

Exposing Corruption Exploring Solutions
Project On Government Oversight

Testimony of
Scott Amey, General Counsel
Project On Government Oversight (POGO)
before the
House Committee on Oversight and Government Reform
Subcommittee on Management, Organization, and Procurement
on
“The State of Federal Contracting Opportunities and Challenges for Strengthening
Government Procurement and Acquisition Policies”

June 16, 2009

Thank you for inviting me to testify today. I am the General Counsel of the Project On Government Oversight, also known as POGO.¹ POGO was founded in 1981 by Pentagon whistleblowers who were concerned about wasteful spending and weapons that did not work. Throughout its twenty-eight-year history, POGO has worked to remedy waste, fraud, and abuse in government spending in order to achieve a more effective, accountable, open, and ethical federal government. POGO has a keen interest in government contracting matters, and I am pleased to share POGO’s thoughts with the Subcommittee today.

Many events over the past fifteen years have called into question the effectiveness of the federal contracting system and highlighted how drastically the contracting landscape has changed. Contract spending has grown tremendously, exceeding \$530 billion in fiscal year 2008;² oversight has decreased; the acquisition workforce has been stretched thin and been supplemented by contractors; and spending on services now outpaces spending on goods. This new emphasis on services has also increased the risk of waste, fraud, and abuse in contracts, as it is more difficult to assess value on services than returns on goods. Some acquisition reforms created have significantly reduced contract oversight and made it difficult for government investigators and auditors to identify and recover wasteful or fraudulent spending. These reforms have also created contracting vehicles that often place public funds at risk.³ In short, poor contracting decisions are placing taxpayer dollars – and sometimes lives – at risk.

¹ For additional information about POGO, please visit www.pogo.org.

² http://www.fpdnsng.com/downloads/agency_data_submit_list.htm.

³ The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition Reform Act of 1996 (FARA) (Public Law 104-106), and the Services Acquisition Reform Act of 2003 (SARA) (Public Law 108-136) have removed taxpayer protections.

On a positive note, interest in improving the federal contracting system has grown significantly in recent years. Congress created the Commission on Wartime Contracting in Iraq and Afghanistan,⁴ which recently released an interim report that was critical of many government and contractor contracting processes. Additionally, the Senate and House have created committees to dig deep into the contracting weeds.⁵ These moves follow efforts in the two most recent National Defense Authorization Acts to improve federal contracting.⁶

The contract oversight bug has also hit President Obama's administration. Within his first 100 days in office, President Obama issued a contracting memorandum outlining the government's obligation to contract wisely by increasing competition and eliminating wasteful spending.⁷ The President's budget also mentions concerns with risky contract types, wasteful spending, and contracts awarded without full and open competition.⁸

So far, Congress and the President seem to be well on their way to implementing contracting improvements. On May 22, the President signed the "Weapons Systems Acquisition Reform Act" which he described as "a bill that will eliminate some of the waste and inefficiency in our defense projects -- reforms that will better protect our nation, better protect our troops, and may save taxpayers tens of billions of dollars."⁹ Additional legislation is moving through the Senate and the House.

At the same time, numerous Government Accountability Office (GAO) and Inspector General (IG) reports are surfacing that highlight contracting deficiencies and recommend ways to correct them.¹⁰ One useful report is the DoD IG report "Summary of DoD Office

⁴ According to the Commission on Wartime Contracting in Iraq and Afghanistan, approximately \$830 billion dollars has been spent since 2001 to fund U.S. operations in Iraq and Afghanistan.

⁵ Commission on Wartime Contracting in Iraq and Afghanistan, "At What Cost? Contingency Contracting In Iraq and Afghanistan," p. 1, June 2009.

http://www.wartimecontracting.gov/download/documents/reports/CWC_Interim_Report_At_What_Cost_06-10-09.pdf.

⁶ The 2008 and 2009 National Defense Authorization acts have including many contract-related provisions. See Pub. Laws 110-181 (January 28, 2008) and 110-417 (October 14, 2008).

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf and

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

⁷ Memorandum for the Heads of Executive Departments and Agencies, Subject: Government Contracting, March 4, 2009. http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/. See

http://www.whitehouse.gov/blog/09/03/04/priorities_not-lining-the-Pockets-of-Contractors/.

⁸ Office of Management and Budget, *A New Era of Responsibility: Renewing America's Promise*, pps. 15, 35, 38-39, 2009.

http://www.whitehouse.gov/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf.

