the term "construction work" in 29 CFR 1910.12 and 29 CFR 1926.32(g), but there have been numerous interpretations and court cases involving the meaning of the term. See, for example, OSHA's interpretation of the difference between construction and maintenance available at: http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=21569.

construction work and are therefore not covered by the standard.[16] However, the test of what falls within the definition of construction can be confusing to small businesses, especially small subcontractors performing activities on varying sites. For example, is an air conditioning contractor who uses a crane to lift a replacement HVAC unit onto a roof engaged in construction work or maintenance? Depending on the answer, the contractor would or would not be covered by the proposed rule. Further, as discussed above, is a company that simply delivers material to a construction site with a boom truck engaged in construction? Advocacy recommends that OSHA clarify the meaning of the term "construction" for this rule and provide examples of activities that are both within and beyond the scope of the rule.

4. **OSHA should further limit the "controlling entity" provisions in the proposed rule.** Many small business representatives have expressed concern over the controlling entity provisions in the proposed rule. These provisions require a controlling entity to provide adequate site conditions and to inform the crane user and operator of any known underground hazards.[17] There are several concerns about these provisions from a small business perspective. For example, a small controlling entity (e.g., a small general contractor or a small manufacturing firm that is having an addition built on its facility) may not be engaged in any construction work and may therefore have little or no expertise about site conditions; however, they would be required to provide information about site conditions to their contractors. Further, a controlling entity might hire a contractor to perform work in a remote location about which the controlling entity has little or no knowledge. Finally, small contractors performing work at a remote sites have complained that site information is not, in practice, being provided to them.

   Advocacy appreciates that OSHA has tried to limit the scope of this provision by only requiring controlling entities to provide information they actually possess, but the provisions are highly controversial and are opposed by many small businesses. Advocacy remains apprehensive about OSHA's imposition of legal obligations on employers for employees who are not their own – especially where the controlling entity is not even engaged in construction. However, even if a controlling entity has a presence on a construction site and arguably is engaged in construction, the policy of requiring it to take action to protect another employer's employees emanates from OSHA's *Multi-Employer Citation Policy*,[18] which has never been promulgated as a rule and whose legal status as applied to construction has been called into question by the 2007 decision of the of the Occupational Safety and Health Review Commission in *Secretary of Labor v. Summit Contractors, Inc.*, pending review before the Eighth Circuit.[19] Advocacy raised similar concerns about the host-contractor provisions in OSHA's pending proposals to revise its Electric Power Transmission and Confined

[16] 73 Fed. Reg. 59916.
[17] 73 Fed. Reg. 59919.
[18] See, OSHA Directive, CPL 2-0.124 (1999) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024).
[19] BNA OSHC 2020 (No. 03-1622, 2007) (currently on appeal to the U.S. Circuit Court of Appeals for the 8th Circuit – No. 07-2191).

Spaces in Construction rules.[20] Accordingly, Advocacy recommends that OSHA eliminate these requirements from the rule.

5. **OSHA should not mandate that employers follow manufacturers' recommendations.** Several small business representatives raised concerns about the proposed requirement that employers follow manufacturers' recommendations about crane operation.[21] Their concern is that manufacturers may unduly limit the operating parameters of the equipment in order to avoid potential liability, thereby narrowing the range of safe operations an employer may undertake. For example, it may a safe practice to lift a person in a basket attached to a boom, but if a manufacturer's manual recommends against it that recommendation would appear to have the effect of a legal prohibition enforceable by OSHA. Advocacy recommends that the proposed rule be revised to confine manufacturers' recommendations to appropriate safety aspects of crane operation and to clarify that compliance with a manufacturer's recommendations may be evidence of proper/improper operation but are not legal mandates.

6. **OSHA should consider and document any "significant alternatives" to the proposed rule.** Advocacy understands that a great deal of time and effort went into the development of the proposed rule through the C-DAC negotiated rulemaking and the SBAR Panel processes. However, because OSHA had committed to publishing the draft rule developed by C-DAC as the proposed rule, a full consideration of significant alternatives that would specifically reduce the burden on small businesses have not been documented in the proposed rule. As stated above, the RFA specifically requires OSHA to "consider any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[22]

   The SERs provided a number concerns and recommendations about the proposed rule that OSHA should assess prior to finalizing the rule, even if that means deviating from the C-DAC draft. Indeed, at least one small business representative has recommended that OSHA discard the C-DAC draft and adopt the revised ASME B-30 consensus crane standard instead. Others have objected to the third-party certification provisions and sought greater flexibility for small cranes performing routine tasks. For these reasons, Advocacy recommends that OSHA consider and document any significant alternatives to the C-DAC draft that it considered so that the public can assess the fullness of the process.

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[20] See, Advocacy letter to The Honorable Jonathan L. Snare, Acting Assistant Secretary of Labor, January 9, 2006 (available at http://www.sba.gov/advo/laws/comments/osha06_0109.html) and Advocacy letter to The Honorable Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, February 28, 2008 (available at http://www.sba.gov/advo/laws/comments/osha08_0228.html.

[21] There are numerous requirements for employers to follow manufacturer's recommendations and criteria throughout the proposed rule. See, for example, 73 Fed. Reg. 59947.

[22] Advocacy notes that 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 to Federal Agencies, How to Comply with the Regulatory Flexibility Act*, SBA Office of Advocacy, May 2003, p. 73-75 (available at http://www.sba.gov/advo/laws/rfaguide.pdf).

Conclusion

Advocacy appreciates the opportunity to comment on OSHA's *Proposed Cranes and Derricks in Construction Rule*. Please feel free to contact me or Bruce Lundegren at (202) 205-6144 (or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Shawne C. McGibbon
Acting Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Susan E. Dudley, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget