

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
4401 Wilson Boulevard, Suite 1110
Arlington, Virginia 22203
703-875-8059

April 19, 2010

Ms. Marguerite Pridgen
Office of Federal Financial Management
Office of Management and Budget
Room 6025
New Executive Office Building
Washington, D.C. 20503

RE: Proposed Guidance for Reporting and Use of Information Concerning Recipient Integrity and Performance

Comments on Implementation of Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (P.L. 110-417)
CODSIA Case 04-10

Dear Ms. Pridgen:

The Council of Defense and Space Industry Associations¹ (CODSIA) appreciates the opportunity to provide comments on OMB's proposed guidance implementing Section 872 of the Duncan Hunter National Defense Authorization Act (NDAA) for FY 2009 published in the *Federal Register* on February 18, 2010. Section 872 requires the establishment of a government wide data system ("Federal Awardee Performance and Integrity Information System" (FAPIIS)) containing specified information related to the performance and integrity of particular Federal contract and grant awardees. The proposed guidance for grants would also apply to cooperative agreements. CODSIA submitted comments on November 5, 2009 on the proposed FAR rule (FAR Case 2008-027).² A final FAR rule was published on March 23, 2010³ and becomes effective on April 22, 2010.

Many companies that belong to CODSIA member associations have both Federal contracts and grants, both of which are covered under section 872. In order to avoid unnecessary misunderstanding and bifurcation of procedures for FAPIIS data

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 eight associations – the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the Associated General Contractors, the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the Chamber of Commerce of the United States. 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.

² The CODSIA comments are available at:

<http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a5188e>

³ The final FAR rule is available at <http://edocket.access.gpo.gov/2010/2010-6329.htm>

provided via the Central Contractor Registry (CCR), we strongly encourage OMB to ensure that the regulations implementing FAPIIS for grants is identical to the FAR implementation, except as necessary to account for the differences in the instruments, and that the CCR questions accurately reflect the requirements of the FAR and grants implementation.

An example of the impact of the inconsistency between the final FAR rule and the proposed grants guidance is seen in the language of the FAR and proposed grants award term that serves as the basis for the common CCR representation. FAR 52.209-7 requires that contractors represent that certain information provided in CCR is "current, accurate and complete as of the date of submission of the offer with regard to the following information." Grant recipients also make a representation in CCR; however, the language of 2 CFR 35 Appendix A that underlies the grant representation differs from that contained in 52.209-7. Consequently, while contractors and award recipients must both respond to the same questions in CCR, the underlying language in 52.209-7 (c)(1) and the language in 2 CFR 35 Appendix A, paragraph I. B, are not identical. There is no distinction in the statute calling for such a difference in the underlying language and it is likely that this significant inconsistency will result in confusion and possible litigation. For consistency, we recommend replacing the language of Appendix A, paragraph I. paragraph B with the language of FAR 52.209-7 (c)(1).

Similarly, the language of FAR 52.209-7 (a) defining "Administrative proceeding" is significantly different than the definition of "Administrative proceeding" at Appendix A, paragraph I.E.1. For example, the definition at 2 CFR 35, Appendix A, paragraph E.1. includes "...state or local or foreign government proceedings..." while the definition at 52.209-7 includes only proceedings at "the Federal and state level, but only in connection with performance of a Federal contract or grant." In addition to the above obvious inconsistencies, there is no rationale in Section 872 for including in this definition either international proceedings or state contracts not funded with Federal funds. Other significant differences also exist. To ensure offerors, contractors and recipients are making representations in CCR using the same criteria, it is essential that OMB adopt the FAR definition.

The language of Appendix A, paragraph I.E.2. "Total Value," defining Federal contracts and grants with total value greater than \$10,000,000, also differs from the FAR language by not providing instructions with regard to priced options. CODSIA recommends adopting the FAR definition to ensure the needed consistency.

In the 18 February 2010 *Federal Register* (page 7316), comments were requested regarding the possible impact of including additional information "from authoritative data sources not described in this guidance and information on each entity receiving awards below the \$500,000 threshold." CODSIA strongly believes OMB should not include any information in FAPIIS that has not been properly adjudicated and that does not directly relate to the offeror or contractor's performance of a Federal contract. Extraneous information on matters irrelevant to the performance of Federal government contracts should not be included and are likely to cloud the important matter of relevance to the instant procurement and surely result in unnecessary litigation.

FAR 9.104-7(b) requires the clause at FAR 52.209-7 to be inserted in solicitations where the resultant contract value is expected to exceed \$500,000.

However, 2 CFR 35.275 requires use of the award term in Appendix A in each grant or cooperative agreement. (Emphasis added) The OMB guidance should set a minimum \$500,000 threshold for use of the award term in Appendix A.

