

Project On Government Oversight

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April 1, 2010

General Services Administration
Regulatory Secretariat (MVPR)
ATTN: Ms. Hada Flowers
1800 F Street, NW
Room 4041
Washington DC 20405

Re: FAR Case 2008-024, Inflation Adjustment of Acquisition-Related Thresholds

Dear Ms. Flowers:

Thank you for the opportunity to comment on the Federal Acquisition Regulation proposed rule entitled “Inflation Adjustment of Acquisition-Related Thresholds” (75 FR 5716, February 4, 2010). Founded in 1981, the Project On Government Oversight (POGO) is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical federal government. POGO has a keen interest in government contracting matters and as a result, is concerned when more contracts become exempt from Federal Acquisition Regulation (FAR) provisions that are designed to protect taxpayer dollars.

Although we recognize that this proposed rulemaking is based upon the provisions of Section 807 of P.L. 108-375, we believe that no inflation adjustments to acquisition-related dollar thresholds should be made at this time. Accordingly, we urge the FAR Council, and in particular, the Office of Federal Procurement Policy (OFPP), to withdraw the proposed rule.

Section 807 was enacted during a period of enormous “deregulatory” initiatives in government contracting. The inflation-adjustment provision, in particular, was heavily promoted by government contractors in order to reduce oversight of federal contracts. However, as the ensuing years have well revealed, government contract dollars have not always been wisely spent, and many government contractors have not always acted in ways to protect the public fisc. Numerous congressional oversight hearings and Inspectors General and Government Accountability Office (GAO) reports have revealed widespread systemic gaps in government contracting oversight.

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More recently, the President's March 4, 2009, memorandum on "Government Contracting" appears to be moving federal agencies in a different direction, one designed to increase contract oversight and accountability.

The proposed FAR rule is a relic of ill-conceived policies that have been widely and publicly discredited. Given the government's difficult financial posture, further increasing the number of contracts that are not adequately protected against waste, fraud, and abuse is simply unwise and unwarranted. Also, given reported contract overcharges and misspending during the last five years alone, the FAR Councils and OFPP should be examining methods for increasing, not decreasing, oversight of government contract dollars.

Do Not Increase Non-Statutory Thresholds

POGO is particularly concerned about the proposed increase in non-statutory dollar thresholds contained in the proposed rule. For example, approval levels for limited sources justification under FAR 8.405-6 have increased, in some instances from \$57 million to \$64 million, and in other instances from \$78.5 million to \$87 million. There is no statutory language addressing such approval levels. Given the various issues that have been reported over the years on sole-source procurements, often resulting in artificially inflated prices, increasing the approval levels for such justifications appears to be inconsistent with the President's March 4, 2009, Memorandum.

This is not the only example of a proposed increase in a non-statutory threshold that appears to be inconsistent with Administration policy. An even more notable example is the proposal, appearing at FAR 22.1103, to increase the threshold from \$550,000 to \$650,000 for contractors that must provide a compensation plan for service contracts. Appropriate review of compensation plans for service contract employees is consistent with the Administration's "High Road" contracting policies and therefore any resulting increase in that threshold would make it more difficult to oversee the "salaries and fringe benefits for professional employees working on the contract" as required by the FAR. In POGO's joint letter to President Obama on February 26, 2010,¹ we expressed concern that when contractors pay very low wages and benefits, taxpayers often end up getting a bad deal. Work quality can suffer and the government bears hidden costs because taxpayers need to provide income assistance and benefits to low income families. Consequently, exempting additional service contracts from the requirement to provide a compensation plan may result in contractors obtaining awards via payment of lesser compensation to employees.

Another example of a detrimental impact of increasing non-statutory thresholds would be the proposed increased threshold for subcontracting plans governed by FAR Subpart 19.702. In today's market, many contractors, especially small businesses, are excluded from bidding as a prime contractor because they are not capable of performing massive multi-part contracts.² We

¹ Joint Letter to President Obama from POGO, The Center for American Progress Action Fund, and OMB Watch, February 26, 2010. Available at <http://www.pogo.org/pogo-files/letters/contract-oversight/co-ca-20100226.html>

² The 2009 Defense Authorization bill directed the Defense Department to minimize the excessive use of multiple layers of subcontractors that add no or negligible value to a contract. Pub. Law 110-417, Sec. 866,

have seen cases in which at least four or five tiers of subcontractors perform work under a federal prime contract. Increasing the subcontracting plan dollar threshold will take vital information out of the hands of government officials and potentially hurt small and minority businesses that will not have an adequate opportunity to compete for work under a government contract.

Increase Penalty Levels Contained in Statutes

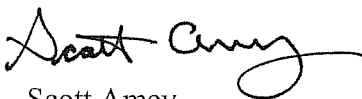
Despite the expressed desire to not change thresholds that are not viewed as “acquisition-related” (including withholding and penalties), POGO recommends that the FAR Council increase the maximum dollar amount of penalties when increasing the acquisition-related threshold contained in the same statute. For example, the threshold for requiring the contract clause at FAR 52.203-11, “Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions,” is proposed to increase 50 percent, but the maximum penalty of \$100,000 for the failure to comply with the required disclosures contained in FAR 52.203-11(e) and the corresponding statute is not proposed to increase. It is illogical to increase the threshold for requiring disclosure of unallowable lobbying activities, but not to increase the penalty for noncompliance. By not increasing the penalty for failure to disclose unallowable activities, the Councils are providing contractors a greater incentive to violate disclosure requirements.

Summary

The proposed changes increasing acquisition-related thresholds could not come at a worse time. It is a continuation of the “business as usual” mindset that has come to plague government contracting. Public perceptions of government contracting are already tarnished due to numerous and well-documented instances of poor acquisition and contracting practices. The proposed rule is an example of the status quo run amok. Accordingly, POGO strongly urges the Councils and OFPP to withdraw the proposed rule in accordance with the spirit and policies enunciated by the President. If the Councils continue to move forward with increasing statutory and non-statutory thresholds, POGO recommends that all penalties for noncompliance also be increased.

Thank you for your consideration of these comments. If you have any questions, please contact me at (202) 347-1122.

Sincerely,



Scott Amey
General Counsel