

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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August 5, 2003  
CODSIA Case No. 6-03

By Electronic Mail  
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General Services Administration Regulatory Secretariat (MVA)  
Room 4035  
1800 F Street, N.W.  
Washington, D.C. 20405

Attn: Laurie Duarte

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (“CODSIA”) appreciate the opportunity to comment on the GSA notice published in the Federal Register on June 6, 2003 (68 F.R. 33950) requesting comments on the posting of awarded contracts on the worldwide web.

Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of six associations representing over 4,000 member companies across the nation. Participation in CODSIA is strictly voluntary. Therefore, a decision by any member association to abstain from participating in a particular CODSIA case is not necessarily an indication of dissent.

## **SUMMARY**

We support the goals of transparency of the federal government’s procurement actions and providing information to the public on where the federal government is spending taxpayer dollars. The federal acquisition system is a tool for agencies to achieve their missions and, with recognized limitations for certain security or proprietary information, the public should know how agencies are accomplishing their missions.

The Federal Government annually enters into over 34 million procurement transactions, including thousands of new contracts. Significant information is already made available to the public about what goods and services the government buys, the spending for those goods and services, the identification of the contractors awarded contracts and the aggregate amount awarded to them. Many individual contracts are, with certain limitations, “public” information and available on request to the contracting agency – subject to the important redaction of company proprietary data information.

In fact, several federal agencies (particularly the Department of Defense) have been moving aggressively to internally provide electronic access to copies of contracts and related contractual information to facilitate contract administration, contract payment and contract closeout. This DoD system, known as Electronic Document Access (EDA), is password controlled to ensure access to only authorized DoD acquisition and program officials. Also through password

controls, a limited number of contractors have access to this DoD system for their own contracts and payment information. In addition, as GSA well knows, its own GSA Schedules program contracts, including pricing, are a matter of public information and posted on its public website.

We appreciate GSA's outreach to the public to identify priorities before implementing any pilot program of posting contracts. We strongly urge GSA, the Integrated Acquisition Environment (IAE) program office, and the Office of Management and Budget to proceed cautiously and slowly with forming the pilot program and that these entities communicate continuously with the affected communities and the public about its actions.

We particularly appreciate the affirmation made in the notice that "any proprietary information contained in the contract covered by the pilot (posting program) would be redacted before posting."<sup>1</sup> But "it is easier said than done," as evidenced by the request for comments on the nature of guidance to be provided to address redaction of proprietary information. We strongly request that GSA hold a public meeting to discuss the parameters of any posting program that have already been decided, and to solicit further public input, in addition to these comments, before the posting program is initiated.

Until the procedures are put in place for ensuring that firms are given the opportunity to evaluate awarded contracts and redact proprietary information, and until evidence is available that redacted information will be protected and not posted, we remain skeptical and cautious about this pilot program and recommend that GSA not initiate it. Until the purposes of the pilot program are more succinctly clarified and the purpose for web posting of contracts is more fully explained, we are opposed to such actions. In our view, the risks far outweigh the perceived, but ill-defined, need.

## **SPECIFIC COMMENTS ON THE NOTICE**

### **1) WE ARE CONCERNED ABOUT THE VOLUME OF TRANSACTIONS TO BE INCLUDED IN THE PILOT PROGRAM**

Today, the Federal Government processes over 34 million contract transactions, ranging from purchase card transactions and small purchases below \$100,000 to billion dollar weapons systems and health care programs. For example, in fiscal year 2002, the Department of Defense issued over 5.8 million contract actions and awarded almost \$165 billion in total awards; the Executive Office of the President issued only 910 contract actions totaling less than \$50 million.<sup>2</sup> Some agencies have automatic contract writing systems that use the uniform contract format set forth in the FAR, and some agencies continue to prepare and process contracts manually. Some agencies process millions of transactions through the GSA schedules, while others do very little. In the absence of any underlying data or information on the scope of the pilot program to be initiated and the number of agencies to be covered, it is impossible to predict, much less ascertain, whether the volume of transaction information will impose a significant compliance burden on the agencies and the contractors. Further, GSA's explanation did not sufficiently address why or whether the information such proposed web access will provide useful information to the public.

