

June 20, 2011

Ms. Hada Flowers
General Services Administration
FAR Secretariat (MVCB)
1275 First Street, NE
Washington, DC 20405

Subject: FAR Case 2010-010—Federal Acquisition Regulation; Service Contracts Reporting Requirements

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2010-010, “Federal Acquisition Regulation; Service Contracts Reporting Requirements” (76 Fed. Reg. 22070, April 20, 2011). The proposed rule, issued by the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), seeks comments on amending the Federal Acquisition Regulation (FAR) to implement section 743 of Division C of the Consolidated Appropriations Act, 2010 (hereinafter Act).¹ The proposed rule requires service contractors for executive agencies covered by the Federal Activities Inventory Reform (FAIR) Act of 1998, except the DoD, to submit information annually in support of agency-level inventories for service contracts.

POGO is an independent nonprofit organization committed to achieving a more accountable federal government. While POGO supports amending the FAR in such a way as to implement the service contract reporting requirements, consistent with the policies set forth in the Act, POGO finds that **the proposed rule fails to ensure that agency officials will have all the information they need to achieve those policies.**

Policy Objectives

Subsection 743(e) requires the head of an executive agency to perform four activities designed to ensure a proper balance between federal and contractor employees in the government’s workforce. The official must: (1) review the agency’s service contracts and the information set forth in the agency’s inventory of service contracts; (2) ensure that the contracts comport with legal requirements governing the types of functions that contractors are forbidden to perform or that require special management attention; (3) identify contracts that have been poorly performed because of excessive costs or inferior

¹ Pub. Law 111-117, §743.

quality; and (4) identify contracts that should be considered for conversion to performance by federal employees or an alternative acquisition approach.³

Inventories Need More Information

In order for agency officials to meet the Act's policy objectives, service contract inventories must contain a sufficient amount of information, including timely and accurate information related to the number of contractors working on specific contracts, descriptions of the work being performed, and the costs. Not only would such information be helpful to agency officials, it would ensure heightened accountability when shared with the public. Practically speaking, no single agency official is capable of reviewing tens of thousands of contracts and their execution.

Set forth below are specific types of information that should be included in agency inventories of service contracts, many of which were outlined in Section 743(e):

- (1) for each service performed under a contract, identification of any inherently governmental function to be performed, or being performed;
- (2) for each service performed under a contract, identification of each function closely associated with an inherently governmental function and requiring special management attention to be performed, or being performed;
- (3) for each service contract, the number of hours agency acquisition personnel spent administering and overseeing contractor performance;
- (4) identification of each service contract that a contracting officer has determined is being poorly performed;
- (5) for each service performed under the contract, sufficient data to determine if outsourcing of the specific service is resulting in excessive costs to the agency and should be insourced;
- (6) a clarification of whether "work location" refers to the place of performance; and
- (7) a designation of whether the services are provided at a government or contractor facility.

POGO believes the proposed rule would not enable the reviewing agency official, or public, to determine whether services are excessively costly and should be insourced.

"Functions" vs. "Services"

Subsection 743(a)(3) of the Act mandates that an agency's annual inventory of service contracts contains, in part, a description of the services purchased by the executive agency and the role the services played in achieving agency objectives, the total dollar amount obligated for services under the contract, the total dollar amount invoiced for services under the contract, and the number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract. The proposed rule also requires that inventories set forth subcontractor information, including the "number of first-tier subcontractor

³ Pub. Law 111-117, §743(e)(1) - (4).

direct-labor hours expended on the services performed during the previous Government fiscal year.”

The proposed rule provides no definition or guidance for the appropriate system of categorizing and cataloging the multitude of services performed by contractors. If agencies will be expected to comport with current guidance from the Office of Management and Budget (OMB),⁴ the proposed rule must reconcile the several inconsistent government systems for categorizing occupational services, functions, and activities.

OMB guidance speaks of how important service contract inventories are for gaining insight into the extent to which contractors are used to perform “activities by analyzing how contracted resources are distributed by function.”⁵ OMB references GSA’s “Product and Services Code (PSC) Manual” as the appropriate system for cataloging services.⁶ The memo acknowledges that “[i]nformation about how contract resources are distributed, when taken into consideration as part of a balanced workforce analysis, can help an agency determine if its practices are creating an over-reliance that requires...rebalancing to ensure the government is effectively managing risks and *getting the best results for the taxpayer.*”⁷ (emphasis added)

However neither the proposed rule nor OMB’s guidance is adequate to satisfy that objective. In order to ensure that an agency is getting the best results for the taxpayer by having contractors perform services that could otherwise be performed by government employees, it is essential that the reviewing official have data evidencing the comparative costs of contractor and federal employee performance so that a valid and reliable determination can be made as to which sector—contractor or federal employee—is best able to economically perform the needed services.