⁹ The White House, Office of the Press Secretary, Remarks by the President at Signing of the Weapons Systems Acquisition Reform Act, May 22, 2009. http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-signing-of-the-Weapons-Systems-Acquisition-Reform-Act/.

¹⁰ GAO, *Defense Acquisitions: Actions Needed to Ensure Value for Service Contracts*, GAO-09-643T, April 23, 2009. <http://www.gao.gov/new.items/d09643t.pdf>. Treasury IG for Tax Administration, *Current Practices Might Be Preventing Use of the Most Advantageous Contractual Methods to Acquire Goods and Services*, 2009-10-037, February 10, 2009.

of Inspector General Audits of Acquisition and Contract Administration,” dated April 22, 2009.¹¹ This report reviewed 142 previous DoD IG reports and grouped contracting deficiencies into 12 issue areas, some of which are reasons why management of federal contracts at several agencies remains on GAO’s “high risk” list.¹²

Federal contracting has also been the subject of industry reports criticizing the current system. The Grant Thornton consulting firm’s *14th Annual Government Contractor Survey*, released in January 2009,¹³ showed that cost reimbursable contracts are used more frequently than fixed price contracts. Cost-reimbursable contracts have been a subject of concern for both the White House and Members of Congress, and the survey stated that it “is difficult to equate the high use of cost reimbursable contracts with the notion that the government is attempting to use more commercial processes to streamline federal procurement.”¹⁴

Many contracting experts and government officials blame the inadequate size and training of the acquisition workforce for the problems in today’s contracting system. POGO agrees that workforce reductions are a major problem, but we believe additional problems deserve equal attention. These problems are:

1. Inadequate Competition
2. Deficient Accountability
3. Lack of Transparency
4. Risky Contracting Vehicles

I will discuss all of these issues in detail and provide realistic recommendations that will improve the way federal contracts are awarded, monitored, and reviewed.

Inadequate Competition

To better evaluate goods and services and get the best value for taxpayers, the government must encourage genuine competition. At first glance, it may seem that federal agencies frequently award contracts competitively. For example, the Department of Defense (DoD) claims that 64 percent of its contract obligations were competitive in 2008,¹⁵ and federal contracting data shows that the Department of Homeland Security

<http://www.treas.gov/tigta/auditreports/2009reports/200910037fr.html>.

¹¹ <http://www.dodig.mil/audit/reports/fy09/09-071.pdf>.

¹² GAO, *High-Risk Series*, GAO-09-271, pps. 77-84, January 2009.

<http://www.gao.gov/new.items/d09271.pdf>.

¹³ Grant Thornton, *14th Annual Government Contractor Industry Highlights Book -- Industry survey highlights 2008*, January 26, 2009.

http://www.grantthornton.com/staticfiles//GTCom/files/Industries/Government%20contractor/14th_Gov_Con_Highlights_011409small.pdf. Grant Thornton is an international consulting company that provides services to public and private clients.

¹⁴ *Id.*, at p. 8.

¹⁵ <http://www.acq.osd.mil/dpap/cpic/cp/docs/dodfy2008competitionreport.pdf> and USAspending.gov http://www.usaspending.gov/fpds/fpds.php?sortby=u&maj_agency_cat=97&reptype=r&database=fpds&fiscal_year=2008&detail=-1&datatype=T&submit=GO.

competes approximately 70 percent of its contracts.¹⁶ These numbers, however, do not tell the entire story. The “competitive” label includes contracts awarded through less than full and open competition, including competitions within a selected pool of contractors, and offers on which only a single-bid was received.

The 110th Congress limited the length of certain noncompetitive contracts and mandated competitive procedures at the task and delivery level,¹⁷ but the government must do more to ensure that full and open competition involving multiple bidders is the rule, not the exception. Consequently, the definition of “competitive bidding” should be revised to apply only to contracts on which more than one bid was received.

In addition to redefining competition, federal agencies must:

1. Reverse the philosophy of quantity over quality. Acquisition is now about speed, and competition is considered a burden, which is a recipe for waste, fraud and abuse.
2. Debundle contract requirements to invite more contractors to the table. Contracts that lump together multiple goods and services exclude smaller businesses that could successfully provide one good or service, but are incapable of managing massive multi-part contracts. Breaking apart multi-supply or service contracts would also assist the government in reducing the multiple layers of subcontracting now prevalent in federal contracting that can drive up costs while adding little value.¹⁸
3. Update USAspending.gov to include a searchable, sortable, and user-friendly centralized database of all contracts and delivery/task orders awarded without full and open competition, including all sole source awards. The database would enhance the requirement created by the National Defense Authorization Act of 2008 to disclose justification and approval documents for noncompetitive contracts.¹⁹

¹⁶ USAspending.gov reports 70.4 percent of DHS contract were subject to competition in 2008 http://www.usaspending.gov/fpds/fpds.php?sortby=u&maj_agency_cat=70&reptype=r&database=fpds&fiscal_year=2008&detail=-1&datatype=T&submit=GO.

