



May 11, 2012

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

Submitted via Regulations.gov

Subject: **DFARS Case 2012-D006**

Dear Ms. Murphy:

The Project On Government Oversight (POGO) provides the following public comment to DFARS Case 2012-D006, “Alleged Crimes By or Against Contractor Personnel,” (77 Fed. Reg. 14490, March 12, 2012). As an independent nonprofit organization committed to achieving a more accountable and transparent federal government, POGO has a longstanding interest in federal contracting and whistleblower protection issues.

The Department of Defense (DoD) seeks input on a proposal to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to expand coverage on contractor requirements and responsibilities with regard to the reporting of crimes committed by or against contractor personnel. The rule would revise DFARS 252.225-7040 to require contractors to provide their personnel with information about how and where to report an alleged crime and where to seek victim, witness, and whistleblower protection. The rule would expand the coverage worldwide to apply to contingency operations, humanitarian or peacekeeping operations, and other military operations.

POGO supports the proposed DFARS amendment. Imposing these relatively modest requirements on contractors accompanying U.S. forces on overseas contingency operations will enhance accountability and bolster national security interests.

The use of contractors in contingency operations has generated considerable controversy in recent years mainly due to high-profile incidents involving contractor employees committing serious offenses against other contractor employees, military personnel, local populations, and the U.S. government.¹ Individually and cumulatively, these incidents have a deleterious effect on U.S. peacekeeping and reconstruction efforts throughout the world.²

¹ Such incidents include **use of excessive force** (see “Ex-Blackwater Guards Face Renewed Charges,” James Risén, *The New York Times*, April 22, 2011. <http://www.nytimes.com/2011/04/23/us/23blackwater.html>); **sexual assault** (see “Ex-contractor sentenced to 2 years for Iraq sex assault,” Brian Rogers, *Houston Chronicle*, January 29, 2010.

It is essential that contractor personnel are fully apprised of their rights and responsibilities before their first day on the job, particularly when the job is located in an overseas contingency operation. Such a high-risk environment requires a civilian workforce that is adequately trained in compliance with all relevant laws, regulations, policies, and procedures.

Upon hiring, it is essential that contractors make employees aware of crime-reporting policies and procedures, including how and where to report criminal offenses and where to seek victim, witness, and whistleblower protection and assistance. Employees should be made familiar with the wide array of criminal acts covered by the Military Extraterritorial Jurisdiction Act (MEJA) and the Uniform Code of Military Justice (UCMJ), especially non-violent offenses such as fraud, theft, bribery, and perjury. In addition, contractor employees should be informed that, in certain circumstances, not reporting a crime can be a crime.

Contractors should emphasize to their employees that their duty to report applies to *all* crimes, even those committed by co-workers. For this reason, it is crucial that contractor personnel be informed of their whistleblower rights. POGO believes that the most effective oversight takes place on the inside – it often takes government or contractor insiders to bring wrongdoing to light to keep problems from spiraling out of control. Too often, would-be whistleblowers are discouraged from coming forward by the prospect of harassment, demotion, or termination. POGO is glad to see DoD proposing this DFARS amendment at a time when Congress is undertaking efforts to strengthen contractor whistleblower rights.³

Last year, POGO expressed a concern that a new rule requiring contractors to display DoD Inspector General fraud hotline posters would open up a whistleblower protection loophole by exempting contracts performed outside the United States.⁴ We are hopeful that the proposed DFARS amendment, combined with the contractor mandatory reporting rule implemented in 2008, will narrow that loophole.

The proposed DFARS amendment would also require contractors to report any alleged offenses under the MEJA and UCMJ to the appropriate investigative authorities. To strengthen

<http://www.chron.com/neighborhood/pearland-news/article/Ex-contractor-sentenced-to-2-years-for-Iraq-sex-1702556.php>); **bribery** (see “Iraqi Translator is Accused of Bribery in Kickback Case,” James Glanz, *The New York Times*, March 25, 2006. <http://www.nytimes.com/2006/03/25/international/middleeast/25contract.html>); **human trafficking** (see “British firm accused in UN ‘sex scandal,’” Antony Barnett and Solomon Hughes, *The Observer*, July 28, 2001. <http://www.guardian.co.uk/world/2001/jul/29/unitednations>); and **fraud** (see “DynCorp to Settle Claims of Inflating Costs for Iraq Work for \$7.7 Million,” Tom Schoenberg, *Bloomberg*, April 23, 2011. <http://www.bloomberg.com/news/2011-04-22/dyncorp-to-pay-7-7-million-for-inflated-claims-on-iraq-work-u-s-says.html>).

² See, for example, *The Department of Defense’s Use of Private Security Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress*, Congressional Research Service, May 13, 2011, pp. 14-18, for a discussion of how abuses committed by private security contractors (PSCs) have undermined U.S. missions in Afghanistan and Iraq. <http://www.fas.org/sgp/crs/natsec/R40835.pdf>

³ For example, the “Non-Federal Employee Whistleblower Protection Act” (S. 241), <http://thomas.gov/cgi-bin/query/z?c112:S.241>., introduced in 2011, would apply protections to all federal fund recipient whistleblowers.

⁴ “New Rule Will Help Contractor Whistleblowers Reach Out and Touch Someone,” Project On Government Oversight, September 22, 2011. <http://pogoblog.typepad.com/pogo/2011/09/new-rule-will-help-contractor-whistleblowers-reach-out-and-touch-someone.html>

accountability, DoD should consider imposing a range of penalties in the event of non-compliance, much like non-compliance with the trafficking in persons provision of the Federal Acquisition Regulation (FAR) subjects contractors to the following remedies:

- (1) Requiring the contractor to remove a contractor employee or employees from the performance of the contract;
- (2) Requiring the contractor to terminate a subcontract;
- (3) Suspension of contract payments;
- (4) Loss of award fee, consistent with the award fee plan, for the performance period in which the government determined contractor non-compliance;
- (5) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or
- (6) Suspension or debarment.⁵

The proposed DFARS amendment imposes a minimal burden on contingency contractors to ensure employees are made aware of crime-reporting policies and procedures before heading out into the field. Encouraging witnesses and victims to step forward and report instances of crime by or against contractor personnel will help eradicate the “culture of impunity” associated with contingency contractors.⁶ The requirement will lead to safer, more law-abiding work environments and a more harmonious working relationship between contractor and military personnel in contingency operations throughout the world. In fact, the Department of Defense should consider taking the next logical step and work with the State Department and the United States Agency for International Development (USAID) to expand the proposed DFARS amendment into a uniform rule covering all DoD, State, and USAID contingency operation contracts.

Thank you for your consideration of these comments.

Sincerely,

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⁵ FAR 52.222-50(e)

⁶ See, for example, “Ending a Culture of Impunity for Contract Soldiers,” Scott Horton, *Harper’s Magazine*, January 16, 2008. <http://www.harpers.org/archive/2008/01/hbc-90002153>