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CODSIA Case – 2020-005

August 4, 2020

Defense Acquisition Regulations System
Attn: Ms. Carrie Moore
OUSD(A&S)/DPC/DARS
Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

Ref: DFARS Case 2018-D063: Data Collection and Inventory for Services Contracts
CODSIA Case: 2020-005

Dear Ms. Moore:

On behalf of the member associations of the Council of Defense and Space Industry Associations (CODSIA),[1] we are pleased to submit these comments on the proposed rule to amend the DFARS to require increased data reporting for certain services contracts, as published in the June 5, 2020, *Federal Register*.[2] We generally support the rule, but recommend (1) exempting contracts or subcontracts for the acquisition of commercial items from the applicability of the provision, and (2) limiting the requirement for subcontract data collection to the first-tier only, consistent with the current FAR coverage for civilian agencies.

Background

The proposed rule would revise the DFARS to narrow the implementation of 10 U.S.C. 2330a based on the amendment made by Section 812 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017. This rule would align the DFARS with other federal agencies in the collection of the majority of data elements required by 10 U.S.C. 2330a, as amended. For those limited data elements not captured government-wide, this rule will require contractors to report data in the System for

[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 – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), CompTIA, Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and 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.
[2] 85 Fed. Reg. 34569, June 5, 2020, available at https://www.govinfo.gov/content/pkg/FR-2020-06-05/pdf/2020-11754.pdf

Award Management (SAM) on an annual basis when they are awarded a Department of Defense (DoD) contract or task order valued in excess of $3 million for logistics management services, equipment related services, knowledge-based services, or electronics and communications services. When applicable, contractors will be required to annually report under the contract or task order during the preceding fiscal year: (1) the total dollar amount invoiced for, and (2) the total number of direct labor hours expended on services performed. The total number of direct labor hours reported to SAM should be the total of both the prime contractor's hours and its subcontractors' hours. A new basic DFARS clause and an Alternate I clause have been created to advise applicable contractors of the policy and requirements for reporting these two data elements in SAM.

Based on the supplemental information in the *Federal Register* notice, DoD proposes to apply this clause to solicitations and contracts for the acquisition of commercial items, excluding commercially available off-the-shelf (COTS) items and acquisitions at or below the $3 million threshold.

For the reasons discussed below, we request that DoD not apply this requirement to commercial item contracts (other than COTS) above the $3 million threshold and limit the requirement for subcontractor data collection to first-tier only.

Commercial Item Contracts

In the *Federal Register* notice, DoD states that the intent of 10 U.S.C. 2330a and, by extension, the proposed rule, is to enhance DoD's ability to manage the total force, inclusive of military, civilian, and contractor personnel. Because of the significant sums expended on commercial service acquisitions, DoD extended the proposed rule to commercial items, excluding COTS.

We disagree with DoD's decision and believe that requiring reporting on labor hours for commercial item contracts conflicts with the intent of FAR Part 12 and DFARS Part 212, as a matter of policy. Additionally, we disagree with DoD's rationale that this reporting requirement will fulfill the intent of 10 U.S.C. 2330a.

Requiring Labor Hour Reporting for Commercial Items Conflicts with Commercial Contracting Policies and Procedures

In general, FAR Part 12 and DFARS Part 212 outline unique policies and procedures applicable to purchasing commercial items. These policies are designed to simplify and streamline the procurement process for both the Government and industry and to encourage companies that operate primarily in the commercial sphere to do business

with the Government. Unlike civilian agencies, however, 10 U.S.C. 2375 exempts DoD contracts and subcontracts for the acquisition of commercial items, including COTS items, from provisions of law enacted after October 13, 1994 that, as determined by the Under Secretary of Defense for Acquisition and Sustainment, set forth policies, procedures, requirements, or restrictions for the acquisition of property or services. One exception applies when the Principal Director, Defense Pricing and Contracting, determines in writing that it would not be in the best interest of the Government to exempt contracts or subcontracts for the acquisition of commercial items from the applicability of the provision.

Regarding the proposed rule, neither 10 U.S.C. 2330a nor section 812 of the NDAA for FY 2017 explicitly requires DoD to collect this detailed data for commercial item contracts; DoD determined that doing so was in the Government's best interest. DoD's decision is at odds with the streamlined commercial contracting framework established by FAR Part 12 and DFARS Part 212. For example, many commercial services are offered as a fixed price for specific tasks, rather than direct labor hours worked by full-time equivalents (FTEs). This practice avoids Government over-customization of commercial items and generally reduces both overall costs and performance/delivery times.

Companies that operate primarily in the commercial sphere may not have a system to track labor hours for particular contracts and may have to adopt an entirely new accounting system to comply with this requirement; a cost that may cause them to avoid contracting with DoD entirely. Additionally, to comply with DoD's proposed rule, commercial businesses may have to modify or create new internal tracking and reporting mechanisms to collect labor hours from their subcontractors who are less motivated to adhere to an onerous government reporting requirement. This requirement will increase contractors' administrative burden and overhead costs, which will ultimately increase costs for the Government with only marginal utility.

Even if contractors already internally track labor hours for commercial item contracts, they may consider this information confidential. While some contractors may be willing to provide labor hour data directly to the Government, many critical commercial service providers may be unwilling to post this information on SAM. Overall, the reporting requirement will discourage industry from selling to the Government.

> *The proposed rule should be revised to only require collection of the information explicitly identified at 10 U.S.C. 2330a(b), "Data to be Collected," from contractors.*

While industry supports the concept of establishing uniform data collection and reporting requirements, versus varying requirements contract-by-contract, industry will be unable to comply with the data collection requirements on firm fixed-price (FFP) and commercial services contracts (including obtaining required information from their subcontractors) for the reasons discussed above. Accordingly, DOD should limit data collection from contractors to what is explicitly authorized under 10 U.S.C. 2330a(b).