### **2) WE ARE CONCERNED ABOUT THE NATURE OF THE CONTRACTS TO BE INCLUDED IN THE PILOT PROGRAM**

<sup>1</sup> Supplemental Information at 68 F.R. 33951 (6/6/03)

<sup>2</sup> Fiscal Year 2002 Federal Procurement Data System Report (as of 4/16/03) at page 2

There are “contracts” and there are “contracts.” Certain types of advisory and assistance services contracts might appropriately be included in a limited pilot program, but it is not easy to identify them based on the coding system for federal contracts in use today. Contracts to support military activities, or financial transactions, or other national economic functions such as transportation or space, may not be appropriate. Too many agencies award a mixture of contract requirements, so identifying and then segregating the types of contracts to be included in the pilot program will be an important but challenging activity.

### 3) WE ARE CONCERNED ABOUT THE POTENTIAL IMPLICATIONS FOR NATIONAL AND HOMELAND SECURITY

As noted in the supplemental information to the notice, GSA acknowledges that guidance may be needed on the identification of contracts whose disclosure would compromise national security.<sup>3</sup> This acknowledgement is both valuable and troubling. It is valuable in that GSA and others in government recognize that the disclosure of contracts that are not themselves classified for national security purposes may still contain information that the government would choose not to release.

For example, there may be no harm in disclosing that the government has a contract for National Guard gear with a November first delivery requirement in Los Angeles. However, if the government has four contracts with different vendors all for delivery of the same or complementary gear to the same location at the same time, this collective analysis of the government’s actions could raise a concern for homeland security. Regrettably, there is no simple way for most to know what information, either individually or collectively, has implications for national or homeland security.

We are troubled that GSA has not already given more attention to this matter or is not prepared to disclose it. If not already done so, we strongly recommend that any pilot program be fully discussed with appropriate national and homeland security agencies before it is initiated.

Congress was sufficiently concerned about the use and effect of aggregated information that it placed significant restraints on the collection and use of “critical infrastructure protection” data provided to the Department of Homeland Security. While it may seem obvious that a procurement action for certain nuclear materials should be exempt from disclosure, what about a procurement action for security services at a government facility (such as the National Institutes of Health) known to possess small amounts of nuclear material used for medical research? While any one contract may not provide useful information, knowing that the Department of Transportation has awarded several contracts for various types of security services at the Port of Philadelphia could provide valuable information – information now more readily available on the Internet. Simply put, while summary data about the cost and nature of goods or services acquired is already available, the details in specific contracts (e.g. the work statement, special terms and conditions and delivery schedules) for those goods or services may not be readily available. Since there is nothing “proprietary” to the contractor about the government’s solicitation for security services or security equipment, the burden would fall to the government on an individual and on a comprehensive basis to know whether “too much” information was available. We are concerned that individual federal agencies and individual contracting officers cannot be, and should not be, burdened with the responsibility for assessing the impact of aggregated federal contracting information.

### 4) WE ARE CONCERNED ABOUT THE RELEASE OF COMPANY PROPRIETARY INFORMATION

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<sup>3</sup> Supplementary Information 68 F.R. 33951 (6/6/03)

As noted above, we compliment GSA for acknowledging that contractor proprietary data will be protected in the pilot program. However, by seeking comments on the methodologies to be used to ensure that protection, we are concerned that GSA has not given sufficient thought and attention to this significant matter. While the Federal Government has developed a well-tested methodology for requiring contractors to identify proprietary data in official submissions through contract clause provisions and marking requirements, not every government contract transaction is required to be evaluated for proprietary information and then redacted. The Federal Government has also developed a well-tested methodology for giving contractors the opportunity to validate the continued assertion of proprietary data when a request for a release of information is made. As a preliminary matter, we recommend that no information be posted through this pilot program that has not been subjected to the existing rigorous government and contractor review process that accompanies a response to a Freedom of Information Act request. Explicit guidance to this effect should be provided to each agency and contracting activity proposed to be included in the pilot program, and to every contractor whose contract is to be disclosed.

#### 5) WE ARE CONCERNED THAT POSTING RISKS COMPLIANCE WITH EXPORT CONTROL REGULATIONS

Companies are held accountable for the control of their information, and ensuring that any release of information that may be subject to government control under the export regulations of either the Department of Commerce or the Department of State are fully and completely complied with. A company faces significant administrative, civil and criminal penalties for violations of the export control statutes. The need to protect this information is in addition to the company's desire to protect its own proprietary data.

