August 17, 2017

Lawrence Trowel
Commissioner
Section 809 Panel
1400 Key Blvd. Suite 210
Rosslyn, VA 22209

Subject: Input to Section 809 Panel on Commercial Item Clauses

Dear Mr. Trowel,

The Coalition for Government appreciates the opportunity to submit comments regarding the burden on commercial contractors that may be imposed by clauses included in FAR 52.212-5 .

The Coalition for Government Procurement (The Coalition) is a non-profit association of firms selling commercial services and products to the Federal Government. Our members collectively account for tens of billions of dollars of the sales generated through the GSA Multiple Award Schedules (MAS) program, VA Federal Supply Schedules (FSS), the Government-wide Acquisition Contracts (GWAC), and agency-specific multiple award contracts (MAC). Coalition members include small, medium, and large businesses that account for more than $145 billion in Federal Government contracts. The Coalition is proud to have worked with Government officials for more than 35 years towards the mutual goal of common sense acquisition.

As requested, the Coalition has provided feedback on the burdens to contractors associated with the identified clauses. The Coalition sincerely appreciates the opportunity to provide input on streamlining the acquisition system and increasing efficiencies. If there are any questions I may be reached at (202) 331-0975 or rwaldron@thecgp.org.

Sincerely,

Roger Waldron
President

Section 809 Panel - Commercial Buying Team
FAR 52.212-5 Clause Review

Clause – 52.223-13, Acquisition of EPEAT®-Registered Imaging Equipment (Jun 2014) (E.O.s 13423 and 13514)
52.223-14, Acquisition of EPEAT®-Registered Televisions (Jun 2014) (E.O.s 13423 and 13514)
52.223-16, Acquisition of EPEAT®-Registered Personal Computer Products (Oct 2015) (E.O.s 13423 and 13514)

Does compliance with this clause impose a burden on your business?

With respect to FAR 52.223-13, 52.223-14, and 52.223-16 Acquisition of EPEAT-Registered Products, there is not a significant amount of burden and cost placed on contractors and subcontractors. Investments have already been made in product design and EPEAT is required by customers other than the Federal government.

Please describe the burden.

The clause requires that imaging equipment, televisions, and personal computers offered at the time of submission of proposal must receive at least a bronze EPEAT certification. EPEAT or the Electronic Product Environmental Assessment Tool is a free source of environmental product ratings to help purchasers make decisions about sustainable products. EPEAT is managed by the Green Electronics Council. The environmental criteria are developed through stakeholder consensus and manufacturers are subject to ongoing verification.

In order to receive bronze certification (the level required by the FAR clauses), the product must adhere to the latest ENERGY STAR specifications and are designed, manufactured, and produced in a way that reduced toxic content and solid waste, decreases emissions, and increases recyclability.

Manufacturers of covered products have already made investments in modifying product design, manufacturing and other processes to meet EPEAT certification requirements. Continuing these commitments to meet the needs of non-Federal government customers is not a significant burden.

Could the clause be revised to minimize the burden on commercial contractors?

Members have reported that they already comply with these clauses and likely would continue to even if the FAR clause were eliminated. Additionally, hundreds of state and local governments, as well as private sector buyers, use EPEAT to make product comparisons. Because of its widespread use, manufacturers will likely continue to register their products on EPEAT.

Ultimately while the FAR clause could be eliminated, it would have very little impact on reducing the burdens of contractors.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

Yes. This is a burden imposed by state and local governments (including California and New York State). Additionally, EPEAT is required by private sector buyers.

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Clause – 52.223-15, Energy Efficiency in Energy-Consuming Products

Does compliance with this clause impose a burden on your business?

With respect to FAR 52.223-15, Energy Efficiency in Energy-Consuming Products, there is not a significant amount of burden and cost placed on contractors and subcontractors.

Please describe the burden.

The clause requires that all energy-consuming products used by the Government are energy efficient products (i.e. ENERGY STAR or FEMP-designated products). This excludes energy-consuming products designed or procured for combat, but includes products purchased by the government, acquired by the Contractor for use in performing services at a Federally-controlled facility, furnished by the contractor for use by the Government, or specified in the design of a building or work or incorporated during its construction, renovation, or maintenance.

In order to receive an ENERGY STAR label, a product must meet the energy efficiency requirements set forth in the ENERGY STAR product specifications, which are managed by the Environmental Protection Agency (EPA).

Additionally, ENERGY STAR certification is required in order to receive bronze-level EPEAT registration.

ENERGY STAR is an established voluntary environmental program managed by the EPA that is well-recognized in the commercial market. Manufacturers that participate make product design, testing, marketing and other investments in the program. The EPA updates the ENERGY STAR standards periodically, which does require investment by manufacturers to meet the new criteria.

Could the clause be revised to minimize the burden on commercial contractors?