¹⁷ Pub. Law 110-181, Sec. 843, January 28, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf. Pub. Law 110-417, Sec. 862, October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

¹⁸ The 2009 Defense Authorization bill directed DoD to minimize the excessive use of multiple layers of subcontractors that add no or negligible value to a contract. Pub. Law 110-417, Sec. 866, October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

¹⁹ Pub. Law 110-181, Sec. 844, January 28, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf. On January 15, 2009, a Federal Register notice was issued creating an interim rule and requesting public comment on the proposed public database of justification and approval documents for noncompetitive contracts. 74 Fed. Reg. 2731. <http://edocket.access.gpo.gov/2009/pdf/E9-555.pdf>.

4. Ensure that waivers of competition requirements for task and delivery orders issued under multiple-award contracts or the federal supply schedule program are granted infrequently.²⁰
5. Make the revolving door database of senior level DoD acquisition officials publicly available.²¹ The revolving door increases the likelihood of unfair bias and conflicts of interest in contract awards decisions.
6. Increase emphasis on sealed bidding to receive the lowest prices.²²
7. Use reverse auctions more frequently. In a Department of Energy reverse auction for pagers, two companies submitted initial bids for \$43 and \$51 per pager. At the close of bidding, the government awarded the contract at the low price of \$38 per pager.²³

Why is competition in contracting important? In a nutshell, genuine competition between contractors means the government gets the best quality goods and services at the best price. Competition also prevents waste, fraud, and abuse because contractors know they must perform at a high level or else be replaced.

Deficient Accountability

Through the years, the government has placed a premium on speeding up the contracting process and cutting red tape. Those policies led to the downsizing of the acquisition workforce and the gutting of the oversight community. When considering the large-scale increase in procurement spending during this past decade, the contracting and oversight communities lack sufficient resources to watch the money as it goes out the door.

Many acquisition reforms also eliminated essential taxpayer protections. For example, under certain types of contracts, one “reform” made it so federal contracting officials now lack the cost or pricing data necessary to ensure that the government is getting the best value. Commercial item contracts, which prevent government negotiators and auditors from examining a contractor’s cost or pricing data, might make sense when buying computers, office supplies, or landscaping services. However, this contracting vehicle has been exploited in some cases, for example the C-130J cargo planes procured by the Air Force. It would have been helpful if auditors had been allowed to review Lockheed Martin’s cost and pricing data, but, because the C-130J was determined to be a

²⁰ See GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874, July 30, 2004. <http://www.gao.gov/new.items/d04874.pdf>.

²¹ Pub. Law 110-181, Sec. 847, January 28, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ181.110.pdf. On January 15, 2009, DoD issued an interim rule implementing the federal statute and requesting comments on it. 74 Fed. Reg. 2408. <http://edocket.access.gpo.gov/2009/pdf/E9-679.pdf>.

²² Sealed bidding is a method of contracting that employs competitive bids and the contract is then awarded by the agency to the low bidder who is determined to be responsive to the government’s requirements. FAR Subpart 6.4 and Part 14.

²³ http://www.lanl.gov/news/index.php/fuseaction/nb.story/story_id/9654.

commercial item, government auditors were literally not allowed to have access to that information. After Senator McCain forced the Air Force to convert the contract back to a traditional contracting vehicle, the taxpayers saved \$168 million.²⁴

POGO believes that Congress should:

1. Appropriate money to GSA to end its reliance on the fees collected from vendors on Schedule and Governmentwide Acquisition Contracts (GWACs) sales. GSA charges a .75 percent Industrial Funding Fee for all schedule orders. This system creates an apparent conflict and perverse incentive to keep costs or prices high. Stated differently, GSA might not be receiving the best prices because the Schedule program revenue will be lost.²⁵
2. Require contractors to provide cost or pricing data to the government for all contracts, except those where the actual goods or services being provided are sold in substantial quantities in the commercial marketplace.
3. Provide enforcement tools needed to prevent, detect, and remedy waste, fraud, and abuse in federal spending, including more frequent pre-award and post-award audits to prevent defective pricing.²⁶ Specifically, the General Services Administration (GSA) Inspector General should have post-award authority to audit cost or pricing information submitted to GSA for the award of Multiple Award Schedule (MAS) contracts.²⁷
4. Eliminate the Right to Financial Privacy Act requirement requiring IGs to notify contractors prior to obtaining the companies financial records. This requirement “tips off” contractors and can harm the government’s ability to investigate federal contracts.²⁸
5. Realize that audits are worth the investment. On average, all IGs appointed by the President return \$9.49 for each dollar appropriated to their budgets.²⁹
6. Enhance the acquisition workforce through improvements in hiring, pay, training, and retention.³⁰

