



PROJECT ON GOVERNMENT OVERSIGHT

September 23, 2011

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

**Subject: DFARS Case 2011-D013—Defense Federal Acquisition Regulations System;  
Defense Federal Acquisition Regulation Supplement; Only One Offer**

Dear Ms. Williams:

The Project On Government Oversight (POGO) provides the following public comment to DFARS Case 2011-013, “Defense Acquisition Regulations System; Defense Federal Acquisition Regulation Supplement; Only One Offer.” (76 Fed. Reg. 44293, July 25, 2011) The proposed rule, issued by the Department of Defense (DoD), seeks comments on amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address acquisitions using competitive procedures in which only one offer is received. POGO is an independent nonprofit organization that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government. Accordingly, POGO has a keen interest in the subject matter of the proposed rule and supports the rule, as well as its objectives.

The proposed rule requires the contracting officer to resolicit for an additional period of at least 30 days, if the initial solicitation allowed fewer than 30 days for receipt of proposals and only one offer was received. Where a period of at least 30 days was allowed for receipt of proposals and only one offer was received, the proposed rule requires the contracting officer to determine the price offered to be fair and reasonable through price or cost analysis, or otherwise enter into negotiations. The basis for these negotiations shall be either certified cost or pricing data or other than certified cost or pricing data, as appropriate.

POGO has long advocated the position that adequate price competition does not exist where only one offer is received pursuant to a competitive solicitation. Where the initial solicitation period is shortened to less than 30 days and only one offer is received, it is essential, as the proposed rule states, that the solicitation period be extended. POGO believes the proposed thirty additional days is both reasonable and appropriate. While the proposed rule requires the

contracting officer to consider whether the statement of work should be revised to promote more competition before issuing a resolicitation, POGO urges DoD to also set forth a set of guidelines and/or criteria for determining when and how a failed solicitation should be revised.

POGO notes that the proposed rule is silent on what should occur if the resolicitation fails to attract other offers. One might infer that because the resolicitation is for at least 30 days, it would be treated as an initial 30 day solicitation and require the sole offer be subject to either a price or cost analysis, or otherwise the contracting officer would enter into negotiations. If this is the proper inference, POGO recommends this interpretation be clearly stated to avoid any ambiguity or uncertainty. If the inference is inaccurate, the appropriate consequences should be clearly stated and the public be given an opportunity to comment.


POGO strongly supports DoD's proposal that 30 day solicitations that produce only one offer should trigger a price or cost analysis. Furthermore, POGO believes that the submission of other than certified cost or pricing data should *never* be a substitute for the submission of certified cost or pricing data. Accordingly, POGO believes that if only one offer is received in response to a solicitation, then the submission of certified cost or pricing data should be required in order to conclude that a fair and reasonable price has been established.

The proposed rule contains a waiver and an exception provision. The waiver provision is unlimited and imposes no restrictions or guidance on when or how the head of contracting activity should exercise their discretionary authority to accept a sole "non-competitive" offer without further action. Without reasonable restrictions on when waivers can be granted, there is no reasonable expectation, based on DoD's history of accepting non-competitive offerors, that DoD's practice will change to any appreciable degree. If DoD is serious about promoting competition, it is incumbent upon the Department to limit the exercise of discretion to waive resolicitation procedures.

The exception provision includes acquisitions in support of "contingency" operations. This is a serious defect. One need look no further than the Commission on Wartime Contracting final report, "Transforming Wartime Contracting: Controlling Costs, Reducing Risks," to appreciate the fact that DoD's non-competitive procurement practices in contingency operations have resulted in billions of dollars in waste. POGO therefore recommends that either that exception be deleted, or a rigorous set of guidelines be included in the final rule to limit that instances in which such an exception could be granted.

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

Sincerely,



544 Paul Chassy, Ph.D., J.D.  
Investigator  
pchassy@pogo.org