Under these export regulations, the uncontrolled posting of export-controlled information on a worldwide accessible medium such as the Internet, that could be accessed from virtually anywhere in the world by virtually anyone in the world, would qualify as an "export" and constitute a violation of the law. Even the federal government is subjected to certain export control restrictions on the information that it discloses. We see no indication that GSA has considered the implications of publishing export-controlled information. Explicit guidance to this effect should be provided to each agency and contracting activity proposed to be included in the pilot program, and to every contractor whose contract is to be disclosed.

#### 6) WE ARE CONCERNED ABOUT THE ADMINISTRATIVE EXPENSES IMPOSED ON BOTH GOVERNMENT AND CONTRACTORS

Companies do not automatically redact their proposals or contracts containing proprietary information because, under the FAR (Parts 24.2 and 52.215-1(e)), companies are permitted to protect their entire proposal from release outside the government. Typically redactions are only made when an agency receives a request to release a copy of the contract. By law and Executive Order, agencies must provide a contractor with notice of the request and a reasonable time within which to review the contract and notify the agency of information the contractor considers proprietary. The agency considers the contractor's recommendations and may agree (and then agree to redact the information) or disagree (and the contractor is free to challenge the agency's action through a "reverse FOIA" action) before any information is released. In either case, there is the time and expense of both the agency and the contractor in taking action to identify, redact and review proprietary information on a case-by-case basis.

Some have suggested that it is more appropriate for a contractor to identify all proprietary information in the contract at the time the contract is formed, thus avoiding the need for any post-award reviews. Although this suggestion may have superficial appeal, it does require all offerors, not just the awardee, to increase its bid and proposal costs. Moreover, each competitor

would need to include in its price the expense of engaging in formal discussions with the government in the effort to identify, explain and confirm that the contractor-identified proprietary information remains proprietary after award.

Some have suggested that the government modify the standard contract format to provide a readily segregable portion of the contract within which all company proprietary data can be housed. However, this approach still does not address the costs associated with the suggested process. Even so, a process would have to be established to conduct a subsequent review of all post-award contract modifications, orders and other contract administration actions.

Before initiating any pilot project for the electronic posting of federal contracts, consideration also has to be given to the time and expense of both the government and the affected contractors to identify requests, review material, process assertions and then disclose and post appropriate information. There will be additional contracting agency costs associated with this review. In addition, there will be significant hardware, software and government personnel costs in developing, maintaining and using the website for the stored information.

#### 7) POSTING WILL NOT FACILITATE A “CONSTRUCTIVE DIALOGUE” TO PROMOTE MODEL CONTRACTING

One of the justifications cited by GSA for moving forward with the posting program is that public interest groups believe disclosure will facilitate a “constructive dialogue to promote model contracting.”<sup>4</sup> From the perspective of our member companies, nothing about the posting of actual contracts will realistically contribute to that goal. As stated above, there are far too many contract actions of varying types for innumerable purposes that simply prohibit the development of “model contracting.” There are other, far less intrusive, methods to begin that dialogue.

Among the direct methods to begin such a dialogue would be to require agencies to post “lessons learned” data on web-based, publicly available links for each procurement office of an agency. For example, as part of the May 2003 revisions to Office of Management and Budget Circular A-76, OMB required each agency to post lessons learned about its competitive sourcing program.

The uniform contract format has been part of the FAR for decades. Numerous congressional, General Accounting Office and inspectors general reports, GAO bid protest decisions, plus comments from the public, have contributed to the legislative and regulatory approaches to contract terms and conditions, approaches to statements of work, pricing methodologies and contract administration matters. Federal agencies regularly notify the public of contract awards, the nature of the contracts and the maximum value of those contracts. DoD provides that information daily on its public website; the Washington Post publishes a list every Monday! The Federal Government is doing a better job of collecting aggregated information in a more timely and accurate manner. All of this has taken place without the unfettered disclosure of actual contracts.

CODSIA welcomes a constructive dialogue with federal agencies and public interest groups concerning model contracting. We would be pleased to co-host one or more open meetings to begin that dialogue – and to use that forum to determine the need for the future public release of actual contracts. That dialogue can proceed without having to release actual contracts.

