



October 11, 2024

Leslie A. Beavers  
Acting Chief Information Officer  
U.S. Department of Defense  
Washington, DC 20301

**RE: Docket No. DARS-2020-0034, Assessing Contractor Implementation of Cybersecurity Requirements**

Dear Ms. Beavers:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Defense in response to the above-referenced notice of proposed rulemaking published in the Federal Register on August 15, 2024, at 89 Federal Register 66327.

### **About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 23,000 member companies. ABC and its 67 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.<sup>1</sup>

The vast majority of ABC's contractor members are also small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)<sup>2</sup> and industry workforce employment (nearly 81% of the construction

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<sup>1</sup> For example, see ABC's 34th Excellence in Construction® Awards program from 2024: [https://www.abc.org/Portals/1/2024/EIC/34th%20EIC%20program.pdf?ver=mzYgfDwm9eScx\\_LNSAZXAQ%3d%3d](https://www.abc.org/Portals/1/2024/EIC/34th%20EIC%20program.pdf?ver=mzYgfDwm9eScx_LNSAZXAQ%3d%3d).

<sup>2</sup> U.S. Census Bureau 2021 County Business Patterns: <https://data.census.gov/table?q=CBP2021.CB2100CBP&tid=CBP2021.CB2100CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.html>.

industry is employed by small businesses).<sup>3</sup> In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United States and account for 69% of all construction industry employment.<sup>4</sup>

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

### **ABC's Comments in Response to the Notice of Proposed Rulemaking**

ABC recognizes the DOD's valid concerns regarding contractor cybersecurity that have motivated the promulgation of the Cybersecurity Maturity Model Certification 2.0 program and supports necessary regulations to protect national security. However, ABC is concerned that, as written, the proposed rule may cause unnecessary confusion and increased burdens on construction contractors, particularly small businesses.

ABC urges the DOD to provide additional clarity and streamline certain requirements in areas of the proposed rulemaking including reporting of information security lapses, continuous certification and data transmission to avoid unnecessarily increasing contractor and, ultimately, taxpayer costs.

Additionally, ABC previously joined a coalition submitting comments on the December 2023 proposed rule<sup>5</sup> to establish CMMC 2.0. As the August 2024 proposed rule would implement a finalized version of the December 2023 proposal into DOD contracts, we incorporate those comments by reference<sup>6</sup> and reiterate the need for increased flexibility and clarity to ensure effective contractor compliance.

Lastly, ABC has signed on to a forthcoming multigroup comment letter on the DOD's August 2024 proposed rule, which is being submitted to this docket by the U.S. Chamber of Commerce. ABC supports those comments and hereby incorporates them by reference.

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<sup>3</sup> 2023 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2023), at page 4, <https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-US.pdf>.

<sup>4</sup> U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2021, available at

<https://data.census.gov/table/CBP2021.CB2100CBP?q=CBP2021.CB2100CBP&hidePreview=true>.

<sup>5</sup> <https://www.federalregister.gov/documents/2023/12/26/2023-27280/cybersecurity-maturity-model-certification-cmmc-program>.

<sup>6</sup> [https://www.abc.org/Portals/1/2024/240226\\_Comments\\_CMMCPProposedRule\\_DoD\\_Final.pdf](https://www.abc.org/Portals/1/2024/240226_Comments_CMMCPProposedRule_DoD_Final.pdf).

## **I. The Proposed 72-Hour Notification Mandate Is Overly Broad and Lacks Clear Definitions**

ABC has serious concerns with how the new requirement for reporting cybersecurity lapses is structured. As currently proposed, this aspect of the rulemaking appears to introduce significant ambiguity into contractors' cybersecurity responsibilities.

The proposed rule would require a contractor on any project requiring CMMC certification to report "any lapses in information security" during the performance of the contract within 72 hours to the contracting officer responsible for the procurement.<sup>7</sup>

The phrase "any lapse in information security" has no clear definition within the rulemaking, meaning even the most insignificant incidents may require reporting. This will lead to uncertainty among contractors, potentially resulting in overreporting or underreporting of incidents.

This provision also does not appear to be limited to lapses involving controlled unclassified information/federal contract information or CMMC-covered systems and data, dramatically expanding the scope of the cybersecurity requirements.

ABC recommends that the DOD either remove this provision from the proposed rule or limit the scope of this provision to CMMC-covered information systems and data while providing a clear, narrowly tailored definition regarding which lapses must be reported.

## **II. The Proposed Rule Fails To Provide Guidance on Maintaining Current CMMC Certification**

The proposed rule's definition of a "current" CMMC certification and requirements around reporting changes in CMMC compliance also raise questions due to a lack of clearly defined terms.

The proposal states that a "current" CMMC certification means there have been "no changes in CMMC compliance since the date of the assessment."<sup>8</sup> Additionally, the proposed rule requires contractors to notify the contracting officer with 72 hours if there are any "changes in the status of CMMC certificate or CMMC self-assessment levels."<sup>9</sup>

The rule fails to define what changes to information systems would be sufficient to invalidate CMMC compliance. Contractors must implement numerous, ongoing changes to their information systems to maintain cybersecurity and ensure the efficient operation of their businesses, and it is unclear if these ordinary business practices could risk taking them out of compliance and/or requiring reporting to the contracting officer.

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<sup>7</sup> <https://www.federalregister.gov/d/2024-18110/p-224>.

