

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

January 27, 2012

Ms. Donna Calacone
Office of Procurement and Property Management
Procurement Policy Division
MAIL STOP 9306
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250-9303

Via e-mail: Procurement@usda.gov

**Subject: Adverse Comments On AGAR Subpart 422.70–“Labor Law Violations”
48 CFR 422 Direct Final Rule; 48 CFR 422 Proposed Rule
CODSIA Case 02-12**

Dear Ms. Calacone:

The Council of Defense and Space Industry Associations (CODSIA)¹ is pleased to submit the following “adverse comments” on the United States Department of Agriculture (“USDA”) Acquisition Regulation (“AGAR”) clause 452.222-7001, “Labor Violations,” which was published in the *Federal Register* on December 1, 2011, as both a “direct final rule”² and a proposed rule.³

CODSIA provides a forum for industry-wide consideration of the many policies, regulations, and procedures that affect government contractors. At the urging of the Department of Defense (DoD), it was formed in 1964 by industry associations having common interests in the defense and space fields and continues to provide broad industry responses to new or revised procurement regulations, policies, and procedures. CODSIA functions as a voluntary, coordinating, non-profit, consultative body.

While we appreciate USDA’s stated goal of respecting and following the policies and laws regarding worker labor protections, CODSIA questions whether this rule is necessary in light of the existing enforcement agencies and robust enforcement mechanisms that are already provided for under the nation’s labor laws. Therefore, we urge USDA to withdraw the direct final rule, as well as the proposed rule, and instead rely on existing

¹ CODSIA currently consists of six industry trade associations and thus represents the comments of thousands of federal government contractors nationwide on acquisition policy issues. A CODSIA comment letter is not a letter from a single organizational entity but from thousands of affected stakeholders. This unique status as the conveyor of regulatory comments for some of the largest trade associations working on acquisition policy also represents the collective expertise of these associations and the companies they represent.

² 76 Fed. Reg. 74722 (Dec. 1, 2011) (direct final rule).

³ 76 Fed. Reg. 74755 (Dec. 1, 2011) (companion proposed rule).

enforcement mechanisms and enforcement agencies that are charged with enforcing the complex web of labor laws encompassed by this rule. We recognize that there is a distinction between the burden of complying with the applicable labor laws and the additional burden USDA would create for complying with the requirements of this regulatory initiative.

In determining whether there is a need for any rule, USDA should consider the potential burden on USDA contracting officials who will be required to resolve reports of noncompliance with labor laws in order to decide whether corrective action is warranted, even though these contracting officials may not have the resources or expertise to interpret and enforce the various labor laws that are potentially implicated by this rule. In addition, USDA should consider the significant burden on contractors that will be required to implement processes and procedures to monitor compliance with myriad labor laws up and down their entire supply chain.

Finally, if USDA ultimately finds that there is a need for such a rule notwithstanding the existing enforcement regimes and proceeds with the rulemaking, CODSIA is concerned that the proposed USDA clause violates the law and FAR restrictions and contains a number of ambiguities that would create significant uncertainty and risk for the contracting community. Therefore, in the event that the rule is not withdrawn in its entirety, we urge USDA to withdraw the direct final rule and instead follow the standard notice-and-comment process to ensure that the views and comments from us and other interested parties are fully and fairly considered.

I. SUMMARY OF THE PROPOSED RULE

Under this new rule, the following clause, AGAR 452.222-7001, would be required in all USDA solicitations and contracts that exceed the simplified acquisition threshold. It provides:

Labor Law Violations (August 2011)

In accepting this contract award, the contractor certifies that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws. The Department of Agriculture will vigorously pursue corrective action against the contractor and/or any tier subcontractor (or supplier) in the event of a violation of labor law made in the provision of supplies and/or services under this or any other government contract. The contractor is responsible for promptly reporting to the contracting officer when formal allegations or formal findings of non-compliance of labor laws are determined. The Department of Agriculture considers certification under this clause to be a certification for purposes of the False Claims Act. The Department will cooperate as appropriate regarding labor

laws applicable to the contract which are enforced by other agencies.

Proposed AGAR 452.222–7001.⁴

As drafted, the rule would apply to all contracts other than those under the simplified acquisition threshold. *See* Proposed AGAR 422.7001.⁵ There are no proposed exceptions for contracts for commercial items, contracts for commercially available off the shelf (“COTS”) items, or for any other contract types.

