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August 31, 2010

Via Regulations.gov

General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, N.W.
Room 4041
ATTN: Hada Flowers
Washington, DC 20405

**Re: FAR Case 2010-008; Recovery Act Subcontract Reporting
Procedures; 75 FR 38684; July 2, 2010
CODSIA Case 13-10**

Dear Ms. Flowers:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ are pleased to submit these comments in response to the interim rule with request for comments dated July 2, 2010 (75 FR 38684; the “Interim Rule”) issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the “Councils”) in FAR Case 2010-08. The Interim Rule, which is the second interim rule issued by the Councils to implement the reporting requirements of the American Recovery and Reinvestment Act (the “Recovery Act”),² revises the Recovery Act reporting clause, FAR 52.204-11, in three ways.

First, it requires first-tier subcontractors with Recovery Act funded awards of \$25,000 or more to report job information to the prime contractor—who, in turn, must report that information to the Government through <http://FederalReporting.gov>. See FAR 52.204-11(d). Second, it requires the prime contractor to submit its first report on or before the 10th day after the end of the calendar quarter in which the prime contractor received the Recovery Act-funded award. See FAR 52.204-11(c). Third, it requires the contractor and first-tier subcontractors to review a series of Frequently Asked Questions (“FAQs”) available online before submitting the required reports and moves the clause’s definitions from subparagraph (a) to the online FAQs. See FAR 52.204-11(c) (“The Contractor shall review the Frequently Asked Questions [] for Federal Contractors

¹CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of eight associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the Associated General Contractors of America (AGC), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

²Pub. L. 111-5, § 512 (Feb. 17, 2009).

before each reporting cycle and prior to submitting each quarterly report as the FAQs may be updated from time-to-time.”). CODSIA’s comments relate primarily to this third change to FAR 52.204-11.

A. The FAR Council should publish the key definitions and procedures for FAR 52.204-11 in the Federal Register and provide an opportunity for public comment.

In its first interim rule in this rulemaking, the Councils defined several key terms (“contract,” “first-tier subcontract,” “jobs created,” “jobs retained ” and“ total compensation”) in subparagraph (a) of FAR 52.204-11. It published those definitions in the Federal Register and provided an opportunity for public comment. The new version of that clause, as revised by the Interim Rule, does not define any of those terms. Instead, the revised clause requires the contractor to obtain the applicable definitions and procedures from the FAQs on the Office of Management and Budget’s (“OMB’s”) website. See FAR 52.204-11(a) (“For definitions related to this clause (e.g., contract, first-tier subcontract, total compensation etc.) see the Frequently Asked Questions available at http://www.whitehouse.gov/omb/recovery_faqs_contractors.”); & (c) (“For information on when the Contractor shall submit its final report, see the Frequently Asked Questions available at http://www.whitehouse.gov/omb/recovery_faqs_contractors.”). Although several of those terms and procedures are defined differently than they were defined under the prior interim rule, the Federal Register notice does not even highlight those changes.³

We commend the Councils for establishing the FAQs to provide practical guidance to contractors to assist in understanding and complying with the Recovery Act’s reporting requirements and the implementing FAR clause. We are concerned, however, that the approach goes too far by relying solely on the FAQs on a website and not incorporated into the clause to provide definitions and certain procedures that are central to the regulations, including FAR 52.204-11. The FAQs should be a resource to assist contractors, not a replacement for well-defined and comprehensive regulations. As discussed below, the approach of relying exclusively on OMB’s website to define the key terms in FAR 204-11 raises both substantive and legal concerns.

1. The reliance on fluid and unpredictable definitions and procedures in the online FAQs as a basis for compliance with FAR 52.204-11 is inconsistent with the Councils’ approach in this and all other

³For example, the definition of “first tier subcontract” was changed significantly from “a subcontract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act” in the initial rule (74 Fed. Reg. 14,645) to “a contract awarded directly by a Federal Government prime contractor whose contract is funded by the Recovery Act, to furnish supplies or services (including construction) for performance of a prime contract, but excludes supplier agreements with vendors, such as long-term arrangements for materials or supplies that would normally be applied to a contractor’s general and administrative expenses or indirect cost” in OMB’s FAQs. Additionally, the original version of the clause did not define “executive,” whereas OMB’s FAQs currently define executive as “officers, managing partners, or any other employees in management positions.”

rulemakings and will undermine compliant implementation of the Recovery Act reporting requirements.