Members have reported that they already comply with this clause and likely would continue to even if the FAR clause were eliminated. Ultimately while the FAR clause could be eliminated, it would have very little impact on reducing the burdens of contractors. With or without FAR 52.212-5, contractors are likely to offer ENERGY STAR and FEMP-designated products to Federal agencies because they are widely available commercially in response to demand outside of the Federal market.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

Yes. Since ENERGY STAR is required for EPEAT registrations, any entities that require EPEAT also require ENERGY STAR. As we explained in the previous Clause Review, EPEAT is required by hundreds of state and local governments.

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Clause – 52.226-6, Promoting Excess Food Donations to Nonprofit Organizations

Does compliance with this clause impose a burden on your business?

With respect to FAR 52.226-6, Promoting Excess Food Donations to Nonprofit Organizations, there is not a significant amount of burden and cost placed on contractors and subcontractors.

Please describe the burden.

The clause encourages, to the maximum extent practicable and safe, for contractors to donate excess, apparently wholesome food to nonprofit organizations that provide assistance to food-insecure people in the United States.

Contractors and subcontractors are required to assume the responsibility for all costs and the logistical support to collect, transport, maintain the safety of, or distribute the excess food to the nonprofit.

The clause is required to be inserted in subcontracts at any tier valued at more than $25,000.

Could the clause be revised to minimize the burden on commercial contractors?

The burden of this clause is not excessive since contractors are encouraged, although not required, to donate excess food. Ultimately the clause does not improve the Government's ability to procure goods and services, but it does not hinder contractors from providing goods or services either.

Ultimately while the FAR clause could be eliminated, it would have very little impact on reducing the burdens of contractors.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

We are not aware of a similar burden for companies that do not do business with the Federal Government.

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Clause – 52.222-62, Paid Sick Leave Under Executive Order 13706

Does compliance with this clause impose a burden on your business?

With respect to 52.222-62, Paid Sick Leave, there is a significant amount of burden and cost placed on contractors and subcontractors.

Please describe the burden.

The clause requires that the contractors shall permit each employee to earn not less than 1 hour of paid sick leave for every 30 hours worked. The clause also requires contractors to allow for the sick leave to accrue. Under the clause, contractors are responsible for subcontractor compliance.

In the event of failure to comply, the contractor or subcontractor may have its payment suspended, or the contract may be terminated. A breach of clause may be grounds for debarment.

Contractors are required to maintain records for three years after the completion of work on the contract. The records must include more than fifteen elements including employee information, wage rate, hours worked, deductions, requests to use paid sick leave, and the dates and amount of paid sick leave taken by employees.

Could the clause be revised to minimize the burden on commercial contractors?

This clause is extremely burdensome to industry. Its impact could be minimized by providing more guidance on when an employee performs work "in connection with" a contract. For example, requiring the sick leave if more than half of the employee's time is spent on the contract.

Additionally, the clause could be updated to provide more flexibility for contractors, including allowing contractors to count fringe benefits provided under Service Contract Act or the Davis-Bacon Act towards the requirement, and reducing the record keeping burden.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

Several state and local governments such as California and the District of Columbia have paid sick leave laws.

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Clause – 52.242-5, Payments to Small Business Subcontractors

Does compliance with this clause impose a burden on your business?

With respect to 52.242-5, Payments to Small Business Subcontractors, there is a burden and cost placed on contractors and subcontractors.

Please describe the burden.

Contractors are required to notify a contracting officer if contractors make a reduced or untimely payment to the subcontractors.

The notice must be given to the contracting officer no later than 14 days after the subcontractor was entitled to payment.

Could the clause be revised to minimize the burden on commercial contractors?

This is burdensome to industry. The reporting is burdensome, and members are concerned about the process because:

- There is no privity of contract between the government and the subcontractor
- There may be extenuating circumstances for the late payment
- There is a burden placed on the contracting office to take un-prescribed action without having privity

The clause can be eliminated. OMB in M-17-26 has already eliminated a similar reporting burden. If the clause cannot be eliminated then guidance must be provided to contracting officers on the correct actions to take. There should be an exception for reporting late payments due to extenuating circumstances that may include invoice errors or performance concerns.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

We are not aware of a similar burden for companies that do not do business with the Federal Government.

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Clause – 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations

Does compliance with this clause impose a burden on your business?

With respect to 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations, there is not a significant burden and cost placed on contractors and subcontractors.

Please describe the burden.

The Government is prohibited from contracting with inverted domestic corporations. These are foreign incorporated entities which used to be incorporated in the United States, or used to be in partnership in the United States, but now are incorporated in a foreign country, or are subsidiaries whose parent corporations are incorporated in a foreign country.

If a company reorganizes as an inverted domestic corporation than the Government may be prohibited from paying the contractors for activities performed after the data or reorganization.

Could the clause be revised to minimize the burden on commercial contractors?

There is not a significant burden associated with the clause.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

We are not aware of a similar burden for companies that do not do business with the Federal Government.

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FAR 52.212-5 Clause Review

Clause – 52.222-59, Compliance with Labor Laws (Executive Order 13673) (Oct 2016).
52.222-60, Paycheck Transparency (Executive Order 13673) (Oct 2016).

