

The following written public statement to the Acquisition Advisory Panel Designated Federal Official was submitted via e-mail on December 6, 2005.

December 6, 2005

Ms. Laura Auletta, DFO

c/o General Services Administration

1800 F Street, N.W., Room 4006

Washington, D.C. 20405

I wanted to provide additional comments and materials to the Acquisition Advisory Panel (“Panel”) regarding some issues that were discussed during its November 29, 2005 meeting. First, I was surprised to learn that the Performance-Based Services Acquisition Working Group had not examined any specific performance based service acquisitions (“PBSAs”) to determine how that contracting vehicle is working. Members of the working group mentioned the lack of empirical data to determine the benefits or problems with PBSA, and therefore I recommend that it look at a small sampling of PBSA at three to five agencies to better assess their value to the taxpayer. Too often we have witnessed “mission creep” or requirements modifications in the procurement of goods that cost the taxpayer more than is necessary. For example, DoD’s procurement of the F/A-22 and many other defense systems are over-budget and behind schedule. Moreover, the final product cannot meet the government’s needs or the original promises made by the contractor. Services may be more prone to such abuse and therefore the Panel should not wait for GAO or another government entity to fully study the issue.

The Panel is undertaking a vital mission and therefore it cannot miss out on the opportunity to examine PBSAs. POGO’s fear is that, like many government panels and commissions, the working group’s recommendation will be that more study and data is required. I recommend that the working group contact three to five federal agencies to examine what types of services have been acquired, the performance measure used, the number, if any, of amendments, modifications, or changes to such contracts, the financial or contracting incentives paid or awarded, the penalties established and applied, the grades given, and return business awarded through performance based acquisitions. I also recommend that the Panel talk to both government and contractor officials of the selected PBSAs to inquire about the process – the good, bad, and ugly to ensure that the Panel can objectively make findings and recommendations with regard to PBSAs.

Second, I wanted to provide some information to Mr. Tom Luedtke, the chair of the Appropriate Role of Contracting Support in Acquisition Functions Working Group (a.k.a. the “Inherently Governmental Functions Working Group”). On March 23, 2005, DoD issued an interim rule with request for comments (70 Federal Register 14572), titled “Defense Federal Acquisition Regulation Supplement; Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions – DFARS 2004-D021.” Comments can be found on the web at <http://emissary.acq.osd.mil/dar/dfars.nsf>. I have attached a copy of the Federal Register notice and POGO’s comments for the Panel’s review. Although the Inherently Governmental Functions Working Group was a late addition to the Panel, its findings and recommendations are essential because of the federal government’s increased use of contractors.

Third, POGO urges the Panel to study the issue of adding transparency to the schedule and interagency contracting process. In the wake of Iraq and Katrina contracting, POGO has received multiple requests for copies of schedules and interagency contracting vehicles. The public, media, Congress, and contractors (especially small businesses) want to see the lists, the contractors on the lists, and the goods and services included on the lists. For example, most inquiries to POGO raise the question: “Who had the opportunity or was eligible to receive the contracts or work” that was steered to a certain contractor? POGO urges the Panel to recommend in its final report that the government buying schedules and interagency contracting system be fully open and accessible to the public.

Finally, I have attached a recent copy of POGO’s contracting concerns and recommendations for the Panel’s review.

Sincerely,

Scott H. Amey

General Counsel

scott@pogo.org

Attachments



Fed Reg Inher Gov Acq jobs 05 23 05.pdf



DoD Inher Govt Functions 05 23 05.wpd



POGO Concerns Recommendations.pdf

duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20054, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

- 2. Section 73.202(b), the Table of FM Allotments under Arkansas, is amended by adding Gassville, Channel 224A.
- 3. Section 73.202(b), the Table of FM Allotments under Massachusetts, is amended by adding Channel 249A at Nantucket.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 05-5734 Filed 3-23-05; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05-28; DA 05-169]

Inquiry Regarding the Impact of Certain Rules on Competition in the Multichannel Video Programming Distribution Market

AGENCY: Federal Communications Commission.

