

Exposing Corruption Exploring Solutions

Project On Government Oversight

August 4, 2011

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

Subject: DFARS Case 2010-D020—Defense Federal Acquisition Regulation Supplement; Representation Relating to Compensation of Former DoD Officials

Dear Ms. Murphy:

The Project On Government Oversight (POGO) provides the following public comment to DFARS Case 2010-D020, “Defense Federal Acquisition Regulation Supplement; Representation Relating to Compensation of Former DoD Officials.” (76 Fed. Reg. 32846, June 6, 2011) The proposed rule, issued by the Department of Defense (DoD), seeks comments on amending the Defense Federal Acquisition Regulation Supplement (DFARS) to require contract offerors to submit representations at the time contracts for commercial items are awarded that all former DoD officials covered by the Procurement Integrity Act (41 U.S.C. § 2104) are in compliance with post-employment restrictions set forth at DFARS 203.171-3 and DFARS 252.203-7000. The proposed rule requires a representation that former DoD employees employed by the contractor are also in compliance with additional post-employment restrictions of 18 U.S.C. 207 and 5 CFR parts 2637 and 2631, including FAR 3.104-2.

POGO is a nonpartisan independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical 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.

POGO believes, however, that the proposed rule would benefit by including five (5) additional requirements: (1) require contractor offeror’s representation to expressly state, when true, it is compensating former DoD employees who have not received a written ethics opinion within the 30 day timeframe; (2) pursuant to Public Law 110-181, Sec. 847(b)(2), require DoD’s Inspector General to annually audit a stratified (by the quantum of dollar obligations) random sample of contracts and the contractors’ list of former DoD employees to determine (a) whether contractors are in full compliance with post-employment restrictions asserted on the representations required in accordance with this proposed rule, (b) whether former government employees working for contract offerors are in full compliance with post-employment restrictions, and (c) whether DoD ethics officers have issued said

written opinions within 30 days of having been sought; (3) pursuant to 41 U.S.C. § 2104 and DFARS 252.203-7000(c), require DoD to exercise its authority to sanction contractors and former DoD employees the Inspector General identifies as violating the requirements of this proposed rule; (4) require DoD to take appropriate action to ensure ethics opinions be issued within the 30-day timeframe mandated by Public Law 110-181, Sec. 847(a)(3); and (5) require DoD to make public the following information: (a) the database required pursuant to Public Law 100-181, Sec. 847(b)(1), (b) the names of the contractors and former DoD employees identified by the Inspector General as not being in compliance with the requirements of this proposed rule, (c) the actions taken by the DoD to seek sanctions for each of the said contractors and former DoD employees identified as not in compliance with the requirements of this proposed rule, and (d) what, if any, sanctions were actually imposed upon the identified contractors and former employees.

1. Compensation Without Written Ethics Opinion

Section 847(a)(4) states:

A Department of Defense contractor may not knowingly provide compensation to a former Department of Defense official described in subsection (c) within two years after such former official leaves service in the Department of Defense, without first determining that the former official has sought and received (or has not received after 30 days of seeking) a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to the activities that the former official is expected to undertake on behalf of the contractor.

The parenthetical “or has not received after 30 days of seeking” would allow compensation in circumstances *not otherwise authorized* simply because an ethics officer had defaulted in their responsibility to issue a written report. There is an implicit conflict between the contractor’s ability to compensate a former government employee who has not received a written ethics opinion within the statute’s 30-day mandate and DoD’s failure to timely provide said opinion. The ethics opinion is designed to determine whether it would be appropriate for a former government employee to be compensated for work performed for a contractor. In addition, the proposed rule requires contract offerors to represent that *all* former government employees are in compliance with post-employment restrictions. How is it possible for a contract offeror to certify that the employee is in compliance with post-employment restrictions when that employee has not *received* the mandated ethics opinion within the required 30-day timeframe? This loophole should be closed to better protect the public interest. At a minimum, contractors should be required to certify, when true, that they are compensating former government employees who have not received a written ethics opinion from a DoD ethics counselor within 30 days of it having been sought.

2. Inspector General Annual Audits

Section 847(b)(2) requires the Inspector General to “periodically” review whether opinion letters are written within 30 days of receipt of the request, but the proposed rule fails to specify a time period for that review. The rule should specify that the Inspector General conduct this review annually.

The proposed rule relies upon contractor representations to ensure compliance, but GAO's study confirms the weakness of voluntary compliance.¹ While it is true the proposed rule introduces a certification provision that provides an *incentive* for compliance, this is insufficient. To *ensure* compliance, it is essential that an independent review be conducted to monitor contractor and former employee compliance. Currently, DoD has no mechanism or database identifying *all* former employees working for DoD contractors and thus is unable to determine whether former employees who accept employment with DoD contractors are in compliance with post-employment restrictions, unless the former employee seeks a written ethics opinion. Similarly, DoD has no mechanism to ensure that contractors are in full compliance with representations proffered at the time of a contract award. Without conducting audits, DoD will be unable to determine whether the proffered representations are credible. The public interest in ensuring compliance with rigorous ethical standards for avoiding personal conflicts of interests would be best served by adopting Inspector General audits.