It is essential to the procurement system that the FAR define the key terms of its solicitation/contract clauses either in the text of the clauses or elsewhere in the FAR (either with the general definitions in FAR 2.101 or in the relevant FAR part). The formal public comment process that accompanies that publication in the FAR assures those that will be charged with implementing the requirements have the opportunity to raise questions, express concerns with the proposed FAR language, and obtain a better understanding of the contractual commitments that will be imposed by the regulation. The approach adopted by the Councils for this Interim Rule runs counter to this well-established process. As stated above, the Councils previously included the definitions in the text of FAR 52.204-11. See 74 FR 14639 at 14645 (Mar. 31, 2009) (interim FAR 52.204-11). Similarly, when the Councils recently issued reporting requirements to implement the Federal Funding Accountability and Transparency Act of 2006 (the “Transparency Act”), the Councils included the key definitions in the text of the Transparency Act reporting clause, FAR 52.204-10. See 75 FR at 39419. In fact, several of those terms, such as “first tier subcontract,” and “total compensation,” are defined in exactly the same way as those terms are defined by OMB’s online FAQs for FAR 52.204-11. Compare FAR 52.204-10(a) with OMB FAQ Question 17 (“What are the definitions for the clause at FAR 52.204-11 dated Jul 2010? (07/02/2010)”) (available at http://www.whitehouse.gov/omb/recovery_faqs_contractors; last viewed August 20, 2010).

It is unclear why the Councils decided that the definitions were suitable for inclusion in the Transparency Act reporting clause but not the Recovery Act reporting clause.⁴ In any event, we submit that the approach used by the Councils in FAR 52.204-10 is preferable, as it provides more certainty and greater clarity for the Government and contractor personnel responsible for implementing the Recovery Act reporting requirements. The lack of standard, reliable definitions and procedures in the clause itself could undermine the procurement community’s efforts to implement the Recovery Act reporting requirements.

Moreover, contractors cannot be expected to commit to comply with reporting obligations that are not fixed at the time of contract award. This is because a contractor cannot determine if it will be able to comply with the contractual requirements if it does not know what requirements will apply. This very unusual practice of allowing the reporting requirements to change without notice and over the life of a Recovery Act-

⁴The FAR Councils have disfavored inclusion of references to websites in the FAR for purposes of providing hyperlinks to definitions even when the definitions are provided elsewhere in the Code of Federal Regulations (“CFR”). On the same date it issued the Interim Rule, the FAR Councils rejected a recommendation that FAR 45.101 include a reference to the CFR website where the Federal Management Regulation defines “real property,” stating that “in general the Councils wish to avoid adding unnecessary hyperlinks to the FAR **due to their potentially transient nature.**” See FAR Case 2008-011, *Government Property*, 75 Fed. Reg. 38,675, 38,676 (July 2, 2010) (emphasis added).

funded contract makes it impossible for a contractor to review the clause requirements prior to accepting the Recovery Act-funded award, thoroughly understand the compliance requirements, and determine if it can comply with those requirements. The Government, therefore, must give contractors an opportunity to review the applicable requirements before agreeing to accept work funded by the Recovery Act.

2. The Interim Rule violates the OFPP Act and the FAR by relying on OMB's website to define the key terms in FAR 52.204-11.