ACTION: Review of rules and statutory provisions; extension of comment period.

SUMMARY: This decision extends the period for filing public reply comments in this proceeding at the request of a commenter.

DATES: Reply comments were due on or before March 16, 2005, and are now due on or before March 31, 2005.

FOR FURTHER INFORMATION CONTACT: Marcia Glauber, Media Bureau, 202-418-7046.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order in MB Docket No. 05-28, DA 05-627,

adopted March 9, 2005, and released on March 9, 2005. The full text of this Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY-A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Room CY-B402, telephone (800) 378-3160, e-mail www.BCPIWEB.COM. To request materials in accessible formats for people with disabilities (electronic files, large print, audio format and Braille), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis of the Order

1. By a Public Notice dated January 25, 2005, the Media Bureau began an inquiry on the impact of specific provisions of the Communications Act of 1934, as amended, and Commission rules on competition in the multichannel video programming distribution (MVPD) market. (70 FR 6593, February 8, 2005.) The Commission is required to submit a report to Congress on the results of its inquiry no later than nine months after the enactment date of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA), *i.e.*, September 8, 2005. (Pub. L. 108-447, § 208, 118 Stat 2809, 3428-29, 2004. The SHVERA was enacted on December 8, 2004, as title IX of the "Consolidated Appropriations Act, 2005.") The Public Notice called for reply comments on March 16, 2005.

2. The Walt Disney Company, Disney ABC Cable Networks Group, The ABC Television Network, and the ABC-owned television stations (collectively, Disney) has requested a thirty day extension of time, until April 15, 2005, to file reply comments. Disney seeks this extension of time to prepare a detailed reply to the issues raised in the initial comments, including an economic analysis in response to a study on retransmission consent submitted by the Joint Cable Commenters.

3. The Commission concludes that the Walt Disney Company has stated good cause for itself and others to receive an extension of fifteen days for the filing of their reply comments. A fifteen day extension will result in a more complete discussion and analysis of the issues raised in the initial comments.

4. Accordingly, *It is ordered that*, pursuant to Sections 4(i), 4(j), and 5(c) of Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and

155(c), and sections 0.61, 0.283, and 1.46 of the Commission's rules, 47 CFR 0.61, 0.283, and 1.46, the date for filing reply comments in MB Docket No. 05-28 is extended until March 31, 2005.

Federal Communications Commission.

Thomas Horan,

Senior Legal Advisor, Media Bureau.

[FR Doc. 05-5835 Filed 3-22-05; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF DEFENSE

48 CFR Part 207

[DFARS Case 2004-D021]

Defense Federal Acquisition Regulation Supplement; Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 804 of the National Defense Authorization Act for Fiscal Year 2005. Section 804 places limitations on the award of contracts for the performance of acquisition functions closely associated with inherently governmental functions.

DATES: *Effective date:* March 23, 2005.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before May 23, 2005 to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2004-D021, using any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Defense Acquisition Regulations Web site: <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. Follow the instructions for submitting comments.

- E-mail: dfars@osd.mil. Include DFARS Case 2004-D021 in the subject line of the message.

- Fax: (703) 602-0350.
- Mail: Defense Acquisition Regulations Council, Attn: Ms. Robin Schulze, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062.

- Hand Delivery/Courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 16th Street, Arlington, VA 22202-3402.

