

May 15, 2012

Senate Armed Services Committee
Russell Senate Office Building
Room SR-228,
Washington, DC 20510

Dear Chairman Levin and Ranking Member McCain:

The Project On Government Oversight (POGO) urges you to support the Department of Defense's (DoD) legislative proposal for the National Defense Authorization Act that will result in improved oversight of billions of dollars' worth of so-called "commercial" goods and services.

Since the mid-1990s, the government has been buying so-called "commercial" goods and services that are not actually sold in the commercial market. Making matters worse, these purchases are often without any government review of the cost data that leads to the final price the contractors are proposing. Would you buy a car if the dealer told you that you couldn't see the window sticker? We doubt it, and the government shouldn't either.

"Commercial item" purchases—which should not be confused with "commercially available off-the-shelf" (COTS) items (or as we say at POGO, "real commercial items")—have been a problematic contract mechanism for years. "Commercial item" purchases at the Department of Defense (DoD) totaled over \$75 billion in 2011—a dramatic increase from the nearly \$20 billion spent on commercial items in 2000. That is a tremendous amount of spending without adequate cost or pricing oversight by the government. This is particularly the case because so many "commercial item" purchases are made non-competitively. In fact, the primary reason the government contracting industry has lobbied so heavily for the commercial item definition is precisely because it prohibits government agencies from obtaining cost or pricing data even when a non-competitive (i.e., sole source) contract is awarded as long as it is labeled commercial.

POGO recently learned that DoD sent a legislative proposal¹ to Congress to narrow the definition of a "commercial item" to mean goods or services that are **actually sold** to the general public in like quantities. This proposal is a huge improvement over the current definition, which includes good or services "of a type" that are "offered" for sale or lease.²

¹ Department of Defense, "SEC.806 Revision to Definition of Term 'Commercial Item' for Purposes of Federal Procurement Statutes Providing Procedures for Procurement of Commercial Items," <http://pogoarchives.org/m/co/dod-legislative-proposal-commercial-item-definition-20120400.pdf> (Hereinafter "SEC.806 Revision to Definition of Term 'Commercial Item'")

² Department of Defense, National Aeronautics and Space Administration, *Federal Acquisition Report: Volume I*, March 2005. https://www.acquisition.gov/far/current/html/Subpart%202_1.html#wp1145507 (Downloaded May 14, 2012)

POGO has promoted such a change to the definition since 1999, and now we have been joined by DoD,³ the Department of Defense Panel on Contracting Integrity,⁴ and the Acquisition Advisory Panel.⁵ All three entities have found that the “of a type” language places the government at increased risk of waste. For example, in 2006, the conversion of the C-130J military aircraft from a commercial item caused the repricing of 39 aircraft and resulted in “institutional net savings of \$168 [million].”⁶

Such savings are a result of the government gaining access to contractor cost or pricing data that allows the government to determine if proposed prices are reasonable, and to negotiate even better prices. Shay Assad, DoD’s Director of Defense Procurement and Acquisition Policy & Strategic Sourcing, agrees:

This is the number one topic that I get from contracting officers in the field. They’re very frustrated that they’re getting claims from, frankly, non-traditional commercial companies claiming to have commercial of-a-type service or products, and then not being able to substantiate with any pricing information of why the price is legit. We’re addressing this in Congress. We think there should be a change in that definition.⁷

Undoubtedly, there will be much opposition from the contracting industry.⁸ Billions of dollars are at stake, and for years, contractors have attempted to gut the Truth in Negotiations Act (TINA), which requires bidders to turn over cost or pricing data to federal agencies to ensure that taxpayers are not being gouged. Any claims that the current system is working and that businesses will cease working with the government if the “commercial item” language is changed are contradicted by numerous government reports highlighting excessive spending under poorly planned and administered “commercial item” contracts and the fact that no genuine data exists to show how many non-traditional contractors are now selling to the government. In fact, what is more pervasive are numerous government reports highlighting commercial item contracting flaws, including the misclassification of items as commercial,⁹ improper designation

³ “SEC.806 Revision to Definition of Term ‘Commercial Item’”

⁴ Department of Defense, Office of the Under Secretary of Defense Acquisition, Technology and Logistics (AT&L), *Panel of Contracting Integrity 2010 Report to Congress*, January 28, 2011, p. 22. http://www.acq.osd.mil/dpap/cpic/cp/docs/PCI_RTC_2010.pdf (Downloaded May 14, 2012)