Does compliance with this clause impose a burden on your business?

With respect to FAR 52.222-59 and 52.222-60, there is a significant amount of compliance, reporting, and cost burden placed on contractors and subcontractors.

Please describe the burden.

These labor reporting requirements are overly broad in scope and are duplicative of previously existing requirements. Significantly, their additional compliance burden will impact both small and large businesses. For instance, the sheer complexity of the requirements will likely discourage small businesses from entering into potential agreements whereby they may become a subcontractor. Further, many large businesses that provide mission-critical services and products to Federal agencies, may be encouraged to leave the Federal market, which would negatively impact the rates of competition for government contracts, and thus, contribute to increased costs for taxpayers in the form of higher prices for products and services purchased by the Government.

In addition, disclosures would be required in response to solicitations valued at over $500,000 if within the preceding three-year period, any administrative merits determinations, arbitral awards or decisions, or civil judgments (as defined by the DOL Guidance) had been rendered against them under the following:

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act
- Americans with Disabilities Act
- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act
- Davis-Bacon Act
- Service Contract Act
- Section 503 of the Rehabilitation Act
- Vietnam Era Veterans' Readjustment Assistance Act
- Migrant and Seasonal Agricultural Worker Protection Act
- Executive Order 11246 (Equal Employment Opportunity)
- Executive Order 13658 (Contractor Minimum Wage)

Further, disclosures would also be required for a list of "equivalent state laws" that included OSHA-approved state plans. For the government's most active service and product contractors, this could be a continuous reporting exercise throughout the year.

Could the clause be revised to minimize the burden on commercial contractors?

Earlier this year, Congress, utilizing the authorities prescribed by the Congressional Review Act (CRA), began the process of minimizing burdens when it passed House Joint Resolution 37. The resolution was subsequently signed by the President, revoking several major components, including these requirements, of the underlying regulation that implemented these clauses. By using the CRA process, Congress ensured that no future measure that is substantially similar could be issued. Currently, the Civilian Agency Acquisition Council has issued a class deviation to these requirements as the FAR Council works to remove the underlying regulations.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

No, these requirements are unlike any in the commercial market.

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Clause – 52.222-55, Minimum Wages Under Executive Order 13658 (Dec 2015) (E.O. 13658).

Does compliance with this clause impose a burden on your business?

With respect to FAR 52.222-55, there is a significant amount of compliance, reporting, and cost burden placed on contractors and subcontractors.

Please describe the burden.

Pursuant to this clause, contractors are required to pay employees a minimum wage of $10.10 if they, "perform on, or in connection with" the employer's contract. The requirement to differentiate workers, however, is unlike any common commercial practice, and thus, imposes a significant compliance burden on contractors, as they do not typically track employees who would be exempt from this requirement.

Could the clause be revised to minimize the burden on commercial contractors?

By removing the, "in connection with" language from the clause, the burden assumed by contractors would be minimized. Alternatively, the guidance could provide more specific guidance for when an employee would qualify for the minimum wage. For instance, requiring the minimum wage if more than half of the employee's time is spent on the contract.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

Yes, contractors would pay applicable employees minimum wages due to similar requirements established by the Davis-Bacon Act, McNamara-O'Hara Service Contract Act, and State and Local minimum wage mandates.

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Clause – 52.204-14, Service Contract Reporting Requirements (Oct 2016) (Pub. L. 111-117, section 743 of Div. C).
52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts (Oct 2016) (Pub. L. 111-117, section 743 of Div. C).

Does compliance with this clause impose a burden on your business?

With respect to FAR 52.204-14 and FAR 52.204-15, there is a significant amount of compliance, reporting, and cost burden placed on contractors and subcontractors.

Please describe the burden.

Vendors are required to report contract number, order number, total dollar amount invoiced, number of contract direct labor hours, and data from subcontractors. In order to comply with these clauses, vendors must invest considerable time and effort into accruing, organizing, and submitting this data. Significantly, the cost of reporting this data will inevitably be covered by taxpayers in the form of higher prices paid by Federal customers. The reporting does not appear to yield significant additional value for the Government, as the required data is already captured by the Federal Procurement Data System (FPDS).

Could the clause be revised to minimize the burden on commercial contractors?

Yes, by removing these reporting requirements the Government could eliminate the burdens assumed by commercial contractors considerably, and enable Federal buyers to realize cost savings.

Alternatively, by revising the clauses to remove the government-unique requirement to identify a subcontractor's, "unique identity identifier," or DUNS numbers, the government could minimize the burden assumed by commercial contractors. Specifically, tracking these numbers is a time-consuming process that is unlike any common commercial practice. In some instances, a commercial entity supporting a covered contract does not have a DUNS number (because they do not directly do business with the government), whereas other entities may have multiple DUNS numbers.

Does the clause impose a burden that is the same or similar to one already imposed on U.S.-based businesses that do not do business with the Federal Government?

No, there is no like burden imposed on U.S. based businesses that do not do business with the Federal Government.