



March 13, 2018

Acting Commissioner Kevin McAleenan
U.S. Customs and Border Protection
1300 Pennsylvania Ave NW
Washington, DC 20229

Acting Director Thomas Homan
U.S. Immigration and Customs Enforcement
500 12th St SW
Washington, DC 20536

Dear Acting Commissioner McAleenan and Acting Director Homan:

The Project On Government Oversight (POGO) is a nonpartisan independent watchdog that champions good government reforms in order to achieve a more effective, accountable, open, and ethical federal government. We are writing to highlight the potential negative impacts of the recent Customs and Border Protection (CBP) award for contractor support to hire thousands of new CBP employees¹ and the recent Immigration and Customs Enforcement (ICE) solicitation for contractor support to hire thousands of new ICE employees.²

We have two concerns about the CBP contract and the potential ICE contract. First, we are concerned that they may violate the Federal Acquisition Regulation restriction on outsourcing inherently governmental functions. Second, we believe the scope of work incentivizes contractors to prioritize the quantity rather than the quality of new employees the agencies ultimately hire.

Inherently Governmental Functions

According to subpart 7.503(c)(9) of the Federal Acquisition Regulation (FAR), “The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment” is an inherently governmental function.³ According to subpart 2.101 of the FAR, such functions are “so intimately related to the public interest as to mandate performance by Government employees,” not contractors.⁴

¹ Customs and Border Protection, Contract ID: 70B06C18D00000001, November 17, 2017.

www.pogoarchives.org/m/co/CBP-contract-with-Accenture-Federal-Services-November-17-2017_20180307.pdf (Hereinafter CBP Contract)

² Immigration and Customs Enforcement, *Draft Statement of Objectives: Office of Human Capital Comprehensive Hiring and Recruitment Services*, February 14, 2018.

www.fbo.gov/utills/view?id=51f4ff270aba0673d4a545b8a3f6e99a (Downloaded March 7, 2018) (Hereinafter ICE *Draft Statement of Objectives*)

³ Federal Acquisition Regulation Subpart 7.503(c)(9). www.acquisition.gov/far/html/Subpart%207_5.html (Downloaded March 7, 2018)

⁴ Federal Acquisition Regulation Subpart 2.101. www.acquisition.gov/far/html/Subpart%202_1.html (Downloaded March 7, 2018)

The \$297 million CBP award to Accenture Federal Service notes that the contract is “closely associated” with “inherently governmental functions.”⁵ The ICE contract solicitation states, “While the Contractor shall provide coordination and support for [inherently governmental] functions, the functions must ultimately be performed by authorized Government employees.”⁶

This language does little to allay our concern that contractors will, in fact, play a pivotal role in determining who CBP and ICE hire and do not hire. There are multiple examples of federal agencies, including CBP itself, violating the FAR’s restriction on contracting out inherently governmental functions.

For example, in 2009, the Department of Defense Office of Inspector General found that an Air Force contractor essentially performed inherently governmental functions while government employees played only a “perfunctory” role in approving the contractor’s work.⁷ In 2014, the Department of Veterans Affairs Office of Inspector General found that a “lack of oversight allowed” a contractor to perform inherently governmental tasks.⁸ And in 2009, the Department of Homeland Security Office of Inspector General found that “CBP did not clearly distinguish between roles and responsibilities that were appropriate for contractors and those that must be performed by government workers because of the rush to fill program management positions.”⁹

Given this history, we are unconvinced that merely acknowledging the existence of inherently governmental functions is sufficient to ensure that contractors do not meaningfully engage in these functions. The aforementioned agencies would have been aware of the FAR regulations but apparently chose to ignore them.

Dangerous Incentives for Contractors

Both the CBP and ICE solicitations state that the emphasis of the contractor’s work will be on “delivering results,” and that the contractor will be paid for the numbers of hires the agencies make.¹⁰

We believe this is a dangerous incentive that prioritizes the quantity of the candidates the contractor helps to hire and the speed at which they do so over the quality of the candidates. This

⁵ CBP Contract

⁶ ICE *Draft Statement of Objectives*

⁷ Department of Defense, Office of Inspector General, *Acquisition of the Air Force Second Generation Wireless Local Area Network*, Report No. D-2009-036, January 16, 2009. media.defense.gov/2009/Jan/16/2001712130/-1/-1/1/09-036.pdf (Downloaded March 7, 2018)

⁸ Department of Veterans Affairs, Office of Inspector General, *Review of Alleged Mismanagement of the Office of Public and Intergovernmental Affairs Outreach Contracts*, Report No. 13-01545-11, November 20, 2014. www.va.gov/oig/pubs/VAOIG-13-01545-11.pdf (Downloaded March 7, 2018)

⁹ Department of Homeland Security, Office of Inspector General, *Better Oversight Needed of Support Services Contractors in Secure Border Initiative Programs*, Report No. OIG-09-80, June 17, 2009. www.oig.dhs.gov/assets/Mgmt/OIG_09-80_Jun09.pdf (Downloaded March 7, 2018)

¹⁰ Customs and Border Protection, *Statement of Objectives for Office of Human Resources Management Frontline Recruitment and Hiring Services*, Contract Solicitation No. HSBP1017R0029, July 7, 2017. www.fbo.gov/utills/view?id=d5b4c20be32961ce8552b8c28dc562db (Downloaded March 7, 2018)

is particularly concerning given the national security and law enforcement functions that many ICE and CBP employees perform.

