

Project On Government Oversight

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January 11, 2011

Defense Acquisition Regulations Council
Attn: Ms. Amy G. Williams
OUSD (AT&L) DPAP (DARS)
Room 3B855
3060 Defense Pentagon
Washington, DC 20301-3060

Re: DFARS Case 2009-D039

Dear Ms. Williams:

The Project On Government Oversight (POGO) provides the following public comment to DFARS Case 2009-D039, "Award-Fee Reductions for Health and Safety Issues" (75 Fed. Reg. 69360, November 12, 2010). The Department of Defense's (DoD) interim rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) pursuant to section 823 of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), which requires contracting officers to consider reduction or denial of award fees if contractor or subcontractor actions jeopardize the health or safety of government personnel. POGO supports the interim rule as a step forward in contractor accountability. We are especially pleased that it applies to the actions of subcontractors. However, the rule falls short in several respects.

First, the rule should not apply solely to harm caused to U.S. government civilian or military personnel. Contractors owe a duty of care to everyone—non-U.S. government personnel are just as likely to be harmed by a contractor's gross negligence or recklessness. Just to take one example, electrocutions on U.S. bases in Iraq—one of the prime motivations for this rule's adoption—have killed or seriously injured contractor personnel in addition to U.S. service members.

The interim rule implements section 814 of the National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364), which calls on DoD to find ways to "link" award and incentive fees to acquisition outcomes in order to improve contractor performance and achieve desired program outcomes. To better accomplish these goals, the rule should apply to harm caused to any person.

Second, the definition of a *covered incident* in DFARS 252.216.7004(a) should be broadened. Under the definition, the incident must involve a criminal action that results in a conviction; a civil or administrative action that results in a "finding of

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fault or liability”; or a civil, criminal or administrative action resolved by consent or compromise with “an acknowledgment of fault by the Contractor.” As POGO has argued before,¹ such conditions ignore that the vast majority of contractor misconduct cases are resolved with no convictions, or findings or admissions of fault or liability. To illustrate this point, consider that POGO’s Federal Contractor Misconduct Database (www.contractormisconduct.org) contains over 1,000 instances of misconduct involving federal contractors, but only a small fraction of these instances—about 15 percent—resulted in formal findings or admissions of fault or liability. The other 85 percent includes some truly egregious examples of contractor misconduct, any of which could justify a loss or reduction of award fees.

The vast majority of corporate misconduct cases are resolved through out-of-court settlements in which the company is allowed to categorically deny any liability or wrongdoing. Indeed, POGO worries the definition of *covered incident* will incentivize contractors to resolve misconduct cases this way so as to protect their award fees. Therefore, these limitations must be removed from the final rule.

Third, contracting officers should be allowed to consider any incident that calls into question a contractor’s integrity or responsibility when deciding whether to reduce or deny award fees, which is why the other limiting language in the definition of *covered incident* in 252.216.7004(a) should also be eliminated. The public interest requires that contracting officers have this power even when the incident does not result in “serious bodily injury or death” or rise to the level of “gross negligence” or “reckless disregard for health or safety.” It is absurd to condition this power on whether or not the injury constitutes a “permanent disability.”

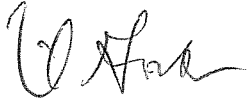
Finally, DFARS 216.405-270 states that, when a covered incident occurs, contracting officers “shall consider” reducing or denying award fees. In the interest of contractor accountability and transparency, DoD should amend DFARS to require contracting officers, when they make a determination pursuant to this rule, to place in the contract file a written statement that explains their decision to reduce or deny an award fee or to decline to do so. These statements should also be made available to the public.

Award-fee contracts constitute a sizable portion of DoD’s annual contract outlays. Last year alone, the total value of award-fee contracts exceeded \$30 billion. With so much of the taxpayers’ money at stake, contracting officers should have as broad discretion as possible in administering such contracts. Like suspension and debarment, the power to reduce or deny award fees is a potent weapon in the government’s contractor accountability arsenal that protects the public from unscrupulous or poorly performing contractors. The interim rule, however, blunts the effectiveness of this weapon with unnecessary restrictions. POGO hopes DoD crafts a final

¹ In January 2009, POGO wrote an open letter to President Obama expressing concerns with section 872 of the National Defense Authorization Act for Fiscal Year 2009 (P.L. 110-417), which mandated the creation of a federal contractor and grantee accountability database later named the Federal Awardee Performance and Integrity Information System (FAPIIS). One of our concerns was that the provision requiring the database to include information about civil, criminal, and administrative proceedings, but only those which result in “a conviction,” “a finding of fault and liability,” or “an acknowledgment of fault” would significantly narrow the database’s scope and thereby hamper its effectiveness. See “POGO Urges President Obama to Provide Public Access to Contracting and Ethics Databases,” <http://www.pogo.org/pogo-files/letters/contract-oversight/co-tic-20090129.html>

rule that vests contracting officers with broader authority to reduce or deny award fees when a contractor causes harm.

Sincerely,

A handwritten signature in black ink, appearing to read "Neil Gordon". The signature is fluid and cursive, with the first name "Neil" being more prominent than the last name "Gordon".

Neil Gordon
Investigator
ngordon@pogo.org