II. COMMENTS

A. OPPM Should Follow Acquisition-Specific Notice-And-Comment Procedures

As a threshold matter, CODSIA urges USDA to reconsider the use of direct final rulemaking procedures and instead follow the standard acquisition notice-and-comment procedures in light of the significant issues and concerns raised by this rule and AGAR 452.222-7001.

According to USDA rulemaking procedures, use of direct final rulemaking authority is appropriate only for rules that are “believed to be noncontroversial and unlikely to result in adverse comments” USDA Departmental Regulation DR-1512, “Regulatory Decisionmaking Requirements” at 6.⁶ Indeed, OPPM’s policy regarding the use of direct final rulemaking authority explicitly recognize that “[n]ot all OPPM rules are good candidates for direct final rulemaking.”⁷ OPPM’s rulemaking policy specifically requires that if any adverse comments are received, OPPM is required to withdraw the direct final rule and instead follow the normal notice and comment procedures.⁸ For purposes of this requirement, an “adverse comment” is any comment that “suggests[s] that the rule should not be adopted, or that suggest[s] that a change should be made to the rule.”⁹

In the commentary accompanying the proposed rule, OPPM indicated that it decided to issue this new rule as a “direct final rule” based on its view that “this as a non-controversial action and expects no adverse comments.”¹⁰ Notwithstanding this view, CODSIA believes that this proposed rule raises a number of significant issues that make it inappropriate for the use of direct final rulemaking authority. First, we urge OPPM to reconsider the need for the proposed rule in light of the numerous agencies which are already entrusted with the enforcement of our nation’s labor laws—agencies that have the expertise, experience, authority, and resources to interpret and enforce these highly specialized rules and regulations. Second, even if there were a need for this rule, the rule contains a number of ambiguities that create significant uncertainty for contractors and

⁴ Published at 76 Fed. Reg. 74,723 and 76 Fed. Reg.74,756.

⁵ *Id.*

⁶ *See also id.* at Appendix E (available at <http://www.ocio.usda.gov/directives/doc/DR1512-001.pdf>).

⁷ 63 Fed. Reg. 9,158 (Feb. 24, 1998) (OPPM Policy Statement regarding “Use of Direct Final Rulemaking”).

⁸ *Id.*; *see also* DR 1512 at Appendix E (same).

⁹ 63 Fed. Reg. at 9,158.

¹⁰ 76 Fed. Reg. at 74,755.

agency officials alike and that would need to be addressed before any rule took effect. Finally, given the breadth of the rule and the complex web of statutes and regulations implicated by this rule, as well as the lack of any exceptions for commercial item or COTS contracts, the proposed clause would impose a significant burden on both USDA contractors and agency officials, as discussed below.

For all of these reasons, which are discussed in more detail below, CODSIA urges OPPM to withdraw the proposed rule in its entirety and instead rely on the existing enforcement agencies and existing regulatory schemes to enforce our nation's labor laws. At a minimum, OPPM should withdraw the direct final rule and instead follow normal acquisition notice-and-comment procedures to address the significant issues and concerns raised in these comments, consistent with OPPM's statement accompanying the proposed rule that "[i]f the Agency receives significant adverse comments, a timely document will be published withdrawing the direct final rule, and all public comments received will be addressed in a subsequent final rule based on [the proposed rule.]"¹¹

B. OPPM Should Reconsider The Need For The Proposed Rule

Although CODSIA respects USDA's concerns, we urge USDA to consider whether the proposed rule is necessary in light of the existing enforcement mechanisms that are already provided for under the nation's labor laws.

According to the Department of Labor ("DOL"), there are more than 180 federal laws as well as implementing regulations that govern the activities of more than 10 million employers and 125 million workers.¹² Enforcement of this complicated web of statutes and regulations has been delegated to a number of different organizations within DOL, including:

- The Wage and Hour Division, which enforces the minimum wage requirements of the Fair Labor Standards Act ("FLSA"), the Davis-Bacon Act, the Walsh-Healey Act, and the Service Contract Act ("SCA"), as well as a number of other federal mandates such as the Immigration and Nationality Act ("INA"), the Consumer Credit Protection Act ("CPCA"), and the Family and Medical Leave Act ("FMLA");
- The Office of Federal Contract Compliance Programs ("OFCCP"), which administers and enforces the Equal Employment Opportunity and other civil rights laws imposed on federal contractors and subcontractors;
- The Veterans' Employment and Training Service ("VETS"), which administers and enforces laws that grant special employment rights, hiring preferences, and employment protections for veterans;
- The Occupational Safety and Health Administration ("OSHA"), which enforces various workplace safety and health standards;

¹¹ See *id.*

¹² See DOL "Summary of the Major Laws of the Department of Labor" (available at <http://www.dol.gov/opa/aboutdol/lawsprog.htm>).

