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United States Senate

WASHINGTON, DC 20510-2309

March 2, 2010

Mr. Shay D. Assad
Director, Defense Procurement and Acquisition Policy
United States Department of Defense
3060 Defense Pentagon, Room 3B855
Washington, DC 20301-3060

Dear Mr. Assad:

I'm writing to comment on your implementation of my amendment to the Department of Defense Appropriations Act of 2010 (Pub. L. 111-118), as contained in section 8116. Two weeks ago, you published a class deviation (Deviation 2010-O0004) implementing its requirements and responsibilities for contractors restricting the use of mandatory arbitration agreements. I believe the framework established by the deviation is excellent and should be closely followed by interim and final rules; however, this letter does identify a few issues that should be addressed in the interim and final rule.

Above all, the rule should require a clause for all contracts in excess of $1 million utilizing funds appropriated by the FY10 Defense Appropriations Act that follows the clause attached to the class deviation.

The rule should also follow your memorandum's guidance with respect to new orders and the modification of any orders under existing contracts using FY10 funds. The rule should incorporate the clarifying examples that your memorandum included.

With respect to the national security waiver, the rule must go further than the class deviation to properly reflect statutory language and congressional intent. Section 8116 states that the Secretary of Defense may waive the application of the restrictions with respect to a particular contract if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States and that the terms of the contract or subcontract are not longer than necessary to avoid such harm. The Secretary is required to transmit to Congress, and simultaneously make public, any such determination 15 days before the contract or subcontract addressed in the determination is awarded. The transmission must set forth the grounds for the waiver with specificity, state any alternatives considered, and explain why each of the alternatives would not avoid harm to national security interests. The class deviation does not include any information on the transmittal to Congress; the rule should. The rule should also specify the precise information the Secretary must provide to justify any waiver.

Furthermore, the Council of Defense and Space Industry Associations (CODSIA), a group of seven associations with common interests in federal procurement, wrote you a letter on January 20, 2010 (the "CODSIA letter") with their recommendations for implementing section

8116. The CODSIA letter contains numerous factually incorrect and inaccurate statements, as the statutory language and legislative history of section 8116 make clear, and I feel obliged to correct the most egregious ones below.

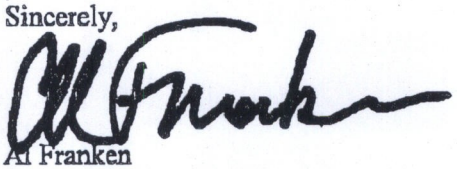
The clause in the class deviation for use in contracts rightly defines a "covered subcontract" as *any* subcontract in excess of $1 million that uses FY10 funds, except for the acquisition of commercial items or commercially available off-the-shelf items. It should not apply only to first-tier subcontracts, as the CODSIA letter suggests.

Under section 8116, a contractor receiving FY10 funds may not enter into mandatory arbitration agreements with respect to Title VII claims and certain torts arising from sexual assault with "any of its employees or independent contractors." I would have thought it needless to say that "any of its employees or independent contractors" means *any of its employees or independent contractors*. But the CODSIA letter suggests that it refers only to those employees doing work under a covered contract. That suggestion, illogical on its face, is made even more implausible in light of the fact that subsection (b) of section 8116 is differentiated explicitly from the general restriction of subsection (a) by specifying that subcontractors must agree not to use mandatory arbitration agreements "with respect to any employee or independent contractor *performing work related to such subcontract*." This language clearly reinforces the fact that the standard for prime contractors is meant to apply to all employees, not just those performing work related the contract.

The CODSIA letter recommends that "[t]he implementation should clarify that with respect to Title VII claims, section 8116 applies only to claims related to or arising from sexual assault or harassment as described by Senator Franken's statement." This is plainly inaccurate. Section 8116 covers "*any*" claim under Title VII of the Civil Rights Act, and not just those related to or arising out of sexual assault or harassment. In *both* of my statements on the floor of the Senate, I referred specifically to the broad scope of Title VII, which covers egregious violations of civil rights and discrimination, alongside and in addition to claims related to or arising out of sexual assault. In my floor statement of October 1, 2009, I said: "Many of our Nation's most cherished civil rights were established by individuals bringing claims in court, the court ruling in their favor, and then extending the protection of those rights to anyone in a similar situation. Arbitration does have a place in our system, but handling claims of sexual assault and egregious violations of civil rights is not its place." On the floor of the Senate on October 6, 2009, I said, "This amendment would defund any contractor who refused to give the victims of rape and discrimination their day in court."

Thank you for the opportunity to comment on the rule for section 8116. If you have any questions, please do not hesitate to contact me, or Jeff Lomonaco on my staff, at (202) 224-5641.

Sincerely,



Al Franken
United States Senator

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Subject: For Mr. Shay Assad

Comments:
