

August 11, 2008

General Services Administration  
Regulatory Secretariat (VPR)  
1800 F Street, NW  
Room 4035  
Washington, DC 20405  
ATTN: Laurieann Duarte

RE: FAR Case 2007-013

Dear Ms. Duarte,

On behalf of United Fresh Produce Association (United Fresh) and our member companies, we submit the following comments on the Proposed Rule cited above. United Fresh represents more than 1,500 growers, packers, shippers, fresh-cut processors, distributors and marketers of fresh fruits and vegetables accounting for the vast majority of produce sold in the United States. We bring together companies across the produce supply chain from farm to retail, including all produce commodities, both raw agricultural products and fresh ready-to-eat fruits and vegetables, and from all regions of production.

### **Overview of Comments**

United Fresh is concerned about the changes proposed by this rule. In particular, for produce companies doing business with the federal government, this proposed rule has the potential to adversely impact their work as a federal contractor or subcontractor. In addition, we believe the E-Verify system is not ready for the increase in usage that this rule would bring about, and would result in uncertainty, confusion, and increased costs for federal contractors. In particular, we would like to highlight several important issues that could impact produce companies and will be focused on in other comments you receive, including those comments submitted by the National Council of Agricultural Employers.

### **Specific Comments on Proposed Rule**

#### *Commercially available off-the-shelf (COTS) item*

A COTS is defined to be (1) any item of supply that is a commercial item and sold in substantial quantities in the commercial marketplace and offered to the Government without modification, in the same form in which it is sold in the commercial marketplace; and (2) does not include bulk cargo, such as agricultural products and petroleum products.

The proposed definition of COTS is unclear and should be clarified so that the regulated community understands the scope of this exemption from the applicability of the E-Verify obligations to contractors and subcontractors.

The most confusing component of the proposed rule involves the definition of "bulk cargo." Under the proposed rule, items considered to be bulk cargo are not entitled to the COTS exemption from the proposed rule. Most concerning is the proposed definition's use of "agricultural products" as an example of "bulk cargo." Our members produce and ship an abundant and affordable supply of fresh fruits and

vegetables throughout the entire year to the federal government through federal nutrition programs and Department of Defense procurement contracts. If such products, regardless of their packaging prior to sale in the commercial marketplace or the government are considered bulk goods for purposes of this rule, then the requirement to use E-Verify would be applicable. Because of the consequences of this determination, it is imperative that the term "bulk cargo" be defined and illustrated with examples so that agricultural producers have a clear understanding of whether they are subject to the proposed rule. Most importantly we agree with several submitted comments who read the intent of the bulk cargo reference to include agricultural products, such as grains that are unpackaged and shipped in hold of a ship, but not agricultural products that are in packaging of some type when shipped to the commercial market or the federal government. Therefore the final rule should clarify that agricultural products that are shipped in some type of packaging are exempt as COTS and not subject to the bulk cargo exception to COTS.

#### *Subcontractor Flowdown*

We agree with other comments submitted to GSA that the distinction between contractors and subcontractors is one of the most critical components of the proposed rule. It seems apparent from the proposal that any person or entity that directly contracts to provide goods or services to the government, that is not otherwise exempt, would be subject to the E-Verify obligations. There are many unique sales arrangements for the agricultural products to commercial and government purchasers. These include, among others, direct sales by a producer of an agricultural commodity to the government; direct sales by a packing operation that obtains fruits or vegetables or other commodities from other producers and then sells the product directly to the government; sales by a broker or handler of agricultural products who purchases the product from a producer or producers but who directly contracts with the government; and processors of agricultural products that purchase them from producers and sell them to the government after processing them. In all of the above examples, the entity directly contracting with the federal government may have acquired the agricultural product from other producers with whom it had contractual arrangements to supply its product.

Because of the great extent to which a flowdown concept could reach entities that indirectly provide product that ultimately is sold directly by another entity that contracts with the federal government, it is critically important that the regulated public has a clear understanding of the proposed subcontracting flowdown provision. We agree with industry colleagues who read the proposed rule as only applying to those entities that directly contract with the government, regardless of whether they produced the product or obtained it from multiple sources through subcontracts. This seems apparent from the limiting definition of the term subcontract.

#### *Federal Farm Programs*

Some agricultural organizations enter into agreements with the federal government with respect to participation in Farm Bill programs such as the Market Access Program (MAP) or Environmental Quality Incentives Program (EQIP). In turn it is unclear as to whether participation in such programs would trigger application of the E-Verify requirements of the proposed rule. We believe that the

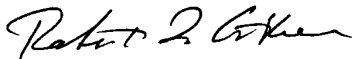
proposed rule should not apply to such agreements because they are not "contracts" within the scope of the Federal Acquisition Regulation (FAR).

The FAR defines "contract" as a legal relationship obligating the seller to furnish the federal government supplies or services. Contracts do not include grants and cooperative agreements. A grant is defined as a legal instrument reflecting a relationship between the federal government and an entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of the federal government acquiring property or services for the benefit of the United States Government. A cooperative agreement is defined the same as a grant, except that, unlike a grant, substantial involvement is expected between the federal agency and the recipient in carrying out the activity covered by the agreement. Farm programs, such as MAP and EQUIP, fit the definition of grant or cooperative agreement and should be exempted from this regulation because they are not a contract.

### **Conclusion**

This proposed rule has the potential to dramatically affect how produce companies that do business with the federal government structure their operations, manage their workforce, and determine whether or not to bid on federal contracts. United Fresh appreciates the opportunity to comment on this important proposed rule and would be happy to answer any questions you may have.

Sincerely,



Robert L. Guenther  
Senior Vice President, Public Policy