- The Office of Labor-Management Standards (“OLMS”), which is responsible for administering laws governing the relationships between unions and their members; and
- The Employee Benefits Security Administration (“EBSA”) (formerly known as the Pension and Welfare Benefits Administration), which is responsible for regulating pension and welfare benefit plans under ERISA, as well as the enforcement of certain health-care protections such as the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).

The foregoing list is just a sampling of the existing enforcement mechanisms and agencies that possess the expertise, experience, and resources to interpret and enforce the complex web of labor laws and regulations that are potentially encompassed by this proposed rule. In light of these existing enforcement authorities, we urge OPPM to reevaluate whether there is a need for the proposed rule. Moreover, USDA should consider whether the proposed rule could potentially cause USDA to usurp the authority of the agencies that have been charged with enforcing those laws and even lead to conflicting enforcement outcomes to the extent that the proposed rule calls for USDA to take “corrective action” in the event it identifies a labor law violation.

Accordingly, we urge USDA to withdraw the proposed rule and instead rely on the existing enforcement mechanisms and enforcement agencies that have been entrusted with the enforcement of our labor laws.

C. The Proposed Rule Would Impose A Significant Burden On Both Contractors And Agency Officials

In determining whether there is a need for the proposed rule, CODSIA also recommends that USDA take into account the significant burden that this proposed rule would likely have on contractors and agency officials alike.

As drafted, the rule requires contractors to certify that the contractor as well as its subcontractors and suppliers at any tier are in compliance with all applicable labor laws. *See* Proposed AGAR 452.222–7001. According to the accompanying regulation, the rule would apply to all contracts other than those under the simplified acquisition threshold, with no exceptions for contracts for commercial items, contracts for COTS items, or any exceptions for any other contract type.

As discussed above, there are more than 180 different federal labor laws that are potentially implicated by the proposed rule—not to mention state labor laws which are arguably implicated by the proposed rule as well. In order to comply with the proposed certification requirement, as well as the requirement to report formal allegations to the contracting officer, contractors will need to implement processes and procedures to monitor and report on their compliance with each and every labor law potentially implicated by the proposed rule, regardless of whether those laws have any nexus to any of the contractor’s USDA contracts. Moreover, because these certifications apply to subcontractors and

suppliers at every tier, contractors would have to establish processes and procedures for monitoring compliance up and down their entire supply chain, including (arguably, based upon a potential interpretation of the clause) “suppliers” that have no nexus to a contractor’s contracts with USDA. For contractors with large numbers of employees and facilities, and/or with significant numbers of subcontractors and suppliers, the burdens of establishing processes and procedures to comply with this rule are potentially significant.

Likewise, the rule would impose a significant burden on USDA contracting officials, who would be responsible for reviewing reports of noncompliance and taking “corrective action” against contractors and subcontractors, even though those contracting officials may not have the expertise or resources to interpret and enforce the myriad labor laws implicated by the proposed rule and where not all corrective action is appropriate or applicable to USDA contracts.

Therefore, in light of the number and magnitude of the potential burdens imposed by the rule, CODSIA recommends USDA withdraw both the direct final rule and the proposed rule.

D. The Proposed Rule Contains A Number Of Ambiguities

Even if USDA were to determine that there is a need for a unique USDA acquisition rule, there are a number of ambiguities in the rule that must be addressed before the rule takes effect.

First, the rule broadly requires each USDA contractor to certify that the contractor and its subcontractors and suppliers are “in compliance with all applicable labor laws.” As drafted, the rule does not clearly define what specific laws are potentially “applicable.” For example, it is not clear whether “applicable” labor laws include only those laws unique to government contractors (*e.g.*, the Davis-Bacon Act and the Service Contract Act), or whether they include the more than 180 federal laws administered by DOL, or even State labor laws. In addition, FAR-based contracts already require compliance with a host of labor laws; if these are the laws that are covered, how does the rule differ from the existing FAR requirement to comply with the labor laws specified in the contract? If the clause is intended to expand contractor responsibility for labor laws beyond those covered in the existing FAR clauses (and any specific USDA-unique clauses), we believe USDA must specify those additional laws to be covered.