In order to assess the comparative costs of private-public service performance, a reviewing official must first be able to ascertain that contractor employees and federal employees would be performing comparable services. Unfortunately, the GSA PSC Manual cataloging system of service codes is completely different from the system the Office of Personnel Management (OPM) uses to differentiate federal government service occupations.⁸ While both the GSA and OPM systems have a refined system for classifying hundreds of occupational services, only the OPM system provides detailed explanations of the functions each of these service providers

⁴ Daniel I. Gordon, Memorandum for Chief Acquisition Officers and Senior Procurement Executives, “Service Contract Inventories,” November 5, 2010. <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf> (hereinafter OMB Memo)

⁵ OMB Memo, p. 1.

⁶ OMB Memo, p. 1.

⁷ OMB Memo, p. 1.

⁸ *Compare* GSA PSC Manual Service Codes (http://blog.citizen.apps.gov/GSA_PSC_Manual/home/service-codes/) with OPM’s Occupational Classification Series (<http://www.opm.gov/qualifications/standards/indexes/num-ndx.asp>). The federal government maintains numerous systems for classifying service functions and occupational services. *See, e.g.,* OMB’s Inventory Function Codes (http://www.whitehouse.gov/omb/procurement_fair_2006_inv_function_codes/); GSA’s Service Item Number (SIN) catalog system (<http://www.gsaelibrary.gsa.gov/ElibMain/scheduleList.do?catid=34&famid=34&sched=no>); U.S. Bureau of Labor Statistics’ (BLS) Standard Occupational Classification (SOC) system (http://www.bls.gov/soc/soc_2010_definitions.pdf); and North American Industry Classification System (NAICS) of occupational identification codes (<http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2007>)

perform. That detail allows the agency to determine if the categorizing systems aggregate the same service functions, for example, to ensure that the engineering services performed by contractors are the same set of engineering services performed by government engineers.

OMB's guidance interchanges the terms "services" and "functions" for purposes of identifying data elements that must be set forth in service contract inventories. Unfortunately, OMB mandates that agencies differentiate services from functions when completing FAIR Act inventories of commercial and inherently governmental activities.⁹ A comparison of OMB's list of "function" codes with the "service" codes set forth in the GSA PSC Manual unequivocally documents that the two concepts are not interchangeable for purposes of making an assessment of comparative costs.

Agency responses to the many challenges filed each year by federal employees and their unions concerning how agencies code job functions is a testament to the distinction OMB requires when filing FAIR Act inventories. In response to federal employee claims that their "jobs" involved inherently governmental functions and thus could not be coded as commercial and subject to outsourcing, agency officials uniformly denied such challenges asserting that the FAIR Act inventory codes concern "functions" not "jobs," i.e., not service occupations.

Just as it is critical to distinguish between function codes and service or occupational classification codes for purposes of generating FAIR Act inventories, it is important to recognize the difference between these codes for purposes of generating service contract inventories. For example, some contracted engineering services may involve inherently governmental functions, while others may not.

The proposed rule makes no provision for distinguishing between the two. It merely reiterates statutory language requiring a description of "services." The guidance OMB provides in its November 5, 2010, memo directs agencies to provide the PSC code, e.g., "R414 systems engineering services."¹⁰ The PSC code is tantamount to a job classification code and covers functions and activities that may or may not be inherently governmental, that may or may not require varying levels of job skills, education, and experience, and may or may not command a broad spectrum of employee compensation.

In sum, the proposed rule must create a system to provide comparable descriptions of the service activities performed both by contractors (and subcontractors) and federal employees.

Insufficient Guidance on Cost Data

The proposed rule fails to require the kind of cost data that would allow agencies to make cost analyses that are essential to determining who is best able to economically perform the services currently being outsourced to contractors, the contractor or the federal employee workforce. The PSC Manual identifies five distinct engineering services codes under Services - C (C212 – engineering drafting services, C214 – management engineering services, C215 – production

⁹ Paul A. Denett, Memorandum for Heads of Executive Departments and Agencies, "2008 Inventories of Commercial and Inherently Governmental Activities," March 26, 2008.