<sup>8</sup> <https://www.federalregister.gov/d/2024-18110/p-179>.

<sup>9</sup> <https://www.federalregister.gov/d/2024-18110/p-224>.

ABC recommends that the DOD clarify specifically which changes are acceptable and which would void a contractor's CMMC certification.

### **III. The Proposed Rule Could Be Interpreted To Expand CMMC Requirements Beyond CUI/FCI**

Further, the proposed requirements regarding data security lack important distinctions, and could be interpreted to drastically expand the scope of CMMC certification requirements.

The proposed rule requires contractors to process, store or transmit data only on systems with the appropriate CMMC certificate or self-assessment required by the contract.<sup>10</sup>

This provision fails to specify if "data" refers specifically to controlled, unclassified information and federal contract information regulated by CMMC, potentially expanding coverage to contractor data that does not include CUI or FCI.

Additionally, this provision could be interpreted as prohibiting transmission to the information systems of any contract-related data to third parties, such as commercial suppliers and other government agencies that are not capable of receiving CMMC certification.

ABC recommends that the DOD revise this requirement to ensure that it does not expand coverage of CMMC beyond CUI and FCI and does not prevent contractors from completing normal business activities involving third parties.

### **V. The Proposed Rule Risks Exacerbating Declining Small Business Participation in Federal Procurement**

As stated previously, the majority of ABC's contractor members are classified as small businesses. These companies represent the backbone of the construction industry. Unfortunately, in recent years, burdensome federal procurement policies have reduced small business participation in federal construction contracting. For example, according to SBA data, the number of small business federal contractors awarded a federal construction contract has declined by 60% from 2010 to 2020.<sup>11</sup>

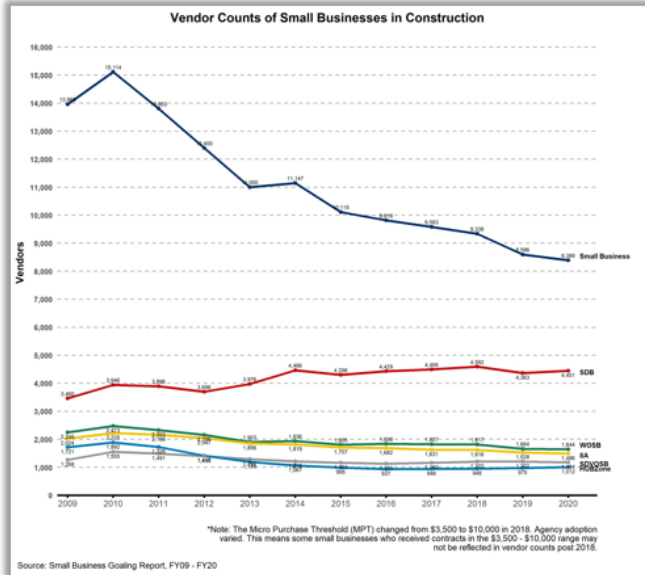
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<sup>10</sup> <https://www.federalregister.gov/d/2024-18110/p-223/>.

<sup>11</sup> Chart available at: <https://thetruthaboutplas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png>. The data was prepared by an SBA economist who said, "The charts represent data on vendors who have received obligations. The definition of 'small' comes from the contracting officer's determination when the contract was awarded. The COs follow the NAICS size standards." Data is from the FPDS that can be publicly accessed through sam.gov: <https://sam.gov/reports/awards/standard>.



## Number of Construction Industry Small Businesses Awarded Federal Contracts Declined 60% From 2010-2020



Vendor Counts of Small Businesses in Construction

FY	Small Business	SDB	SDVOSB	HUBZone	WOSB	8A	SBGR
2009	13960	3460	1268	1721	2245	2024	16186
2010	15114	3946	1555	1892	2473	2225	17644
2011	13803	3896	1491	1726	2333	2168	16335
2012	12400	3696	1400	1416	2156	2047	14510
2013	11000	3976	1292	1199	1903	1856	12690
2014	11147	4466	1216	1067	1936	1819	12706
2015	10115	4298	1163	995	1805	1707	11724
2016	9818	4429	1133	937	1838	1682	12465
2017	9583	4495	1160	946	1827	1631	12146
2018	9338	4592	1202	948	1817	1616	11424
2019	8596	4363	1202	975	1664	1528	10504
2020	8389	4451	1184	1012	1644	1486	10191

The decline in small business participation in federal contracts directly correlates with increased federal regulatory burdens. Small business contractors are likely to choose to pursue private sector and state or local government contracts instead of federal contracting opportunities because of increased regulatory clarity and lower regulatory burdens. These factors reduce risk and decrease costs related to the need for expertise from attorneys and compliance professionals, which ultimately makes small businesses more competitive in the private sector and state or local government marketplaces.

ABC urges the DOD to implement the recommended clarifications to CMMC 2.0 outlined in our comments, which will be critical to ensuring continued access to federal defense contracting opportunities for small businesses.

### Conclusion

As previously stated, ABC understands and supports the DOD's vital interest in protecting our national security by implementing improved cybersecurity requirements for federal contractors. However, as currently written, the CMMC 2.0 program and contracting provisions lack much-needed clarity. The DOD should implement the above revisions to ensure effective implementation of cybersecurity protocols without unnecessary cost increases and delays to DOD contracts.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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