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Agency Information Collection Activities; Proposals, Submissions, and Approvals: Federal Acquisition Regulation; Preaward Survey Forms: OMB Control No. 9000-0011

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General Comment

See attached file(s)

Attachments

20130826 _TechAmerica_Cost_Comment_FAR_Preaward_Survey_9000-0011



August 26, 2013

Via Regulations.gov
General Services Administration
FAR Desk Officer
OMB, Room 10102, NEOB
Washington, DC 20503

Attn: Hada Flowers/ /IC 9000-0011

**RE: Federal Acquisition Regulation (FAR); Information Collection; OMB
Control No. 9000-0011, Preaward Survey Forms (Standard Forms 1403,
1404, 1405, 1406, 1407, and 1408)**

Dear Ms. Flowers:

On behalf of the Technology Association of America, Inc.¹ (“TechAmerica”), I am pleased to submit the following comment to FAR; Information Collection; Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408), which the Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) (collectively the “Agencies”) published in the *Federal Register* at 78 FR 38341 on June 26, 2013 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 Agencies’ estimate of the public burden of performing the information collection requirements. In short, the Agencies estimate does not accurately reflect the public burden because it is based on invalid assumptions and a flawed methodology. Consequently, TechAmerica opposes granting the Agencies 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 Agencies’ 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

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.

by or for the Federal Government.”² Granting the Agencies’ request for an extension of its previously approved information 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 Agencies have 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 Agencies that are collecting the information. The information collected here is not required by statute. Moreover, the information collected for the second part of the information collection, *Royalties*, is not the type of information usually collected by companies in the private sphere. The Agencies’ 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 Agencies have 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 Agencies Do 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:

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

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/inforeg/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/inforeg/icb/2011_ICB_Data_Call.pdf.

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 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 Agencies have 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 Agencies in this request is insufficient.

Specifically, the Agencies estimate 3,540 respondents, responding once per year will respond under this information collection using one of six different forms. According to the Agencies, each form, which varies in length and complexity, will take the respondent twenty-four hours to complete.

First, 3,540 respondents seems understated. We question how the Agencies arrived at their estimate of 3,540, or 30 percent of the contracts awarded in the Federal Procurement Data System in Fiscal Year 2012 that were over the simplified acquisition threshold (SAT) and not using commercial acquisition procedures. The notice simply says that “it is estimated that preaward surveys were completed for 30 percent, or 3,540 of the 11,805 contracts that were awarded.” Why 30%? This year’s number is nearly 40% lower than the 2010 request.⁶ Why the dramatic decrease? In addition, the FAR permits preaward surveys when “circumstances justify its cost.” Though the estimate does not include even one, we find it hard to believe that preaward surveys are *never justified* under this information collection. We recommend that OMB insist that the Agencies provide the actual number of responses received annually (either the number during the last year fiscal year or an estimate of the numbers during the last three to five fiscal years). The Agencies should be able to provide that data even if they must cull the data from their own individual databases or combine other datasets. After all, OMB first approved this information collection in 1985.⁷ An estimate based on actual data would be much more reliable and further the purposes of the Act.

We also question the Agencies’ estimate of only 24 hours of burden required for each response. The forms vary in complexity and may require plant visits, phone calls, and

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 ICR-Agency Submission Record, http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201001-9000-003

⁷ OMB Control Number: 9000-0011, OMB Control Number History, <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=9000-0011>

correspondence. We appreciate that the Agencies increased the time per form to 24 hours from its previous estimate of 21 hours in 2010. While a medium-sized business may be able to complete SF 1407 in a mere 12 hours with the contract administration office, well more than 40 may be required for SF 1406. We urge the Agencies to evaluate the forms individually and then combine the result into a total estimate for this information collection.

Moreover, 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 Agencies' estimate seems to only accounts for the third aspect, which generally is the least time consuming. The Agencies 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 Agencies' 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.⁸ 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 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."⁹ OMB found that, of these four causes, adjustments "accounted for most of the overall decrease in Federal paperwork burden in FY 2010."¹⁰

⁸ *Supra* note 5 at iv. The current total is well above 10 billion hours. "Government-Wide Totals for Active Information Collections," Inventory of Currently Approved Information Collections, August 16, 2013, Office of Information and Regulatory Affairs *available at* <http://www.reginfo.gov/public/do/PRARReport?operation=11>

⁹ *Supra* note 5 at 2.

¹⁰ *Id.* at 6.

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.¹¹ 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 Agencies estimate. 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 Agencies are 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 Agencies 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.

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 Agencies' 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. More recently, the Agencies adjusted their estimate on OMB Control No. 9000-0091, again by a factor of twenty, when they reexamined the burden, conferred with subject matter experts, and took into account the time to review submissions before a company actually submits under an information collection.¹²

The Agencies have 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

¹¹ See attachment.

¹² Federal Acquisition Regulation; Submission for OMB Review; Anti-Kickback Procedures Notice, 78 FED. REG. 45198 (July 26, 2013).

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C.F.R. Part 1320. We submit that the Agencies' current estimate has failed to consider the time necessary for collection and review of the information prior to submission. Because the Agencies have 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 Agencies' 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