

Project On Government Oversight

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February 11, 2011

General Services Administration
Regulatory Secretariat (MVCB)
Attn: Hada Flowers
1275 First Street, NE
Washington, DC 20417

Re: FAR Case 2009-036

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2009-036, "Federal Acquisition Regulation; Uniform Suspension and Debarment Requirement" (75 Fed. Reg. 77739, December 13, 2010). The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) issued an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 815 of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84), which extends the restriction on contracting to subcontractors at any tier that have been suspended or debarred, with certain exceptions for commercial item and commercially available off-the-shelf (COTS) item acquisition contracts.

In the case of commercial item acquisition contracts, the rule prohibits prime contractors from subcontracting with suspended or debarred entities at the first-tier subcontracting level only. In the case of COTS item acquisition contracts, prime contractors will not be prohibited from subcontracting with suspended or debarred entities at any level. Additionally, subcontractors on COTS item acquisition contracts will not be required to disclose to the prime contractor whether it, or any of its principals, is suspended, debarred, or proposed for debarment at the time of the subcontract award.

POGO supports the rule, but is of the opinion that the exceptions for commercial and COTS item acquisition contracts will severely hamper its effectiveness. The government spent a total of \$535 billion on contracts in fiscal year 2010. Considering that commercial and COTS item acquisition contracts accounted for almost 20 percent (\$106 billion) of this total, it is imperative that these particular contract types be treated no differently than all others when it comes to determining which entities may participate in a procurement activity.

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POGO has publicly stated its approval of the concept of the government purchasing legitimately “commercial” items through streamlined procedures.¹ The commercial marketplace provides genuine benefits from a contractor accountability standpoint because these items are subject to competitive market forces. This special designation is supposed to apply to non-unique, mass-marketed products such as food, computers, office furniture, and automobiles. However, there have been instances when the government stretched the definition of “commercial” well beyond its intended meaning, spending billions of dollars on goods and services in the absence of various crucial oversight mechanisms.

The Department of Defense Inspector General once warned that the definition of “commercial item” in FAR 2.101 is a “major loophole” through which many items purchased by the government could slip.² The following are some of the more noteworthy items that were designated as “commercial” in recent years:

- C-130J military transport aircraft³
- Boeing KC-767A Tanker Aircraft⁴
- Atlas rockets⁵
- C-17 cargo aircraft⁶

Allowing prime contractors to conduct business with suspended or debarred entities on commercial item or COTS item acquisition contracts could put billions of taxpayer dollars at increased risk of fraud, waste, and abuse. It could also jeopardize agency missions.

POGO also cannot understand what larger purpose will be served if subcontractors on COTS item acquisition contracts are excused from having to disclose to the prime contractor that they or their principals have been suspended, debarred, or proposed for debarment. This requirement does not impose an undue burden on subcontractors, and it would go a long way toward protecting the government’s interests.

In addition, the Councils should provide a clarification of the term “compelling reason” as it appears in FAR 9.405-2(b) and 52.209-6(b) (“...contractors shall not enter into any subcontract

¹ See, for example, The Project On Government Oversight, “Written Testimony of POGO’s Danielle Brian on DoD’s Use of ‘Commercial’ Acquisition and ‘Other Transaction Authority’ before the Senate Armed Services Committee, Airland Subcommittee,” March 15, 2005. <http://www.pogo.org/pogo-files/testimony/contract-oversight/co-rcv-20050315.html>

² Department of Defense, Office of Inspector General, *Commercial and Noncommercial Sole-Source Items Procured on Contract N000383-93-G-M111* (Report No. 98-064), June 24, 1998, pp. 14-15. <http://www.dodig.mil/audit/reports/fy98/98-064-s.pdf> (Downloaded February 10, 2011)

³ Department of Defense, Office of Inspector General, *Acquisition – Contracting for and Performance of the C-130J Aircraft* (D-2004-102), July 23, 2004, p. 5. <http://www.dodig.mil/audit/reports/fy04/04-102.pdf> (Downloaded February 10, 2011)

⁴ Department of Defense, Office of Inspector General, *Acquisition of the Boeing KC-767A Tanker Aircraft* Report (No. D-2004-064), March 29, 2004. <http://www.dodig.mil/audit/reports/fy04/04-064.pdf> (Downloaded February 10, 2011)

⁵ The Project On Government Oversight, “Appendix H: Memo to Defense Secretary William Cohen from U.S. Senator Tom Harkin,” October 31, 1997. <http://www.pogoarchives.org/m/dp/C130J/2005AppendixH.pdf>

⁶ The Project On Government Oversight, “Heavy Lifting for Boeing: Sweetheart Deal Helps Defense Contractor and Hurts Taxpayers,” March 19, 2001. <http://www.pogo.org/pogo-files/alerts/national-security/ns-c17-20010319.html>

in excess of \$30,000...with a contractor that has been debarred, suspended, or proposed for debarment unless there is a compelling reason to do so.”). For example, from whose standpoint will the compelling reason be determined? Will it depend on the interests of the government, the interests of the prime contractor, or both? Will it depend on the type of good or service being provided? Will it depend on an assessment of the degree of non-responsibility of the suspended or debarred subcontractor?

Suspension and debarment are among the most effective tools for preventing taxpayer money from going to non-responsible contractors at every level of the procurement activity, from the prime contractor to the lowest-tier subcontractor. Suspension and debarment should be based on considerations of responsibility or non-responsibility and risk to taxpayers, not the type of good or service being purchased. Unless and until the government can categorically affirm that commercial and COTS item acquisition contracts are being used to procure only legitimately “commercial” items—that is, goods and services that are sold to the general public in significant quantities—these contracts should not be exempted from the uniform suspension and debarment requirement.

In conclusion, POGO supports the interim rule but hopes the Councils will eliminate the exceptions for commercial item and commercially available off-the-shelf item acquisition contracts.

Sincerely,

A handwritten signature in black ink, appearing to read 'Neil Gordon', written in a cursive style.

Neil Gordon
Investigator
ngordon@pogo.org