

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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January 20, 2010

Mr. Shay Assad
Director, Defense Procurement and Acquisition Policy
3060 Defense Pentagon
Room 3B855
Washington, DC 20301-3060

Subject: Implementation of Section 8116 of the Fiscal Year 2010 Defense Appropriations Act - CODSIA Case 02-10

Dear Mr. Assad:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA)¹ are pleased to provide their recommendations for implementing section 8116 of the Fiscal Year (FY) 2010 Defense Appropriations Act (Pub. L. 111-118), the so-called "Franken Amendment." Section 8116 prohibits the use of FY10 appropriated funds for certain contracts unless the contractor agrees not to enter into or enforce any existing agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of allegations of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

Since this amendment was proposed and adopted late in the appropriations cycle, there is only a limited record of legislative intent upon which to base implementation guidance. This legislative intent is important given the potentially broad scope of the amendment's application and its significant impact on contractor personnel programs and policies. Our members want to ensure there is a consistency of interpretation regarding the legislation's requirements. We have attached a set of recommendations regarding the legislation based upon our understanding of the

¹ CODSIA 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 seven associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), 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.

provisions in section 8116. We would appreciate an opportunity to discuss these issues and questions with you and your staff prior to release of any proposed guidance or implementing rule.

Our project officer is Mr. Richard J. Powers of Aerospace Industries Association. Mr. Powers may be reached at 703-358-1042 or by e-mail at dick.powers@aia-aerospace.org. We look forward to working with you and your staff on this issue.

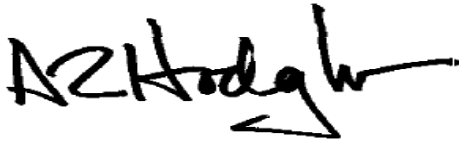
Sincerely,



Richard J. Powers
Director of Financial Administration
Aerospace Industries Association



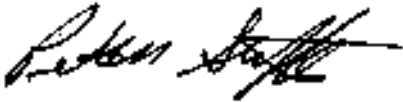
Alan Chvotkin
Executive Vice President & Counsel
Professional Services Council



A.R. "Trey" Hodgkins, III
Vice President – Federal Procurement
Policy
TechAmerica



Richard L. Corrigan
Policy Committee Representative
American Council of Engineering
Companies



Peter Steffes
Vice President – Government Policy
National Defense Industrial Association



R. Bruce Josten
Executive Vice President – Government
Affairs
U.S. Chamber of Commerce



Cynthia Brown
President
American Shipbuilding Association

**Questions and Issues in Implementation of Section 8116 of the
FY10 Defense Appropriations Act (Pub. L. 111-118)**

1. We understand that section 8116 applies only to DoD contracts and subcontracts in excess of \$1,000,000 and only to new awards with FY10 funds and the addition of FY10 funds to existing contracts. Therefore, we believe the restrictions apply only to the following transactions.
 - a. Prime contracts above \$1,000,000 awarded between February 17 and September 30, 2010.
 - b. First-tier subcontracts above \$1,000,000 awarded between June 17 and September 30, 2010, using FY10 funds, unless the prime contractor certifies that the first-tier subcontractor agrees to comply with the restriction.
 - c. The FY10 funded portion of multi-year contracts above \$1,000,000 awarded between February 17 and September 30, 2010.
2. For orders under existing contracts and subcontracts, please
 - a. Clarify the treatment of individual task or delivery orders awarded after February 17, 2010 under multiple award contracts awarded prior to February 17, 2010,
 - b. Clarify treatment of orders funded with FY10 funds and placed under multiple year IDIQ contracts,
 - c. Clarify how prime contractors are expected to treat individual purchase orders awarded to suppliers (especially those above \$1M) after June 17, 2010 under previously awarded supplier purchase agreements,
 - d. Clarify the treatment of modifications of existing contracts using FY10 funds, and
 - e. Clarify the treatment of undefinitized contract actions.
3. Section 8116 does not state that it is applicable to contracts for commercial items or commercial off the shelf (COTS) items. Therefore, we believe the authority in 41 U.S.C. 430 and 431 exempts contracts and subcontracts for commercial items and COTS item acquisitions from the application of section 8116 requirements. Because section 8116 does not specifically state that it is applicable to commercial items, it is our opinion that Congress did not intend that section 8116 apply to commercial item contracts even with a value greater than \$1,000,000. Further, at a time when DoD is relying on commercial firms for state-of-the-art products and services, it would be counter-productive to require that these firms make major changes in their personnel practices and policies solely to do business with DoD.
4. Since section 8116 is limited in scope to DoD contracts funded by FY10 dollars, we believe an appropriate interpretation of the phrase "any employee," when applicable to a DoD prime contractor other than a contractor for commercial items, would mean only those employees doing work under a covered contract.

5. The implementation should clarify that with respect to Title VII claims, section 8116 applies only to claims related to or arising from sexual assault or harassment as described by Senator Franken's statement.
6. The language in section 8116 states that the contractor must "agree" not to (1) enter into any agreement that requires arbitration of certain specified claims as a condition of employment; and (2) take any action to enforce any provision of an existing agreement that requires arbitration of such specified claims. We believe that the agreement takes place when the contractor accepts the clause requiring compliance with both elements of the statute.
7. DoD's implementation should provide clarification as to what "enforce any provision of an existing agreement" means. In our opinion, the meaning should limit enforcement of the mandatory arbitration provisions, not enforcement of other aspects of an agreement that do not relate to arbitration of the statutorily listed claims or torts. Consistent with the wording in Section 8116(a)(1), we believe the meaning of "existing agreements should be limited to those agreements that were formed "as a condition of employment."
8. The implementation should make it clear that the section 8116 restrictions only apply to arbitration cases that have not been adjudicated prior to implementation of section 8116. Implementation should also clarify that it does not affect a company's enforcement of a court order compelling arbitration or an arbitration award that pre-dated the date of the new requirement as it is applied to a given contractor or subcontractor.
9. The implementation should clarify how the Secretary of Defense will interpret and apply the national security waiver.
10. Any implementation of section 8116 will have a significant impact on the private sector and should allow for public comment, as required by the Office of Federal Procurement Policy Act (41 U.S.C. 418b).