²⁴ Secretary of the Air Force, Office of Public Affairs, Press Release (051006), *AF announces C-130J contract conversion*, October 25, 2006. <http://www.af.mil/information/transcripts/story.asp?id=123029927>.

²⁵ In 2004, the Industrial Funding Fee was reduced from 1 percent to .75 percent to fall in line with the actual costs of running the program.

²⁶ National Procurement Fraud Task Force, Legislation Committee, *Procurement Fraud: Legislative and Regulatory Reform Proposals*, June 9, 2008. <http://pogoarchives.org/m/co/nptflc-white-paper-20080609.pdf>.

²⁷ Statement of Brian Miller, Inspector General, GSA, before the Senate Ad Hoc Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, pps. 6-7, April 21, 2009. http://hsgac.senate.gov/public/_files/MillerTestimony.pdf.

²⁸ *Id.*, at pps. 4-5.

²⁹ GAO, *Inspector General: Actions Needed to Improve Audit Coverage of NASA*, GAO-09-88, p. 5, December 2008. <http://www.gao.gov/new.items/d0988.pdf>.

³⁰ Expedited hiring authority was granted for the defense acquisition workforce last year (Pub. Law 110-

7. Require comprehensive agency reviews of outsourcing practices, especially for contract-related management and consulting services contracts.³¹
8. Pass the Contracting and Tax Accountability Act of 2009 (H.R. 572) prohibiting federal contracts from being awarded to contractors that have an outstanding tax liability.³²
9. Hold agencies accountable when they divert small business contracts to large corporations and thereby skew small business procurement numbers.³³

Through the years, measure to ensure government and contractor accountability have been viewed burdensome and unnecessary measures. This attitude needs to be replaced with one recognizing that accountability measures are essential to protecting taxpayers and should be seen as a normal cost of doing business with the federal government.

Lack of Transparency

To regain public faith in the contracting system, the government must provide open public access to information on the contracting process, including contractor data and contracting officers' decisions and justifications.

The following actions should be taken to provide the public with contracting information:

1. USAspending.gov should become the one-stop shop for government officials and the public for all spending information, including actual copies of each contract, delivery or task order, modification, amendment, other transaction agreement, grant, and lease. Additionally, proposals, solicitations, award decisions and justifications (including all documents related to contracts awarded with less than full and open competition and single bid contract awards), audits, performance and responsibility data, and other related government reports should be incorporated in USAspending.gov.
2. To better track the blended federal government workforce, Congress should require the government to account for the number of contractor employees working for the government using a process similar to FAIR Act inventories of government employees filed by federal agencies.

417, sec. 833), and therefore the civilian agencies should be granted the same authority.

³¹ Alice Lipowicz, Federal Computer Week, *DHS draws flak for review of services contracts*, June 5, 2009. <http://fcw.com/articles/2009/06/08/news-dhs-contracts.aspx>.

³² http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h572ih.txt.pdf.

³³ Department of the Interior, Office of the Inspector General, *Interior Misstated Achievement of Small Business Goals by including Fortune 500 Companies*, W-EV-MOI-003-2008, July 2008. Carol D. Leonnig, Washington Post, *Agencies Counted Big Firms As Small SBA Says It Will Correct Data on Federal Contracts*, A1, October 22, 2008. http://www.washingtonpost.com/wp-dyn/content/article/2008/10/21/AR2008102102989_pf.html.

Risky Contracting Vehicles

As previously mentioned in my testimony, POGO is concerned with the government's acceptance of limited competition in contracting as well as its over-reliance on cost-reimbursement and commercial item contracts. POGO realizes that there are benefits to these vehicles in certain circumstances, but we are not alone in voicing concerns about how these contract vehicles are used in practice.