We also respectfully submit that the Councils' approach violates the Office of Federal Procurement Policy ("OFPP") Act, which requires that the Councils follow certain notice-and-comment requirements when revising the FAR. 41 U.S.C. §418b; FAR 1.501-2; *United States v. AEY, Inc.*, 603 F.Supp. 2d 1363 (S.D. Fla. 2009). Both the OFPP Act and the FAR itself generally require that the public be given 30 days to comment on a proposed procurement regulation, including "significant revisions" to such regulations, after publication in the Federal Register and 60 days before such a rule or significant revision takes effect. 41 U.S.C. §418b(a)-(b); FAR 1.501-2(c). Notice of a proposed regulation must include the full text of the proposal or, if it is impracticable to publish the full text, a summary of the proposal and a statement specifying the executive agency employee from whom the full text may be obtained. 41 U.S.C. §418b(c)(1); FAR 1.501-2(b). The OFPP Act and FAR 1.501-2 do not allow the Councils to promulgate a FAR clause without defining the key terms somewhere in the FAR.

The definitions and procedures for FAR 52.204-11 on OMB's website are subject to change both during the pendency of this rulemaking and after it is finalized. Indeed, the clause itself acknowledges that the definitions and procedures are fluid, stating, "the FAQs may be updated from time-to-time." FAR 52.204-11(c). The definitions are material to the regulation, as they determine both the scope of the clause and its substantive requirements. For instance, the definition of "first-tier subcontract" determines which subcontract awards the prime contractor must report and the definitions of "jobs created" and "jobs retained" determines how the prime contractor reports the employment effects of the Recovery Act funding for the prime contractor and subcontractors. Consequently, a change in the definitions constitutes a "significant revision" that triggers the OFPP Act's notice-and-comment requirements.

By allowing the definitions and procedures to change on OMB's website without notice in the Federal Register and an opportunity for public comment, the Interim Rule circumvents the OFPP Act.⁵ *Cf. Navajo Refining Co., L.P. v. United States*, 58 Fed. Cl.

⁵The Administrative Procedures Act ("APA") does not apply to the FAR. However, it is instructive that the Court of Appeals for the D.C. Circuit held that an agency must comply with the APA's notice-and-comment requirements—which are not materially different from the OFPP Act requirements in that both are triggered by substantive changes to the covered regulations—when revising a definition that is material to regulations covered by the APA. See *Michigan v. EPA*, 213 F.3d 663, 691-93 (D.C. Cir. 2000) (held that EPA failed to provide adequate notice and

200, 206-09 (2003) (held failure to publish notice in the Federal Register of proposed class deviation from FAR for economic price adjustment clause violated the OFPP Act); *La Gloria Oil and Gas Co. v. United States*, 56 Fed. Cl. 211, 221-22 (2003) (“[P]ublication of the class deviation was required by . . . § 22 of the OFPP Act. Defendant did not publish notice of the proposed class deviation and, contrary to defendant’s assertion, the published notice of the proposed permanent revision did not provide notice of the class deviation. Because defendant obtained the class deviation in contravention of the publication requirements established by . . . § 22 of the OFPP Act, the class deviation was not authorized and is not valid”); *American Small Business League v. Johnson*, 2010 WL 2645252 (N.D. Cal., June 8, 2010) (slip op.) (concluding that changing search fields on the Federal Procurement Data System website without providing notice in the Federal Register would violate the OFPP Act notice-and-comment requirements if it were a significant revision).

For these reasons, we recommend that the Councils revise the Interim Rule to include the definitions and procedures for FAR 52.204-11 in the text of the clause and publish it in the Federal Register and allow an opportunity for public comment. If it does not do so, we request that the Councils, at the very least, explain why they adopted this approach and how they believe it satisfies the OFPP Act’s notice-and-comment requirements, and also state in 52.204-11 that the FAQs in effect upon issuance of a particular solicitation (or possibly upon contract award) will govern any contract awarded under that solicitation.