In FAR 52.209-7(c)(1), the offeror is making its representation with regard to whether they have, "in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or state level..." (Emphasis added) However, the language of 2 CFR 35 Appendix significantly differs by referring instead, to "...the award or performance of a grant, cooperative agreement, or procurement contract from either the Federal Government or a State..." (Emphasis added) The language of 2 CFR 35 should be revised to limit the representation to only federally funded contracts or grants, whether performed at the Federal or state level. (Note: Under the American Recovery and Reinvestment Act of 2009 (ARRA), many states are recipients of ARRA-funded Federal grants under which Federal grant rules apply.)

Central Contractor Registration (CCR)

We note that the CCR representations are already active in CCR even though the effective date for the final FAR rule does not arise until 22 April 2010. The premature adoption of the proposed guidance and related contractor compliance questions has already caused significant confusion in the contracting community.

As noted above, both the FAR and grants/cooperative agreement representations use the same three questions in the CCR. It is essential that the underlying language of representations in FAR 52.209-7 and 2 CFR 36 Appendix A be identical. It is equally important that the language of the CCR questions parallel the language of the two implementing rules. Today, the CCR questions do not do that.

For example, CCR Question #1 leaves it unclear as to the criteria on which an entity bases its "yes or no" response. Some have interpreted the question to mean the \$10 million threshold; others have argued this question refers to whether there is a solicitation provision, contract clause, or Financial Assistance Agreement term requiring that they complete the questions. In addition, the language of question 1 references FAR 52.209 without any clause number. Question #1 must be clarified before the 22 April 2010 deadline; we offer the following substitute:

*Is your business or organization (represented by the DUNS number on this specific CCR record) required by **FAR 52.209-7, FAR 52.209-8 or a Financial Assistance Agreement award term** to **provide information** ~~answer information~~ regarding criminal, civil, and/or administrative proceedings ~~in accordance with federal solicitation, contract, or assistance action requirements~~ (Federal Acquisition Regulation (FAR) 52.209)?*

Question #2 does not include the reference to the priced options currently included in FAR 52.209-7 and our recommended change to the 2 CFR 35 award term. We recommend the following change:

Does your business or organization (represented by the DUNS number on this specific CCR record) have current active Federal contracts and ~~or~~ grants

*with total value (including **all priced options** ~~any exercised/unexercised options~~) greater than \$10,000,000?*

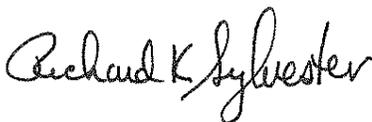
Question 3 does not accurately reflect the language of the underlying FAR representation in 52.209-7 and our recommended change to the 2 CFR 35 Appendix A award term. We recommend the following changes:

*Within the last five years, has your business or organization (represented by the DUNS number on this specific CCR record) and/or any of its principals, in connection with the award to or performance by your business or organization of a ~~Federal or State~~ contract or grant, been **the subject of a proceeding, at the Federal or state level that resulted in any of the following dispositions** ~~involved in a~~ (1) **a criminal proceeding resulting in a conviction or other acknowledgment of fault;** (2) **a civil proceeding resulting in a finding of fault and liability that results in the payment of** ~~with a monetary fine, penalty, reimbursement, restitution, and/or damages greater than of \$5,000 or more, or other acknowledgment of fault; and/or~~ (3) **an administrative proceeding resulting in a finding of fault and liability that resulted in the payment of** ~~with either a monetary fine or penalty greater than of \$5,000 or more; or the payment of a or reimbursement, restitution, or damages greater than in excess of \$100,000, or other acknowledgment of fault;~~ **or (4) in a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by your business or organization if the proceeding could have led to any of the outcomes specified in (1), (2) or (3) above?***

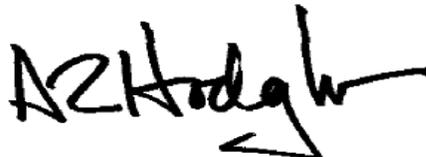
CODSIA reemphasizes the critical importance of identical coverage, to the greatest extent possible, of (1) FAR 52.209-7; (2) 2 CFR 35; and (3) the associated common representations in CCR. The data required by FAPIIS is important and highly sensitive, given the purpose for which it will be used. Any disconnects among these three elements of implementation will cause great confusion in government and industry and likely lead to undesirable consequences.

We appreciate the opportunity to provide comments on the proposed guidance. If you have any questions or need any additional information, please do not hesitate to contact Ric Sylvester, Vice President of Acquisition Policy at the Aerospace Industries Association, who serves as our project officer on these comments. He can be reached at 703-358-1045 or at Richard.sylvester@aia-aerospace.org.

Sincerely,



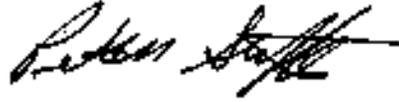
Richard K. Sylvester
Vice President, Acquisition Policy
Aerospace Industries Association



A.R. "Trey" Hodgkins, III
Vice President, National Security &
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



Alan Chvotkin
Executive Vice President & Counsel
Professional Services Council



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



Cynthia Brown
President
American Shipbuilding Association



Marco Giamberardino, MPA
Senior Director, Federal and Heavy
Construction Division
Associated General Contractors