



November 13, 2012

Via Regulations.gov
General Services Administration
1275 First Street NE
Washington, DC 20417

Attn: Ms. Hada Flowers

**RE: Federal Acquisition Regulation; Information Collection 9000-0029;
Extraordinary Contractual Action Requests**

Dear Ms. Flowers:

On behalf of the Technology Association of America, Inc.¹ (“TechAmerica”), I am pleased to submit the following comment to the Federal Acquisition Regulation information collection requirement extension for Extraordinary Contractual Action Requests, OMB Control Number 9000-0029, which the Department of Defense, General Services Administration, and National Aeronautics and Space Administration (the “Agency”) published in the *Federal Register* at 77 Fed. Reg. 56,213 on September 12, 2012, and requested public comment regarding an extension of a previously approved information collection requirement from the Office of Management and Budget (“OMB”). This comment will address the Agency’s estimate of the public burden of performing the information collection requirements. In short, the Agency’s estimate does not accurately reflect the public burden because it is based on invalid assumptions and a flawed methodology. Consequently, TechAmerica opposes granting the Agency’s requested extension under the Paperwork Reduction Act (the “Act”).

A. An Extension of the Information Collection Requirement Would Violate the Fundamental Purposes of the Paperwork Reduction Act.

Granting the Agency’s request for an extension would contradict the fundamental purposes of the Act. Congress intended that the Act would “minimize the paperwork burden . . . resulting from the collection of information . . . and ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government.”² Granting the Agency’s request for an extension of its previously approved information

¹ The Technology Association of America (TechAmerica) is the leading voice for the U.S. technology industry, the driving force behind productivity growth and jobs creation in the United States and the foundation of the global innovation economy. Representing approximately 1,000 member companies of all sizes serving clients in the public and commercial sectors of the economy, it is the industry’s largest advocacy organization and is dedicated to helping members’ top and bottom lines. It is also the technology industry’s only grassroots-to-global advocacy network, with offices in state capitals around the United States, Washington, D.C., Europe (Brussels) and Asia (Beijing). Learn more at www.TechAmerica.org.

² Paperwork Reduction Act, 44 U.S.C. § 3501.

collection requirement would contravene these essential purposes by continuing to significantly underestimate the paperwork burden imposed by this requirement. We believe that if an accurate assessment of the reporting burden were conducted, the Office of Management and Budget ("OMB") would recognize that the Agency has not met its high burden under the Act to justify the paperwork requirements. Further, the Act correctly notes that information collection creates a burden not only on the entity submitting the information, but also imposes administrative and cost burdens on the Agency that is collecting the information. The Agency's actions in this request are inconsistent with the Act's intended purpose to "minimize the cost to the Federal Government of the creation, collection, maintenance, use, dissemination, and disposition of information."³ With the Government continuing to face increased budget constraints, it is more important now than ever to minimize these costs. For these reasons, President Obama has issued a number of Executive Orders and memoranda seeking to "get rid of absurd and unnecessary paperwork requirements that waste time and money."⁴ The Agency has expended considerable amounts of its scarce resources in seeking this extension, and if the extension is granted, it would extend and perhaps increase the cost to the Government without sufficient justification. Instead of expanding or retaining information collection requirements, agencies should be seeking to create savings by reducing or eliminating such requirements.

B. The Agency Does Not Accurately Estimate the Public Burden an Extension of the Information Collection Requirement Would Create.

The Act defines the public burden an extension of the information collection would create:

Burden is the time, represented as hours spent by the public responding to Federal information collections. When an agency estimates and seeks to reduce the paperwork burden it imposes on the public, the agency must consider the time that an individual or entity spends reading and

³ *Id.*

⁴ Executive Order 13563; Executive Order 13579 *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf>; "Presidential Memoranda – Regulatory Flexibility, Small Business, and Job Creation," January 18, 2011, *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre>; "Presidential Memoranda – Administrative Flexibility," January 18, 2011, *available at* <http://www.whitehouse.gov/the-press-office/2011/02/28/presidential-memorandum-administrative-flexibility>; "Minimizing Paperwork and Reporting Burdens; Data Call for the 2011 Information Collection Budget" *available at* http://www.whitehouse.gov/sites/default/files/omb/infocreg/icb/2011_ICB_Data_Call.pdf; President Barack Obama, "Toward a 21st Century Regulatory System," *Wall Street Journal*, January 18, 2011, *available at* <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html>; *see also* "Presidential Memoranda – Regulatory Flexibility, Small Business, and Job Creation," January 18, 2011, *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/presidential-memoranda-regulatory-flexibility-small-business-and-job-cre>; "Presidential Memoranda – Administrative Flexibility," January 18, 2011, *available at* <http://www.whitehouse.gov/the-press-office/2011/02/28/presidential-memorandum-administrative-flexibility>; "Minimizing Paperwork and Reporting Burdens; Data Call for the 2011 Information Collection Budget" *available at* http://www.whitehouse.gov/sites/default/files/omb/infocreg/icb/2011_ICB_Data_Call.pdf.