¹⁰ OMB Memo, Appendix B.

engineering services, C216 – marine engineering services, and C220 – structural engineering)¹¹ and two distinct engineering services codes under Services - R (R414 – engineering support, and R425 – engineering/technical support).¹² Service codes C and R are the only segments of the Manual that contain engineering services.¹³ None of the service codes in the PSC Manual provide a definition of expressly what engineering services, functions, or activities are covered with the domain of that code.

In contrast, OPM’s classification system identifies 19 distinct engineering service codes (801 – general engineering, 802 – engineering technical, 803 – safety engineering, 804 – fire protection engineering, 806 – materials engineering, 810 – civil engineering, 819 – environmental engineering, 830 – mechanical engineering, 840 – nuclear engineering, 850 – electrical engineering, 854 – computer engineering, 855 – electronics engineering, 858 – bioengineering and biomedical engineering, 861 – aerospace engineering, 881 – petroleum engineering, 890 agricultural engineering, 893 – chemical engineering, and 896 – industrial engineering).¹⁴ In contrast to the PSC Manual, the OPM Handbook provides meaningful guidance on how each of the 19 enumerated engineering services are distinguishable.¹⁵

The current OMB guidance for implementing the proposed rule fails to incorporate the panoply of distinctive services, such as engineering services, reflected in other government classification systems. This is critical because costs vary depending upon which specific engineering service is being provided. Reliance on the PSC Manual provides no insight into what, for instance, a coded engineering service should, or does, cost when performed by contractor employees. Currently, the only data a reviewing official is provided is the total value of obligated and invoiced engineering services under a specific service contract (enumerated as an “action obligation”) and stratified by one of the seven PSC codes.¹⁶ Under the proposed rule, the inventory would also provide the number of contractor and first-tier subcontractor direct labor hours expended on the services performed under each of the seven PSC codes.

There are two major shortcomings of the proposed rule’s reliance on these limited data points. First, the reviewing official has no way of determining whether the agency has contracted for the type of engineering services that command compensation at the upper or lower tier of services. Second, the reviewing official has no way of determining the total number of hours spent by the contractor and all levels of subcontractors, because the proposed rule does not require the prime contractor to document the total number of hours spent performing the contractual services by *all* subcontractors.

¹¹ See GSA PSC Manual, Services - C - Architect and Engineering Services.

http://blog.citizen.apps.gov/GSA_PSC_Manual/services-c/

¹² See GSA PSC Manual, Services- R - Support Services. http://blog.citizen.apps.gov/GSA_PSC_Manual/services-r/

¹³ See *GSA PSC Manual*. http://blog.citizen.apps.gov/GSA_PSC_Manual/services-r/

¹⁴ See *OPM’s Handbook of Occupational Group and Families*, pp. 67-75.

<http://www.opm.gov/fedclass/gshbkocc.pdf>

¹⁵ Similarly, BLS’s SOC system identifies 18 distinct engineering occupations and eight distinct engineering technician occupations, along with helpful standards for distinguishing the services provided by each of the occupations. See BLS’s *2000 Standard Occupational Classification Under Guide*, http://www.bls.gov/soc/2000/soc_d0a0.htm; The NAICS and SIN systems also identify many more distinct engineering services than does the system OMB decided was appropriate for satisfying the requirements of the proposed rule.

¹⁶ OMB Memo, Appendix B.

The significance of these two obvious failures can be easily illustrated using the example of engineering services. Assume, hypothetically, that a 2009 task order is invoiced for 1,040 hours at \$185,000. A reviewing official could conclude that the contracting fee was *twice* as high as the average total compensation for the highest paid federal employees, for whom the average salary for general engineers in 2009 was \$135,400 for 2,080 hours of work.¹⁷ Adding OPM's 36.25 percent benefit rate, or another \$50,000 to the average to the federal employee general engineers' salary, established \$185,000 as the true cost the government would incur for the full-time services of its general engineers.¹⁸ The federal employee benefit rate, which doesn't include general overhead costs, is comprised of the following benefits: (1) insurance and health, (2) standard civilian retirement, (3) Medicare, and (4) miscellaneous fringe benefits, which were not defined.¹⁹

Conversely, assume, hypothetically, that the contractor's invoice for \$185,000 actually reflected an additional 1,040 hours of work performed by subcontractors who were not first-tier subcontractors. The reviewing official would have no way of determining that the government was being billed at a fair and reasonable rate, when compared with the cost it would have to incur were the work performed by a federal employee. This hypothetical illustrates the simple fact that dividing the total dollar amount invoiced for any particular service (e.g., engineering services) by the total number of contractor direct labor hours *fails to ensure* a valid and reliable billing rate for a specific service performed under contract.