All comments received will be posted to <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Robin Schulze, (703) 602-0326.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule adds DFARS Subpart 207.5 to implement Section 804 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375). Section 804 adds 10 U.S.C. 2383, which places limitations on the award of contracts for performance of the acquisition functions closely associated with inherently governmental functions that are listed in section 7.503(d) of the Federal Acquisition Regulation.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. The analysis is summarized as follows: The objective of the rule is to ensure proper management and oversight of contracts for functions that generally are not considered to be inherently governmental, but may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance. The impact of the rule on small entities is unknown at this time. DoD agencies will implement the requirements of the rule in making decisions whether to enter into, and in the administration of, contracts for performance of the acquisition functions closely associated with inherently governmental functions that are listed in section 7.503(d) of the Federal Acquisition Regulation. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2004-D021.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 804 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375). Section 804 provides that DoD may enter into contracts for the performance of acquisition functions closely associated with inherently governmental functions only if: (1) Appropriate DoD personnel cannot reasonably be made available to perform the functions; (2) appropriate DoD personnel will supervise contractor performance and will perform all associated inherently governmental functions; and (3) DoD addresses any potential organizational conflict of interest of the contractor in the performance of the contract. Section 804 became effective upon enactment on October 28, 2004. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 207

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Part 207 is amended as follows:

■ 1. The authority citation for 48 CFR Part 207 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 207—ACQUISITION PLANNING

■ 2. Subpart 207.5 is added to read as follows:

Subpart 207.5—Inherently Governmental Functions

Sec.
207.500 Scope of subpart.
207.503 Policy.

207.500 Scope of subpart.

This subpart also implements 10 U.S.C. 2383.

207.503 Policy.

(S-70) *Contracts for acquisition functions.*

(1) In accordance with 10 U.S.C. 2383, the head of an agency may enter into a contract for performance of the acquisition functions closely associated with inherently governmental functions that are listed at FAR 7.503(d) only if—

(i) The contracting officer determines that appropriate military or civilian DoD personnel—

(A) Cannot reasonably be made available to perform the functions;

(B) Will supervise contractor performance of the contract; and

(C) Will perform all inherently governmental functions associated with the functions to be performed under the contract; and

(ii) The contracting officer ensures that the agency addresses any potential organizational conflict of interest of the contractor in the performance of the functions under the contract (see FAR Subpart 9.5).

(2) See related information at PGI 207.503(S-70).

[FR Doc. 05-5629 Filed 3-22-05; 8:45 am]

BILLING CODE 5001-08-P

DEPARTMENT OF DEFENSE

48 CFR Part 209

Defense Federal Acquisition Regulation Supplement; Technical Amendment

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making a technical amendment to the Defense Federal Acquisition Regulation Supplement to update the list of agency debarring and suspending officials.

DATES: Effective March 23, 2005.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0311; facsimile (703) 602-0350.

List of Subjects in 48 CFR Part 209

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Part 209 is amended as follows:

■ 1. The authority citation for 48 CFR Part 209 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 209—CONTRACTOR QUALIFICATIONS

209.403 [Amended]

■ 2. Section 209.403 is amended in the definition of "Debarring and suspending official", in paragraph (1), by removing "National Security Agency—The

investigations about us contact center



May 23, 2005

POGO comments on a government attempt to restrict outsourcing jobs associated with purchasing goods and services

May 23, 2005

Sent by e-mail to: dfars@osd.mil
Hard copy to follow

Defense Acquisition Regulations Council
Attn: Ms. Robin Schulze
OUSD(AT&L)DPAP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 2004-D021

Dear Ms. Schulze:

The Project On Government Oversight (POGO) appreciates the opportunity to comment on **70 Federal Register 14572** (March 23, 2005) – “**Defense Federal Acquisition Regulation Supplement; Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions.**” Founded in 1981, POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. POGO supports the interim rule because it places some controls on the award of contracts for the performance of jobs closely associated with the federal government’s purchases of goods and services. As we have witnessed in recent months, failures in the procurement system have jeopardized taxpayer dollars.

POGO commends the Department of Defense’s (DoD’s) efforts to make contracting officers *accountable for their decisions*. However, *transparency must also be added to the interim rule*. Contracting officers should provide written justifications supporting the three (3) criteria listed at 10 U.S.C. § 2383(a). Public disclosure of those decisions will protect against outsourcing jobs that should be performed by government personnel while allowing government officials, Congress, and

the public to see the decision making process.