understanding a request for information, as well as the time spent developing, compiling, recording, reviewing, and providing the information.⁵

We respectfully submit that the Agency has not faithfully applied this definition nor fully complied with its obligations under the Act and the implementing regulations in 5 C.F.R. Part 1320. See 5 C.F.R. § 1320.8 ("This review [of the information collection requirement] shall include ... [a] **specific, objectively supported** estimate of burden, which shall include, in the case of an existing collection of information, an evaluation of the burden that has been imposed by such collection." (emphasis added)). The methodology used by the Agency in this request is insufficient. While the provided estimate may reflect a reasonable estimate of the time required to complete the information collection device (form, online website, etc.), the estimate does not reflect the total burden each respondent faces to comply. For this and every information collection exercise the Government imposes, each respondent must not only take time to report the compiled data, but must, on a continual basis, monitor whether or not they have a need to collect data at all. If this threshold analysis indicates that such a need exists, the respondent must establish and update mechanisms to capture that data and, at the requisite reporting intervals or instances, compile the data into a format that complies with the reporting requirement. In other words, each information collection requirement effectively imposes three separate requirements on the public: (1) the need to monitor whether reporting is required; (2) the need to compile and collect the required information; and (3) the need to disclose that information to the Government. Each of these requirements demands time of the respondent, but the Agency's estimate only accounts for the third aspect, which generally is the least time consuming. The Agency should reassess the estimated total burden hours provided as part of this request and revise those estimates to more accurately reflect the total burden noted in the Act and above.

C. The Collective Burden of Compliance with the Information Collection Requirement Greatly Exceeds the Agency's Estimate and Outweighs Any Potential Utility of the Extension.

In addition to the burden the information collection in this request imposes on individual respondents, there is an immense collective burden imposed on all respondents. OMB estimates that, in Fiscal Year 2010, the public spent 8.8 billion hours responding to information collections.⁶ This estimate is ten percent (10 percent), or one billion hours less than the previous fiscal year. While this reduction seems to represent a victory in furthering the purposes of the Act, it is

⁵ Information Collection Budget of the United States Government for Fiscal Year 2010, Office of Management and Budget, Office of Information and Regulatory Affairs at 1.

⁶ *Supra* note 5 at iv.

unlikely these estimates provide an accurate picture of the overall burden. In the same report, OMB identifies four causes of the paperwork burden change: (1) adjustments to agency burden estimates; (2) new statutory requirements; (3) discretionary agency actions; and (4) lapses in OMB approval.”⁷ OMB found that, of these four causes, adjustments “accounted for most of the overall decrease in Federal paperwork burden in FY 2010.”⁸

Based on a review of the acquisition-related Information Collection waiver requests published in the Federal Register between June of 2008 and June of 2011, using the Government's estimates, there are over 30 million total hours, across all respondents, of information collection burden required of the government acquisition community annually.⁹ As noted above and highlighted below, the methodology behind these estimates is woefully inadequate, and consequently, the total burden and the associated costs are far higher than the Agency estimates. Such a burdensome paperwork requirement imposes unnecessary expenses for both the Government and the respondents, without demonstrating a clear value to the taxpayer that would justify the additional cost.

While the Agency is under immense pressure to reduce the number of information collection hours it imposes upon the public, it should not avoid its statutory responsibility by providing an artificially low estimate of the burden. We respectfully submit that assessing the impact in a horizontal fashion as part of a total burden on respondents was the intent, if not the letter, of the Act. The Agency should be responsible for assessing the total information collection burden they create and the need for extending this additional burden in that context. Further, OMB should make a comparable cumulative assessment across the entire Federal Government and objectively consider the need to increase or sustain that burden as part of their review of this request.