Without valid and reliable contractor billing rates, it is impossible for a reviewing official to conduct a valid *comparative cost analysis* to determine whether a specific contractual service are is and reasonable or should be considered for insourcing or selection of another contractor to better serve the taxpayer. But even if the proposed rule was modified to require the number of *all* contractor and subcontractor direct labor hours, that would still not be sufficient because the proposed rule fails to employ a classification system that permits an agency reviewing official to compare compensation rates for *comparable services*.

A review of OPM's FedScope data shows that, in 2009, federal engineers earned salaries, on average, from \$71,000 (computer engineers) to \$135,000 (general engineers), depending on the type of services performed and the type of government agency that employed them. When full fringe benefits are added, their full compensation ranged, on average, from \$115,000 to \$185,000. One randomly selected GSA contract for "professional engineering services" (contract # GS-00F-0006N) has a broad billing range for the year March 2011 through February 2012. It

¹⁷ The standard work year is 2080 hours. OPM's FedScope website provides the average annual salaries for its civilian workforce, stratified by occupational classification. See "FedScope: Employment-June 2009." <http://www.fedscope.opm.gov/cognos/cgi-bin/ppdscgi.exe?DC=Q&E=/FSe%20-%20Status/Employment%20-%20June%202009&LA=en&LO=en-us&BACK=/cognos/cgi-bin/ppdscgi.exe?toc=%2FFSe%20-%20Status&LA=en&LO=en-us> (Instructions: select filter at the top for "Occupation – All," select appropriate category, and then select OPM category/occupation identification number that appears in left column of Appendix B; find filter for "MEASURES" by scrolling all the way to the right, and then select "Average Salary.")

¹⁸ Memorandum from Jim Nussle, Director of the Office of Management and Budget, "Update to Civilian Position Full Fringe Benefit Cost Factor, Federal Pay Raise Assumptions, and Inflation Factors used in OMB Circular No. A-76, Performance of Commercial Activities," M-08-13, March 11, 2008, p. 2. <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2008/m08-13.pdf> (hereinafter Jim Nussle Memorandum)

¹⁹ Jim Nussle Memorandum, p. 2.

bills communication engineers at \$155,000 per year and bills up to \$330,000 per year for principal telecommunications engineers.²⁰ Thus, depending upon the specific engineering services provided, one contractor engineering service is more than double others.

Should a reviewing official be comparing the contractor's \$155,000 rate with OPM's \$115,000 rate or OPM's \$185,000 rate? Or should the comparison be between the contractor's \$330,000 rate with the two OPM rates? There is no way to know the answer to that question, unless the proposed rule is amended to adopt a services classification system that reflects the broad spectrum of occupational services recognized in the real world and that tailors that system to be compatible with the government's classification system so that compensation standards can be compared across comparable service clusters.

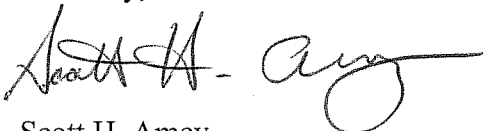
Conclusion

The failings of the proposed rule will intensify when agency officials conduct reviews of service contracts covering hundreds of different services. Unless the proposed rule is amended to require service contract inventories to contain the additional data points suggested by POGO, the purpose and utility of the mandated inventories will be effectively frustrated, to the detriment of the taxpayer.

OMB has both the authority and the responsibility to design an implementing regulation that effectively accomplishes the intent of the enabling statute. Such a regulation need not limit the data elements to only those specified in the enabling statute. It may expand those data elements so that the policy objectives enunciated in the statute can be met. POGO urges thoughtful consideration of how the proposed rule can be used to amend the proposed rule and effectuate the policy objectives of the statute.

Thank you for your consideration of this comment. If you have any questions, please feel free to contact me at (202) 347-1122.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott H. Amey", with a stylized flourish at the end.

Scott H. Amey
General Counsel
scott@pogo.org

²⁰ The rates shown in the contract were hourly rates and POGO multiplied them by 2080 to obtain the annual rates. See https://www.gsaadvantage.gov/ref_text/GS00F0006N/014OD1.269OF9_GS-00F-0006N_GS00F0006NCORPSCH041210.PDF