#### 8) POSTING WILL NOT “IMPROVE WEAK PRACTICES”

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<sup>4</sup> Supplementary Information, 68 F.R. 33951 (6/06/03)

It is hard to know what concerns the public interest groups seek to address by their use of the term “weak practices.”<sup>5</sup> Nothing in an awarded contract will provide the public with information about the process that an agency used to conduct its required market research, solicit offers or make an award decision. The contract will provide only the results of the contract process. Again, numerous congressional, General Accounting Office and other reports have highlighted concerns with the process used to solicit and award contracts. The Federal Acquisition Regulation (and numerous agency supplements) already describes for the public the typical process that an agency will follow in seeking to contract for goods or services. The public is generally able to access through the Internet information on agency future planned procurements. The public is also generally able to access through the Internet specific agency solicitations and to follow that process until at least the due date for proposals (and beyond through the solicitation amendment process). The public is also generally able to access through the Internet the award decisions resulting from these solicitations. In our view, nothing about the practices used by agencies for awarding contracts would be gained by having Internet access to the contracts that were the result of those pre-contract practices.

CODSIA welcomes the opportunity to discuss with federal agencies and the public interest groups ways to address “weak practices” used by procurement agencies. We would be pleased to co-host one or more open meetings to begin that discussion – and to use that forum to determine the need for the future public release of actual contracts.

#### 9) POSTING WILL NOT REDUCE “REPETITIVE REQUESTS UNDER FOIA”

Another rationale offered by the public interest groups for posting contracts online is to “reduce repetitive requests under FOIA for contracts that are of particular interest to the public.”<sup>6</sup> While automatic posting of contracts may reduce the need for any request for disclosure, we believe that the allegedly “repetitive requests” for information on one specific contract actually signifies that these “repetitive requests” are seeking proprietary information that should not be and would not be disclosed under the FOIA. In our view, rather than disclosing contracts through this web-posting program, it is more appropriate to focus on the agency’s and the Department of Justice’s operating procedures for evaluating and releasing contract information under FOIA.

CODSIA welcomes the opportunity to discuss with federal agencies and the public interest groups ways to address concerns with repetitive requests for disclosure under FOIA. We would be pleased to co-host one or more open meetings to begin that discussion – and to use that forum to determine whether there is a need for the future public release of actual contracts.

#### CONCLUSION

While we recognize the value of transparency, we also are concerned about the risk of inadvertent or improper disclosure of valuable information – affecting the government or the contractor. We are concerned that GSA has not yet developed (or disclosed) the nature and scope of the posting program, the types of contracts to be included or the procedures for protecting contractor proprietary data.

We do not believe that the rationale proffered by the public interest groups for having instant public access to specific contracts provides any justification for the time and expense for such significant governmental action. In any event, other methods should be tried first to see if the stated goals of these public interest groups can be achieved through less intrusive and less costly means.

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<sup>5</sup> Supplementary Information, 68 F.R. 33951 (6/06/03)

<sup>6</sup> Supplementary Information, 68 F. R. 33951 (6/06/03)

As we stated above, CODSIA welcomes the opportunity to discuss with federal agencies and public interest groups ways to address the issues raised by this notice. We would be pleased to co-host one or more open meetings to begin that discussion – and to use them to determine the need for the future public release of actual contracts.

We also strongly request that GSA hold a public meeting to discuss the parameters of any posting program that has already been decided, and to solicit further public input, in addition to the single notice for comment, before any posting program is initiated.

However, until the purpose of the posting pilot program is clearer and the need for web posting of contracts is more explicit, we are opposed to the Federal Government taking such actions. In our view, the risks of such actions far outweigh the minimal benefits.

We appreciate the opportunity to comment on the GSA notice. If you have any questions, please contact Alan Chvotkin of the Professional Services Council, the Project Officer for this CODSIA case. He can be reached at (703) 875-8059 or at [Chvotkin@pscouncil.org](mailto:Chvotkin@pscouncil.org).

Sincerely,


(SEE ATTACHED CODSIA SIGNATORIES)



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President  
Contract Services Association of America



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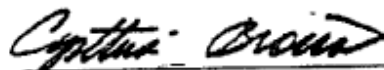
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