Second, the rule requires contractors to report to the contracting officer “when formal allegations or formal findings of non-compliance of labor laws are determined.” As drafted, the rule does not define what constitutes a “formal allegation or formal finding” of non-compliance or specify who is responsible for “determining” whether a noncompliance exists. For example, under OSHA regulations, any employee may file a formal complaint, which may then result in a formal investigation by OSHA or a less formal inquiry to determine whether a violation has occurred.¹³ As drafted, USDA’s proposed rule could be interpreted to require disclosure of any OSHA complaint alleging a violation of workplace

¹³ See OSHA Field Operations Manual, Ch. 9 (“Complaint and Referral Processing”).

safety standards whether or not the complaint is ultimately determined to have merit following a formal investigation or inquiry. To the extent that USDA proceeds with the rulemaking, we recommend that the clause be revised to require reporting of formal findings of noncompliance by the cognizant organization within DOL only and that the requirement to report “formal allegations” be deleted.

Third, while the rule’s certification requirement clearly extends to subcontractors or suppliers, it is not clear whether the rule’s reporting obligation likewise applies to violations by subcontractors or suppliers or whether this reporting obligation is limited to non-compliance only by the covered contractor.

Fourth, the term “supplier,” is not defined in the FAR or USDA regulations and could be interpreted to extend broadly to any firm that provides goods or services to a USDA contractor, regardless of whether that supplier has any nexus to a government contract.

In light of these ambiguities, the new rule would create significant uncertainty and risk for contractors doing business with USDA. This risk is magnified by the fact that the rule specifically references the False Claims Act, as well as USDA’s intent to “vigorously pursue corrective action” against any contractor or subcontractor in the event of noncompliance. Therefore, in the event the rule is not withdrawn, we recommend that USDA follow notice-and-comment rulemaking to clarify any and all ambiguities in the proposed rule as currently drafted. At a minimum, the rule should be clarified to (i) identify the specific labor laws encompassed by the certification; (ii) clearly define the circumstances when a non-compliance must be reported, including whether contractors are required to report non-compliance by subcontractors and supplier; (iii) clearly define what constitutes a “subcontractor” or “supplier” for purposes of the proposed rule; and (iv) include some nexus to a USDA contract.

E. USDA Imposes an Improper Contract Certification

A contractor who accepts an award is "deemed" to certify that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors at any tier, and suppliers, are also in compliance with all applicable labor laws. We have several concerns with this provision. First, Section 29 of the Office of Federal Procurement Policy Act prohibits an agency from creating an acquisition certification requirement that is not imposed by statute or approved by the head of the agency; to our knowledge, no such approval has been provided. In addition, the pre-award "deemed certification" imposes an absolute certification for the prime contractor's own compliance and does not provide for a "best knowledge and belief" standard for the prime contractor, even though such "best knowledge" standard is available for the prime relating to its subcontractors and suppliers at any tier. However, since it is most common that the prime contractor will not have any contractual relationship with any of its subs until after award, the prime is being asked to make an assertion before it is in any position to flow down the compliance requirements.

In addition, the clause contravenes FAR 12.301(a), which states that “contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses . . . [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items” See also FAR 12.301(f) (limiting the ability of agencies to supplement the FAR provisions and clauses applicable to commercial items).

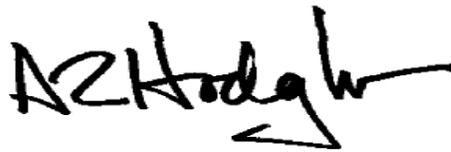
II. CONCLUSION

Thank you for the opportunity to submit these comments on this important matter. We urge USDA to immediately cancel the direct final rule and also withdraw the proposed rule. CODSIA would welcome the opportunity to discuss these comments further or to submit additional information to assist OPPM. CODSIA’s project officer for this rule is Alan Chvotkin with the Professional Services Council and he can be reached at (703) 875-8059 or at chvotkin@pscouncil.org. You can also contact Bettie McCarthy, CODSIA’s Administrative Officer at 703-875-8059 or at codsia@pscouncil.org.

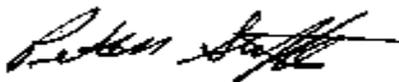
Sincerely,



Alan Chvotkin
Executive Vice President & Counsel
Professional Services Council



A.R. “Trey” Hodgkins, III
Senior Vice President, National Security
and Procurement Policy
TechAmerica



Peter Steffes
Vice President, Government Policy
National Defense Industrial Association



Richard Corrigan
Policy Committee Representative
American Council of Engineering Companies



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



Susan Tonner
Assistant Vice President
Aerospace Industries Association