Specifically, the Agencies' estimate that only 100 respondents will be subject to this requirement annually is understated. The estimate appears to be selected at random and it bears no relation to the number of requests for extraordinary contractual relief that contractors submit annually. While the Government is in a better position to research and confirm the average number of requests submitted over the last five to ten years (rather than merely “coordinate with subject matter experts”), we estimate that the number of respondents is more likely closer to 500 annually.

We also question the estimate of 16 hours of burden associated with each response. A request for extraordinary contractual relief is just that, *i.e.*, a request for relief that is unusual and not based on the terms of the contract. As a result

⁷ *Supra* note 5 at 2.

⁸ *Id.* at 6.

⁹ See attachment.

of the extraordinary nature of the request, FAR Subpart 50.1 imposes substantial requirements on contractors seeking this type of relief.

The information required to support a request for extraordinary contractual relief varies based on the circumstances. In general, however, a request requires at least the following information:

- (1) A brief description of the contracts involved, the dates of execution and amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.
- (2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.
- (3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.
- (4) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes.
- (5) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose, be disposed of under the contract terms.
- (6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.
- (7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, as necessary to support the request's monetary elements.
- (8) A list of persons connected with the contracts who have factual knowledge of the subject matter, including, when possible, their names, offices or titles, addresses, and telephone numbers.
- (9) A statement and evidence of steps taken to reduce losses and claims to a minimum.
- (10) Any other relevant statements or evidence that may be required.

See FAR 51.104-3(a). Additionally, the contracting officer can, and often will, request a broad range of other information from the contractor. See FAR 51.104-3(b) & (c). As evident from these requirements, these requests are not simple or pro forma submissions. To the contrary, they are extensive and require extensive fact finding to develop the necessary information. Further, there usually is a back-and-forth process between the contractor and the Government needed to resolve the request and to quantify the relief, and this process involves additional information collection requirements.

It is entirely unrealistic to expect that companies could prepare a request for extraordinary contractual relief and work through this process by investing only 16 hours of effort. The estimate is so understated that it suggests that the Agencies may not understand the nature of the requirement or the burdens it places on companies. In any event, a more reasonable estimate would be in the range of 80 to 160 hours per response, as satisfying this requirement will demand two to four weeks of a full-time equivalent ("FTE") for most contractors.

Moreover, for this and every information collection exercise the Government imposes, each respondent must not only take time to report the compiled data or complete the required certification, but must, on a continual basis, monitor whether or not they have a need to collect data at all. If this threshold analysis indicates that such a need exists, the respondent must establish and update mechanisms to capture that data and, at the requisite reporting intervals or instances, compile the data into a format that complies with the reporting requirement. In other words, each information collection requirement effectively imposes three separate requirements on the public: (1) the need to monitor whether reporting is required; (2) the need to compile and collect the required information; and (3) the need to disclose that information to the Government. Each of these requirements demands time of the respondent, but the Agencies' estimate only accounts for the third aspect, which generally is the least time consuming.

D. The Government's Response to the Paperwork Reduction Act Waiver for FAR Case 2007-006 is Instructive on the Total Burden for Respondents.

As noted above, TechAmerica challenges the methodology behind estimating the burden on each respondent to comply with this information collection requirement. We believe that the Agency's estimated burden hours should be modified in this instance for the same reason that they were modified upward in FAR Case 2007-006. In that case, a final rule contained an information collection requirement that brought it under the authority of the Act. The Government initially estimated a total burden of three hours per response. During the open comment period, only one comment was received; however, that was sufficient to show that a modification of the Government's estimate was necessary. After comment, the Government conceded that the methodology and

the resultant estimate did not accurately reflect the total burden, as defined in the Act, imposed upon the company. After modification, the revised burden was sixty hours per response, meaning that the initial annual reporting burden of three hours was off by a factor of twenty.

The Agency has failed in this information collection waiver request to rationalize how it arrived at the estimated burden as required by the Act and the implementing regulations in 5 C.F.R. Part 1320. We submit that the Agency's current estimate has failed to consider the time necessary for collection and review of the information prior to submission. Because the Agency has not effectively measured the burden as defined in the Act under this request nor demonstrated that the burden is justified from the perspective of the taxpayer, Government, the Agency, or the respondents, we respectfully submit that the Agency's request should be denied.

TechAmerica appreciates this opportunity to comment, and would be pleased to respond to any questions the Agency may have on these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A.R. Hodgkins" with a stylized flourish at the end.

A.R. "Trey" Hodgkins, III
Senior Vice President