A March 18, 2009 letter from Peter Orzag, the Director of the Office of Management and Budget, to Senator Lieberman stated that "cost-reimbursement contracts place substantial risk on the government."³⁴ The letter further stated that the use of "cost-reimbursement contracts calls into question whether these vehicles are being used excessively or without adequate justification, and whether agencies have the necessary skills and capacity – within both acquisition and program offices – to successfully administer these contracts."³⁵

The Treasury IG for Tax Administration also recently reported that the "IRS' predisposition to use cost-reimbursement contracts could result in inefficient use or misuse of taxpayer funds."³⁶

POGO has additional concerns with the government placing taxpayer dollars at risk by over-designating many items and services as commercial.³⁷ Designating an item or service as commercial when there is no actual commercial marketplace places the government at risk because the government doesn't have access to cost or pricing data that is essential for ensuring the contract is fair and reasonable. The changes to procurement law and regulation during the past fifteen years have been most stark in this area. Reduced to its essentials, the so-called "acquisition reform" movement has largely been about best practices when contractors buy from their vendors, and a different set of rules when those same contractors sell to the federal government. The government's failure or inability to obtain cost or pricing data has been nothing short of shocking, and has invited outright price gouging of the public fisc. It is in this area where POGO would expect contractors to most aggressively lobby. After all, who can blame them?

Likewise, time and material (T&M) contracts place agencies in a vulnerable position where they may not receive a benefit after a significant investment of taxpayer dollars.

³⁴ Executive Office of the President, Office of Management and Budget, Letter to the Honorable Joseph I. Lieberman, Chairman Committee on Homeland Security and Governmental Affairs, p. 1, March 18, 2008. http://www.whitehouse.gov/omb/assets/procurement/cost_contracting_report_031809.pdf.

³⁵ *Id.*, at p. 2.

³⁶ Treasury IG for Tax Administration, *Current Practices Might Be Preventing Use of the Most Advantageous Contractual Methods to Acquire Goods and Services*, 2009-10-037, p. 1, February 10, 2009. <http://www.treas.gov/tigta/auditreports/2009reports/200910037fr.html>.

³⁷ POGO Letter to Congress urging it to review Hamilton Sundstrand's 9-year no-bid commercial item spare parts contract, November 27, 2006. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-cfc-20061127.html>. POGO has submitted public comments to proposed contracting regulations affecting time and material hour contracts. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-cas-20040127.html> and <http://www.pogo.org/pogo-files/letters/contract-oversight/co-cas-20060306.html>.

Even the Federal Acquisition Regulation specifies that T&M contracts are to be used on a very limited basis because they provide “no positive profit incentive to the contractor for cost control or labor efficiency.”³⁸ Worse, the Services Acquisition Reform Act (SARA) of 2003 actually expanded cost or pricing data exemptions for T&M contracts so that once a service is “deemed” to be commercial, contractors no longer have to supply the underlying basis for the proposed labor rate. As might be expected, contractors have flocked to T&M contracts because it is another way to reap enormous profits at taxpayer expense.

POGO believes that risky contracts can work in practice, but only if additional oversight protections are added, including:

1. For commercial item contracts, goods or services should be considered to be “commercial” only if there are substantial sales of the actual goods or services (not some sort of close “analog”) to the general public. Otherwise, the goods or services should not be eligible for this favored contracting treatment.
2. The Truth in Negotiations Act (TINA) should be substantially revised to restore it to the common sense requirements that were in place prior to the “acquisition reform” era. Specifically, all contract awards over \$500,000, except those where the goods or services are sold in substantial quantities to the general public in the commercial marketplace, should be subject to TINA. This small step would result in enormous improvements in contract pricing, negotiation and accountability, and save taxpayers billions of dollars per year.
3. All contracting opportunities in excess of \$100,000 – including task or delivery orders, and regardless of whether the action is subject to full and open competition, award against a GSA Federal Supply Schedule or an agency Government Wide Acquisition Contract, or any other type of contracting vehicle -- should be required to be publicly announced for a reasonable period prior to award, unless public exigency or national security considerations dictate otherwise.
4. All contracting actions, including task and delivery orders, should be subject to the contract bid protest process at the Government Accountability Office (GAO). While POGO recognizes that many will decry this recommendation as adding “red tape” to the process, we believe it is the only meaningful way to ensure that contractors are treated on an even playing field, and that agency contract award decisions can be justified in a way that will instill public confidence.

Thank you for inviting me to testify today. I look forward to working with the Subcommittee to further explore how the government should improve the federal contracting system to better protect taxpayers.

³⁸ FAR Subparts 16.601(c).
http://www.acquisition.gov/FAR/current/html/Subpart%2016_6.html#wp1080953.