⁵ General Services Administration, Acquisition Central, “Chapter 1-Commercial Practices Findings and Recommendations,” *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, p. 31. <https://www.acquisition.gov/comp/aap/documents/Chapter1.pdf> (Downloaded May 14, 2012)

⁶ United States Air Force, “AF announces C-130J contract conversion,” U.S. Air Force Website, October 25, 2006. <http://www.af.mil/news/story.asp?id=123029915> (Downloaded May 14, 2012)

⁷ Amber Corrin, “DOD moves to change rules for buying commercial products,” *Federal Computer Week*, May 1, 2012. <http://fcw.com/articles/2012/05/01/dod-of-a-type-contract-rule-changes.aspx> (Downloaded May 14, 2012)

⁸ Letter from Stan Soloway, President & CEO of Professional Services Council, to the Honorable Howard “Buck” McKeon, Chairman, and Honorable Adam Smith, Ranking Member, of the House Committee on Armed Services, about revising the definition of commercial item, April 19, 2012. http://www.pscouncil.org/PolicyIssues/Legislation/Authorization/Letter_to_HASC_on_FY13_DoD_Commercial_Items_Proposal.aspx (Downloaded May 14, 2012)

⁹ Letter from Katherine V. Schinasi, Managing Director, Acquisition and Sourcing Management at Government Accountability Office, to Chairmen and Ranking Members of the Senate and House Armed Services Committees about Contract Management, July 7, 2006. <http://www.gao.gov/new.items/d06838r.pdf> (Downloaded May 14, 2012)

of commercial items,¹⁰ restricted pricing determinations on the F-16 Mission Training Center simulator service contract,¹¹ questionable commercial item determinations in \$860 million military spare parts contract,¹² and an unjustified commercial acquisition strategy for procuring the C-130J aircraft.¹³

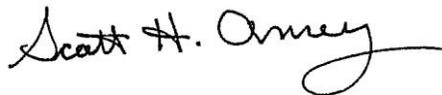
Truly commercial items, such as COTS, will continue to operate under the status quo, but goods or services that are not sold in substantial quantities in the commercial marketplace should be awarded with more oversight of pricing. DoD's legislative proposal would put an end to wasteful commercial item spending within agencies and provide a more accessible outlet for truly commercial vendors that want to do business with the federal government.

There may be other acceptable, targeted alternatives. For example, POGO would support a change to the current definition that would state that the exception to providing cost or pricing data only applies when the government is acquiring goods or service on a competitive basis. In so doing, the requirement for contractors to provide cost or pricing data for commercial item procurements would be limited to those cases when the government is acquiring the item or service on a sole source basis. Such a change would protect the government and taxpayers from paying higher prices, which is often the case in a sole source procurement.

We hope that you join the Defense Department and POGO in our efforts to amend the commercial item definition, which will result in better contracting decisions that will save taxpayers billions of dollars each year.

Please do not hesitate to contact me at scott@pogo.org or 202-347-1122 if you have any questions about commercial item contracting.

Sincerely,



Scott Amey
General Counsel

cc: Members of the Senate Armed Services Committee

¹⁰ Department of Defense, Office of Inspector General, *Acquisition: Commercial Contracting for the Acquisition of Defense Systems (D-2006-115)*, September 29, 2006. <http://www.dodig.mil/audit/reports/FY06/06-115.pdf> (Downloaded May 14, 2012)

¹¹ Department of Defense, Office of Inspector General, *Acquisition: Procurement Procedures Used for F-16 Mission Training Center Simulator Services (D-2006-065)*, March 24, 2006. <http://www.dodig.mil/audit/reports/FY06/06-065.pdf> (Downloaded May 14, 2012)

¹² Department of Defense, Office of Inspector General, *Acquisition: Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation (D-2006-122)*, September 29, 2006. <http://www.dodig.mil/Audit/reports/FY06/06-122.pdf> (Downloaded May 14, 2012)

¹³ Department of Defense, Office of Inspector General, *Acquisition: Contracting for and Performance of the C-130J Aircraft (D-2004-102)*, July 23, 2004. <http://www.dodig.mil/audit/reports/fy04/04-102.pdf> (Downloaded May 14, 2012)