3. Mandatory Sanctions

41 U.S.C. § 2104 and DFARS 252.203-7000(c) authorize penalties and administrative actions against contractors and former DoD employees who fail to comply with legal restrictions governing employment of former DoD employees. It does not serve the public interest simply to identify parties who have failed to comply with post-employment restrictions, unless appropriate actions are taken to sanction those so identified. Mandatory sanctions reduce any incentive to disregard post-employment restrictions and will better help eliminate the ethical abuses associated with the revolving door that exists between the federal government and the entities it regulates.

4. DoD Accountability

Public Law 110-181, Sec. 847(a)(3) requires an “ appropriate ethics counselor...provide... former official a written opinion regarding the applicability or inapplicability of post-employment restrictions to activities that the...former official may undertake on behalf of a contractor” within 30 days of a former official's request of such an opinion, and Sec. 847(b)(2) requires DoD's Inspector General to review whether such opinions are issued within the mandated 30-day timeframe. Nevertheless, the proposed rule fails to address how ethics counselors who fail to meet their statutory responsibilities will be held accountable. As with former DoD employees, it does not serve the public interest simply to identify current government officials who have failed to comply with statutory mandates, unless appropriate actions are taken to hold them accountable. Failure to certify the applicability of post-employment restrictions to activities that a former official may undertake on behalf of a contractor within the 30-day timeframe runs the risk of allowing such officials to be compensated by contractors even though they are in violation of relevant post-employment restrictions. Former government officials and contractors should not be allowed to circumvent applicable ethics restrictions because DoD has defaulted on meeting its statutory obligations. Accountability is essential to good governance.

5. Public Access to Data

Public access to enforcement data is an essential component of government transparency and accountability. Making the suggested enforcement data available to the public helps to eliminate post-employment ethical abuses.

¹ Government Accountability Office, *Defense Contracting: Post-Government Employment of Former DoD Officials Needs Greater Transparency* (GAO-08-485), May 2008. <http://www.gao.gov/products/GAO-08-485> (Downloaded August 4, 2011)

POGO has written extensively about the dangers posed by the revolving door (see, for example, POGO's report *The Politics of Contracting*, June 29, 2004, available at <http://www.pogo.org/pogo-files/reports/government-corruption/the-politics-of-contracting/gc-rd-20040629.html>), and has been trying to add transparency to the process. If left unregulated or unmonitored, the movement of officials between government and contractors subverts the contracting process, resulting in flawed policies and bad procurement decisions that exacerbate public distrust in the government. In the case of the Department of Defense, this could even pose special risks to vital national security matters such as military readiness and weapons systems effectiveness.

POGO is a fervent believer in the aphorism "sunshine is the best disinfectant." Contractors receive hundreds of billions of taxpayer dollars each year from the Department of Defense. The public has a right to know when former senior DoD officials covered under the requirements of Section 847 seek employment with those contractors. In January 2009, POGO wrote to President Obama urging him to make the Section 847 database/repository available to the public (POGO's letter is posted at <http://www.pogo.org/pogo-files/letters/contract-oversight/co-tic-20090129.html>).

POGO again urges the Department of Defense to make publicly available the database mandated under Section 847(b)(1), as well as the names of the contractors and former DoD employees identified by the Inspector General as not being in compliance with the requirements of this proposed rule, the actions taken by the DoD to seek sanctions for each of the said contractors and former DoD employees identified as not in compliance with the requirements of this proposed rule, and what, if any, sanctions were actually imposed upon the identified contractors and former employees. This information could easily be integrated with the Office of Management and Budget's contract spending database, USAspending.gov.

DoD should draft a rule that effectively accomplishes the intent of the enabling statute. Such a regulation need not limit the requirements to only those specified in the enabling statute. It may expand those requirements so that the policy objectives enunciated in the statute can be met.

Finally, 18 U.S.C. § 207, 41 U.S.C. § 2104, and Public Law 110-181, Sec. 847 each apply to *all* contracts. It is not clear from the notice whether the proposed rule is *limited* to only "contracts for commercial items" or extends to all contracts. Because contracts for commercial items constitute only a small portion of DoD contracts covered by these statutes, it is imperative that the proposed rule extend to all contracts. It is for this reason that POGO requests clarification on the scope of this rule and requests permission to amend its comments to address the issue of scope before the rule is finalized if the proposed rule is limited to contracts for commercial items.

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 blue ink that reads "Paul Chassy". The signature is written in a cursive, slightly slanted style.

Paul Chassy, Ph.D., J.D.
Investigator
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