The government should protect inherently governmental functions. POGO is concerned at the breadth of the "functions generally not considered to be inherently governmental" listed at FAR 7.503 (d). According to the FAR, currently contractors can prepare the federal budget, develop statements of work, support acquisition planning, and assist in contract management; however, POGO believes contractors should not be allowed to perform those functions.

POGO's concerns pertain to the expanding definition of the term "inherently governmental function," which is a looming problem for the federal government. That expanded definition is creating a world in which the government's priorities and spending are being heavily influenced by for-profit companies. As a result, personal and corporate conflicts of interests and ethics concerns are on the rise. POGO is increasingly concerned that the roles of the contractors and federal employees are blurring, particularly in the world of acquisition.

It appears that the Government Accountability Office (GAO) also believed it is essential to retain government control of acquisition functions.

It is clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policymaking functions, and the government may need to retain an in-house capability even in functions that are largely outsourced. Certain other capabilities, such as adequate **acquisition skills to manage costs, quality, and performance and to be smart buyers of products and services, or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.** (Emphasis added).

GAO, Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* at 9, 36, 48 (April 2002).

DoD's interim rule pertains to jobs that are categorized as "inherently governmental"¹ functions (*i.e.*, jobs that **must** be performed by government employees) and "not inherently governmental" functions (*i.e.*, jobs that can be performed by contractor personnel). The objective of the interim rule is to ensure proper management and oversight of contracts for functions that generally are not considered to be inherently governmental. In other words, DoD wants to place some controls on jobs that may be performed by contractor personnel – jobs that approach being categorized as inherently governmental because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the government oversees contractor performance.

This interim rule implements Section 804 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) – codified at 10 U.S.C. § 2383 (effective October 28, 2004). Section 804 provides that DoD may enter into contracts for the performance of "acquisition functions closely associated with inherently governmental functions" only if:

- (1) Appropriate DoD personnel "cannot reasonably be made available to perform the functions;"
- (2) appropriate DoD personnel will "supervise contractor performance of the contracts" and will "perform all inherently governmental functions associated with the functions to be performed under the contract;" and
- (3) DoD "addresses any potential organizational conflict of interest of the contractor in the performance of the functions under the contract" consistent with Subpart 9.5 of Part 9 of the Federal Acquisition Regulation (FAR) and the best interests of DoD.

In light of recent procurement scandals, including the Darleen Druyun situation, contractors **overseeing other contractors, and the Abu Ghraib prison abuses, the federal government must better** oversee the way it purchases goods and services. Integrity must be restored to the purchasing system and jobs related to that system should not be handed over to contractor personnel.

POGO does not believe that acquisition functions should be performed by contractors. If, however, the government finds it necessary to hand over acquisition functions to contractors, POGO urges DoD to require contracting officers to provide written justification of their decisions and to make those justifications publicly available on the web.

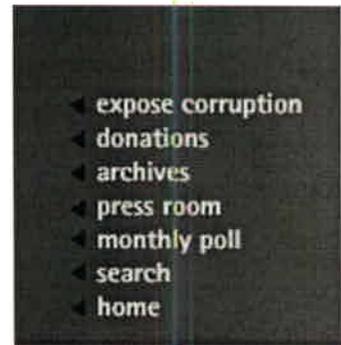
Sincerely,

Scott H. Amey
General Counsel
scott@pogo.org

1. Section 5 of Pub. L. No. 105-270 (the "Federal Activities Inventory Reform Act" (1998)) defined an inherently governmental function as a "function that is so intimately related to the public interest as to require performance by Federal Government employees." See also office of Management and Budget, Office of Federal Procurement Policy, *Policy Letter 92-1 to the Heads of Executive Agencies and Departments – Subject: Inherently Governmental Functions*, September 23, 1992, p.1.

