

October 2, 2015

Defense Acquisition Regulations System  
Attn: Mr. Mark Gomersall  
OUSD(AT&L)DPAP/DARS  
Room 3B855  
3060 Defense Pentagon  
Washington, DC 20301-3060

Subject: DFARS Case 2013-D034

Dear Mr. Gomersall:

The Project On Government Oversight (POGO) provides the following public comment to the “Evaluating Price Reasonableness for Commercial Items” proposed rule.<sup>1</sup> 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.

POGO supports the proposed rule. The proposal will standardize commercial item buying and assist contracting officers in obtaining needed cost or pricing data that will ensure the government receives fair and reasonable prices.

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 without any government review of the cost data that supports the final price the contractors are proposing.

“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) total tens of billions of dollars each year. That is a tremendous sum of money being spent without adequate cost or pricing oversight by the government. This is particularly true because so many “commercial item” purchases are made non-competitively. In fact, the primary reason contractors have 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.

---

<sup>1</sup> 80 Fed. Reg. 45918, August 3, 2015. <http://www.gpo.gov/fdsys/pkg/FR-2015-08-03/pdf/2015-18938.pdf>

DoD is not sitting out the commercial-item debate. The Department has proposed its own Better Buying Power 3.0 plan to “develop a draft legislative proposal to revise the definition of the term ‘commercial item’ to eliminate items and services merely offered for sale, lease, or license by September 2015.”<sup>2</sup> Naturally, industry opposes DoD’s proposed changes, saying the government will miss out on “leading edge capabilities that are being developed for the commercial market but could also have enormous value to the department.”<sup>3</sup>

DoD’s legislative recommendation is one POGO is pleased to support. The DoD cannot continue to classify items that are merely “of a type” and “offered for sale” as commercial—but not actually ever sold in commercial quantities—because the prices of items with little or no market availability are not set by the commercial market.

POGO has promoted such a change to the commercial definition since 1999, and now we have been joined by DoD, the Department of Defense Panel on Contracting Integrity,<sup>4</sup> and the Acquisition Advisory Panel.<sup>5</sup> 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].”<sup>6</sup>

The current proposed rule will amend the acquisition regulations to implement portions of section 831 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112–239, enacted January 2, 2013). Section 831 requires the issuance of guidance on the use of the authority to require the submission of other than cost or pricing data. Specifically, section 831 provides that the guidance:

1. include standards for determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price;
2. include standards for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price;

---

<sup>2</sup> Department of Defense, Under Secretary of Defense, “Implementation Directive for Better buying 3.0 – Achieving Dominant Capabilities through Technical Excellence and Innovation”, April 9, 2015, p. 22.  
<http://bbp.dau.mil/docs/BBP3.0ImplementationGuidanceMemorandumforRelease.pdf>

<sup>3</sup> Stan Soloway, *Washington Technology*, “Better buying power? Well, maybe,” April 14, 2015.  
<http://washingtontechnology.com/articles/2015/04/14/insights-soloway-better-buying-power.aspx>

<sup>4</sup> 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](http://www.acq.osd.mil/dpap/cpic/cp/docs/PCI_RTC_2010.pdf)

<sup>5</sup> 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.  
<http://babel.hathitrust.org/cgi/pt?id=pur1.32754075492383;view=1up;seq=1>

<sup>6</sup> United States Air Force, “AF announces C-130J contract conversion,” U.S. Air Force Website, October 25, 2006.  
<http://www.af.mil/News/ArticleDisplay/tabid/223/Article/129290/officials-announce-c-130j-contract-conversion.aspx>

3. ensure that in cases in which such uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations; and
4. provide that no additional cost information may be required by the Department of Defense in any case in which there are sufficient nongovernment sales to establish reasonableness of price.

According to the DoD, the “proposed rule does not add to or remove any of the existing requirements” and was created to provide guidance to contracting officers to better understand rules governing the “submission of other than cost or pricing data.”

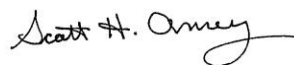
Specially, POGO supports the inclusion of the term “market-based pricing” and requiring that contracting officers “obtain adequate commercial marketplace sales data.” By defining a commercial market as one in which 50 percent or more of the sales by volume are nongovernmental, DoD will avoid buying items that are designated as commercial, for which there are no genuine commercial market prices, or even worse, items only offered for sale and thereby no commercial market exists.

Added contract provisions that define what sales data is relevant and sufficient also will have a pro-taxpayer impact and result in better buying.

POGO is very pleased to see that DoD strengthened language to require that contracting officers request uncertified cost data. Previous clauses merely stated that contracting officers “may” request cost or pricing data, or that such information was not prohibited. Those provisions caused confusion, especially when contractors refused to turn over cost data to DoD.<sup>7</sup> 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.

DoD’s proposed rule will ensure that it pays fair and reasonable prices for goods and services. If you have any questions, I can be reached at [scott@pogo.org](mailto:scott@pogo.org) or (202) 347-1122.

Sincerely,



Scott Amey  
General Counsel

---

<sup>7</sup> 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>