



November 10, 2016

Defense Acquisition Regulations System
Attn: Mr. Mark Gomersall
OUSD(AT&L)DPAP/DARS
Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

Subject: DFARS Case 2016-D006

Dear Mr. Gomersall:

The Project On Government Oversight (POGO) provides the following public comment to the “procurement of Commercial items” proposed rule.¹ As an independent nonprofit organization committed to achieving a more accountable and transparent federal government, POGO has a longstanding interest in federal contracting issues, especially those involving the acquisition of so-called “commercial” items, and as a result we can only support certain provisions in the proposed rule.

Since the mid-1990s, the government has been buying “commercial” goods and services that are not actually sold in the commercial market. Making matters worse, these purchases are often made noncompetitively and without any government review of the cost or pricing data. As result, we see report after report by the Department of Defense (DoD) Inspector General (IG) highlighting wasted taxpayer dollars in DoD commercial item procurements.

POGO has always supported narrowing the definition of a “commercial item” to mean goods or services that are actually sold to the general public in like quantities. Such a change would be a huge improvement over the current definition, which includes good or services “of a type” that are merely “offered” for sale or lease.²

We applauded DoD for its previous efforts to improve commercial item buying.³ Furthermore, we realize that Congress is exacerbating bad commercial item procurements by passing laws that will slow down the buying process and result in wasted taxpayer dollars.⁴ The FY 2016 Defense

¹ 81 Fed. Reg. 53101, August 11, 2016. <https://www.gpo.gov/fdsys/pkg/FR-2016-08-11/pdf/2016-18704.pdf>

² FAR Subpart 2.101.

³ Project On Government Oversight, Letter to the Senate Armed Services Committee, May 15, 2012. <http://pogoarchives.org/m/co/cas/pogo-letter-cas-20120515.pdf>; Project On Government Oversight, Public Comment, “Evaluating Price Reasonableness for Commercial Items” DFARS Case 2013-D034, October 2, 2015. http://www.pogoarchives.org/m/co/public_comment_commercial_item_price_reasonableness_20151002.pdf

⁴ Pub. L. 112–239, Section 831; Pub. L. 114–92, Sections 851-853 and 855-857.

Authorization Bill (Sect. 851-857) expanded the buying of military-only items, limit DoD's access to contractor pricing information, restrict conversions when an item no longer has a commercial market, and essentially lock the government into previous commercial determinations and prices. Simply stated, Congress is forcing DoD into a worse buying position than the one that it is in.

Specifically, POGO opposes:

1. the use of prior commercial item determinations, which can lock DoD into buying items that are no longer commercial (Sect. 212.102(a)(iii)(A));
2. requiring a review of the commercial item determination, which can slow down the process by taking up to 30 days (Sect. 212.102(a)(iii)(B) and (C));
3. requiring the use of market research to determine price reasonableness, when obtaining offeror cost or pricing data would be more time efficient and germane (Sect. 212.209(a));
4. requiring a written determination, including a finding of error **and** cost saving, when converting from a commercial acquisition to a noncommercial acquisition (Sect. 212.7X01(a)). "And" should be replaced with "or" to allow government officials to convert the procurement when it is deemed appropriate;
5. the lack of language stating that any provision limiting the government's ability to obtain cost or pricing data to support a price determination is void (Sect. 215.402(a)(i)(B)). As written the provision only states that contractor officers "shall not limit the Government's ability to obtain" pricing information, but it should go further to state that any such provision is void just in case a mistake is made by an official;
6. requirements for price analysis that allow for "recent purchase prices paid by the Government **or** commercial customers (Sect. 215.404-1(b)(ii)). Government officials should have access to both to ensure that the government is obtaining the best prices;
7. the permissive allowance that a contracting officer "may request" other relevant information to determine cost or prices (Sects. 212.209(d), 215.404-1(b)(iv), 234.7002(d)(3)). Those provisions cause confusion, especially when contractors refused to turn over cost data to DoD.⁵ Because the proposed rule limits DoD's access to uncertified cost data to that which is "regularly maintained by the offeror in its business operations" there should be no burden on contractors and should be changed to "shall".

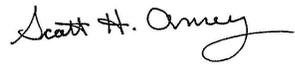
POGO supports the proposed rule's provisions stating that:

1. "Nothing in this section shall be construed to preclude the contracting officer from requiring the contractor to supply information that is sufficient to determine the reasonableness of price, regardless of whether or not the contractor was required to provide such information in connection with any earlier procurement" (Sect. 212.209(d)); and
2. Contracting officers should review the age, volume, and nature of transactions when considering price reasonableness information.

⁵ Mandy Smithberger, Project On Government Oversight, "DoD Cost Analysis is like Pin the Tail on the Donkey", February 25, 2015. <http://www.pogo.org/blog/2015/02/dod-cost-analysis-is-like-pin-the-tail-on-the-donkey.html>

DoD's proposed rule needs improvement or DoD will continue to pay prices well above what is fair and reasonable. If you have any questions, I can be reached at scott@pogo.org or (202) 347-1122.

Sincerely,

A handwritten signature in black ink that reads "Scott H. Amey". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Scott Amey
General Counsel