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September 16, 2005

POGO'S Government Contracting Concerns and Recommendations in the Aftermath of Hurricane Katrina

POGO'S GOVERNMENT CONTRACTING CONCERNS AND RECOMMENDATIONS IN THE AFTERMATH OF HURRICANE KATRINA

1. LACK OF COMPETITION

POGO CONCERN

- A vastly increased micro-purchase threshold eliminates competition for a large number of contracts and is susceptible to government purchase card fraud and abuse
- Non-urgent purchases of goods and services may not be subject to competitive bids
- The federal government is relying on familiar and convenient contractors

POGO RECOMMENDATION

- Repeal the \$250,000 micro-purchase threshold
- Conduct full and open competition or at least limited competition for all non-urgent purchases
- Add stronger audit provisions to existing laws
- Do not create any additional provisions to allow for non-competitive contracting
- Open competition to all contractors (including small and minority businesses) rather than the current closed club of federal contractors

2. LACK OF TRANSPARENCY

POGO CONCERN

- Basic information regarding government purchases of goods and services (e.g. contract type, award amount, summary of work) is inadequate
- Government auditors do not have adequate access to cost or pricing data

POGO RECOMMENDATION

- Congress should require agencies to create user friendly web sites showing all contracts, task and delivery orders, agreements, grants, or other disbursements of federal dollars to ensure the taxpayer dollars are being spent wisely
- Allow government auditors access to cost or pricing data from contractors selling goods or services whose prices are not determined in the commercial marketplace

3. INADEQUATE OVERSIGHT

POGO CONCERN

- Federal spending is outstripping the capacity of federal auditors and contracting personnel to ensure taxpayers and Katrina survivors are not being exploited

POGO RECOMMENDATION

- Strengthen oversight and audit provisions for government contracts
- Rebuild staff in federal contracting and audit offices that have been cut to the bone over the past decade

4. CONTRACTOR MISCONDUCT

POGO CONCERN

- Large contracts are being awarded to contractors with histories of misconduct (Bechtel, Halliburton, Shaw and Fluor)

POGO RECOMMENDATION

- The government must create a centralized database which lists instances of contractor misconduct so that government procurement officials can make contracting determinations prior to committing federal funds

5. INHERENTLY GOVERNMENTAL FUNCTIONS

POGO CONCERN

- Career civil servants are being replaced by appointees and contractor employees who place private sector goals above those of the public good

POGO RECOMMENDATION

- Policymakers should review the current definition of federal government job positions to ensure that "inherently governmental" jobs are not outsourced to contractors who may have financial interests that pose conflicts of interest with public service

6. THE REVOLVING DOOR

POGO CONCERN

- Some senior federal officials are exploiting their public service by going to work for the industries they had been overseeing, costing taxpayers through excessive contract prices, limiting or eliminating competition from businesses that may be the best for the job, and resulting in flawed policies and bad procurement decisions
- The revolving door also exacerbates public distrust, which can result in a decline in civic participation and demoralizing career civil servants who see their supervisors and co-workers using their government positions as stepping stones for private gain

POGO RECOMMENDATION

- Political appointees and Senior Executive Service policymakers (people who develop rules and determine requirements) should take an oath that they will not receive compensation from contractors who were regulated by or benefitted from the policies the official formulated while in public service
- Close the loophole that allows former government employees to work for a different department or division of the same contractor they oversaw as a government employee

Additional Resources

- ▶ **POGO 's Contractor Misconduct Database.**
- ▶ **POGO provides additional information to the panel reviewing the government's buying system.** August 30, 2005.
- ▶ **POGO 's testimony on DoD's Use of "Commercial" Acquisitions.** March 2005.
- ▶ **POGO Report - Politics of Contracting Report,** including the revolving doors spinning from the government to the top 20 government contractors. June 29, 2004 .
- ▶ **POGO 's Senate testimony calling for the suspension or debarment of Halliburton.** September 10, 2004.
- ▶ **POGO Report - Federal Contracting and Iraq Reconstruction.** March 11, 2004.
- ▶ **POGO Report - Pick Pocketing the Taxpayer: The Insidious Effects of Acquisition Reform** Revised Edition. March 11, 2002.

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