B. Concerns Over Prime Contractors Obtaining Job Information from Subcontractors

CODSIA is concerned about the difficulty contractors may face obtaining the required job information from their subcontractor partners. It is very likely that such requests will be met with great resistance. For contracts that have yet to be awarded, there is no guarantee that they will be able to successfully obtain this information from potential first-tier subcontractors, which creates a barrier to entry. For contracts that have already been awarded and do not contain the clause at FAR 52.204-11, this modification to the original contract would create a completely separate set of difficulties. See 75 FR 38687 Subcontractors would be faced with the decision to either accept the contract modification or refuse, which could force the prime contractor to either terminate the contract or lead both parties down the uncertain road of litigation. Any refusals to submit to these requirements will, in turn, force a financial hardship on prime contractors by obtaining subcontract help elsewhere at a possibly higher cost. Such a result would limit competition for subcontracts due to a limited pool of subcontractors that would be willing to bid on Federal work. Either of these options would undoubtedly lead to delayed

comment under the Administrative Procedures Act before revising the definition of “electricity generating unit” after issuing a final rule implementing the Clean Air Act).

completion of the contract and would be costly to both the prime contractor and the government.

Another concern centers on the 1967 Court of Claims decision (*Schweigert, Inc. v. United States*, 181 CT. CL. 1184 (1967)) which held that a prime contractor could be held responsible for the delays of its first-tier subcontractors or suppliers. The Default clause was later amended to include delays caused by subcontractors and suppliers at any level within the scope of the prime contract's delay responsibility, no longer limiting a prime contractor's responsibility for all first-tier subcontracts and suppliers. Ultimately, we are concerned about the potential penalties concerning violations of the reporting requirements and how they will be assumed by or imposed on the prime contractor.

CODSIA would recommend that to facilitate expediency in posting the information to the Federal reporting web site, prime contractors should not be required to obtain information from their first-tier subcontractors. Instead, prime contractors and subcontractors should each separately file this information directly with the government website. The prime contractor's responsibility would be to flow-down this requirement to the subcontractor. As long as the prime contractor fulfills that obligation, the prime should be credited with fully performing its obligation. Accordingly, if a subcontractor were to fail to report this information, it should not reflect negatively on the prime contractor's performance evaluation. If the Councils insist on keeping this requirement as is, we strongly recommend the inclusion of a safe harbor and affirmative defense for prime contractors for violations committed by any subcontracting entity.

C. The Councils should state in the FAR that the FAQs cannot be inconsistent with FAR 52.204-11 and that the FAR controls in the event of any inconsistency.

CODSIA is concerned that the guidance in the FAQs on OMB's website could conflict with the FAR. For instance, FAR 52.204-11 states that the contractor and subcontractor must report the number and types of "jobs created and jobs retained." See FAR 52.204-11(d)(7)(ii) & (d)(10)(xii)(B). The clause also states, "[a] job cannot be reported as both created and retained." While CODSIA appreciates this direction, it seems to be superfluous in light of changes made to the guidance in the FAQs. Specifically, FAQ 15 requires the contractor to only report, "the number of hours worked and funded by the Recovery Act." It makes no distinction between jobs created and jobs retained. The distinction appears to be a remnant of the initial 2009 Recovery Act regulation that required separate reporting of jobs created and jobs retained. Because OMB's reporting requirements have changed as reflected in the FAQs, we recommend removing references to reporting of "jobs created and jobs retained" from FAR 52.204-11.

We also recommend that the Councils work with OMB to resolve any other discrepancies between the FAR and the FAQs available online. Additionally, the FAR

itself should state unequivocally that, in the event of a conflict, the FAR text controls over the FAQs.

* * * * *

CODSIA appreciates this opportunity to comment on the Interim Rule, and we would be pleased to respond to any questions the Councils may have on these comments. Please do not hesitate to contact Trey Hodgkins, Vice President for National Security and Procurement Policy and the CODSIA Project Officer at thodgkins@techamerica.org or 703-284-5310 or Bettie McCarthy, CODSIA's Administrative Officer at 703-875-8059 if you have further questions.

Sincerely,



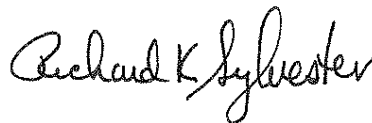
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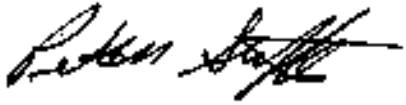
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Cynthia Brown
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