CBP's own past presents a cautionary tale.

In 2008, James Tomscheck, the head of CBP Internal Affairs at the time, wrote an internal agency memo titled, "'The Perfect Storm' for CBP Integrity," in which he outlined concerns about CBP's reliance on contractors to vet potential new hires. He wrote of the contractors:

...there are strong indications that these companies have hired inexperienced and unqualified persons to schedule, scope, and do BI [background investigation] cases; people that would not previously have been considered for employment. There is also confirmation that these contractors have mandated efficiencies to protect their financial bottom line. This has resulted in decreased accuracy and overall quality of the BI. This scenario has been confirmed by BI investigators who were previously employed by these contractors.¹¹

The numbers of CBP employees with criminal backgrounds and employees who abused their power as border agents to commit criminal acts increased substantially during this time. The Associated Press reported in 2017 that the number of CBP employees charged with misconduct "grew each year between 2007 and 2012, reaching 336, a 44 percent increase."¹²

Similarly, dozens of ICE employees have been charged with criminal acts over the past ten years, which raises questions about the agency's existing vetting standards.¹³

Incentivizing contractors who support hiring to prioritize quantity and speed over quality can have deadly consequences. In 2013, a military contractor who passed a background check by contractor U.S. Investigations Services (USIS) shot and killed 12 people at the Washington Navy Yard. USIS had been aware of the military contractor's criminal background prior to the mass shooting, but the company never reported it to the government.¹⁴ The Department of Justice later alleged that, for at least four years, "USIS deliberately circumvented contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits."¹⁵

¹¹ Email from James F. Tomscheck, Customs and Border Protection Chief of Internal Affairs, to CBP Commissioner W. Ralph Basham and CBP Deputy Commissioner Jayson P. Ahern re: "BPA Hiring and Integrity Issues," April 16, 2008. static.texastribune.org/media/documents/CBP_Perfect_Storm_email.pdf (Downloaded March 7, 2018)

¹² Elliot Spagat, "Corruption at US border agency led to lie detectors," Associated Press, January 13, 2017. apnews.com/a4d203586a2e4cbdb12db43345423d9c (Downloaded March 7, 2018)

¹³ Ron Nixon, "Is ICE's Help-Wanted Sign a Welcome Mat for Rogue Applicants, Too?" *The New York Times*, March 12, 2017. www.nytimes.com/2017/03/12/us/politics/trump-ice-agents-deportations-immigrants.html (Downloaded March 7, 2018)

¹⁴ Matt Apuzzo, "Security Check Firm Said to Have Defrauded U.S.," *The New York Times*, January 23, 2014. www.nytimes.com/2014/01/23/us/security-check-firm-said-to-have-defrauded-us.html (Downloaded March 7, 2018)

¹⁵ Department of Justice, "U.S. Investigations Services Agrees to Forego at Least \$30 Million to Settle False Claims Act Allegations," August 19, 2015. www.justice.gov/opa/pr/us-investigations-services-agrees-forego-least-30-million-settle-false-claims-act-allegations (Downloaded March 7, 2018)

Recommendation

Given the power an individual CBP or ICE agent is entrusted with, we urge you to take action to ensure the agencies themselves fully vet and train any new hires. The hiring process, even interviewing candidates for employment, must be performed by government employees. We recommend that DHS reconsider the use of contractors to perform any hiring related functions that involve direct contact with potential candidates. CBP and ICE may need to evaluate whether they should hire more human resources professionals on a permanent or temporary basis in order to meet this need.

The government is ultimately responsible for ensuring that its employees are well vetted. Government employees who abuse their power or engage in misconduct can negatively impact the agencies' missions and reputations, and can erode public trust. There have been numerous cases of abuse of power and misconduct involving CBP and ICE employees in the recent past—this problem will rear its head again if steps are not taken to address the problems we have raised.

Sincerely,



Danielle Brian
Executive Director

cc: John Kelly, Acting Inspector General
Office of Inspector General, Department of Homeland Security

The Honorable Ron Johnson, Chairman
Senate Committee on Homeland Security & Governmental Affairs

The Honorable Claire McCaskill, Ranking Member
Senate Committee on Homeland Security & Governmental Affairs

The Honorable Michael McCaul, Chairman
House Committee on Homeland Security

The Honorable Bennie Thompson, Ranking Member
House Committee on Homeland Security