Rather than require the reporting of direct contractor and subcontractor labor hours, DOD should use the data collected pursuant to 10 U.S.C. 2330a(b) and apply the same methodology used to determine military or civilian FTEs to fulfill the inventory summary required by 10 U.S.C. 2330a(c). Subcontractors under commercial services and FFP contracts will not be willing, and should not be required, to provide such information, which is why Congress provided DOD explicit authority at 10 U.S.C. 2330a(c)(2)(E) to use estimates within the inventory.

> *DoD is Unlikely to Meet the Intent of 10 U.S.C. 2330a by Requiring Labor Hour Reporting for Commercial Items*

As discussed above, DoD rationalized extending the proposed rule to commercial items on the basis that it will use this labor hour data to facilitate strategic workforce planning and program funding decisions, as required by statute. Specifically, 10 U.S.C. 2330a requires DoD to utilize the inventory of covered services contracts to: 1) inform strategic workforce planning decisions, 2) develop budget justification materials for services, and 3) ensure service contractors do not perform inherently governmental functions.

The Government Accountability Office (GAO) reported in 2018, however, that workforce and budget officials at the Army, Navy, and Air Force make only limited use of labor hour data from their service contract inventory to inform decision-making. In part, this is because by the time the inventory is available, the data reflected are often too outdated to inform strategic decisions.[3]

DoD's proposed rule is silent on how the Government will ensure labor data for commercial item contracts is meaningfully used by workforce and budget officials. Additionally, the proposed rule's annual reporting cycle will not produce the timely, relevant data needed to inform real-time, strategic program decisions. Finally, the proposed rule only requires reporting on aggregate labor hours performed. Without additional detail, this data cannot determine whether contractors are performing

[3] Government Accountability Office, "Long-standing Issues Remain about Using Inventory for Management Decisions," GAO-18-330 (Mar. 29, 2018), https://www.gao.gov/products/GAO-18-330.

inherently governmental functions – one of DoD's stated purposes for collecting data pursuant to 10 U.S.C. 2330a.

In short, DoD must commit to significant internal process reforms to fulfill its 10 U.S.C. 2330a obligations. Absent these reforms, the proposed rule is merely a burdensome and costly reporting requirement that is unlikely to meaningfully advance government planning. The proposed rule is particularly onerous for commercial businesses, as title 10 generally exempts DoD contracts from similar requirements. At a minimum, we recommend DoD limit the negative impacts of this provision—which are not outweighed by Government utility—by exempting from the final regulations not only COTS, but all commercial item contracts.

> *The proposed rule should include exemption authority for certain commercial contracts.*

At a minimum, we believe DoD should have the authority to exempt specific commercial contracts or types of contracts (*e.g.*, cloud computing services contracts) from the provision's proposed data reporting requirements. The legislative history of 10 U.S.C. 2330a demonstrates Congress' concern with "reduc[ing] data collection and unnecessary reporting requirements"[4] in order to focus on "activities performed . . . pursuant to staff augmentation contracts and contracts closely associated with inherently governmental functions."[5] The proposed rule, however, goes beyond addressing Congress' concerns and imposes unnecessary reporting requirements on contractors providing services that were never outsourced and, presumably, will not be insourced. To ease the administrative burden on commercial item contractors and to better ensure "a Governmentwide approach to collecting service contract data,"[6] we recommend that DoD have the authority, analogous to the Office of Federal Procurement Policy's authority,[7] to exempt specific commercial contracts or types of contracts from the provision's proposed data reporting requirements.

Applicability to Subcontracts

The proposed rule requires prime contractors to include subcontractor labor hours in the total number of hours reported annually to SAM. To ease the administrative burden of complying with this requirement, we recommend the final rule specifically authorize

[4] S. Rep. No. 114-840, at 1095 (2016) (Conf. Rep.).
[5] 10 U.S.C. 2330a(c)(1).
[6] 85 Fed. Reg. at 34570.
[7] *See* FAR 4.1703(a)(1) ("Except as exempted by OFPP guidance, service contractor reporting shall be required for contracts . . .").

prime contractors to rely on the direct labor hour data received from their subcontractors when reporting to SAM.

Finally, we note that DoD's proposed rule requires prime contractors to report on labor hour data for *all* subcontracts. In contrast, FAR 4.1703(a)(1) requires civilian service contractors to report on only contractor and first-tier subcontractor data. It is unclear whether collecting information below the first tier would materially facilitate DoD's future strategic workforce planning and program funding decisions. In addition, the cost and burden for contractors to collect this data from all subcontractors, regardless of tier, would outweigh the marginal benefit for DoD, as discussed above. Additionally, it is unlikely that collecting this data from such subcontractors would significantly change the total labor hours reported.

Accordingly, to the extent permitted by law, we recommend DoD consider aligning this proposed rule with FAR 4.1703(a)(1) by limiting labor hour reporting requirements to prime contracts and first-tier subcontracts.

Thank you for your attention to these comments. We welcome the opportunity to discuss them with you and/or the drafting team at your convenience. If you have any questions or need any additional information, please do not hesitate to contact CODSIA's lead on these comments, Megan Petersen, Senior Director of Policy, Public Sector and Counsel for the Information Technology Industry Council. She can be reached at (530) 209-4575 or mpetersen@itic.org.

Sincerely,

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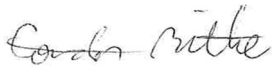

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