



June 22, 2017

Chairman Mac Thornberry  
Ranking Member Adam Smith  
House Armed Services Committee  
2120 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Thornberry and Ranking Member Smith:

Thank you for providing us the opportunity to express our concerns regarding the Defense Acquisition Streamlining and Transparency Act (H.R. 2511).<sup>1</sup> We appreciate the Committee's commitment and interest in reforming the defense acquisition process to better provide for our warfighters while also stewarding the taxpayers' funds. The Project On Government Oversight (POGO) has long been concerned about the Department of Defense's (DoD) procurement of ineffective and overpriced weapons. Throughout our history we have focused on how to make the procurement system more competitive, accountable, and transparent as well as less risky.

While there has been a constant push to tinker with federal procurement laws and regulations, we think that many failures are the result of poor requirement planning, an overworked acquisition workforce, and a lack of access to cost or pricing data that prohibits the government from properly overseeing its industry partners. Simply stated, improving the DoD procurement process doesn't necessarily require new rules, but better enforcement and use of the rules that exist.

Several provisions included in the Defense Acquisition Streamlining and Transparency Act (H.R. 2511), if implemented appropriately, could result in time efficiencies and savings for DoD and taxpayers. We are pleased to see that the Committee has also tackled the issue of service contracts, which totaled \$152 billion in fiscal year 2016.<sup>2</sup> Other proposals, however, such as altering DoD's contract auditing processes and increasing the threshold for contractors to supply cost or pricing data, are a recipe for waste, fraud, and abuse.

Below, for your consideration, is a section-by-section evaluation of provisions we support and oppose.

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<sup>1</sup> *Defense Acquisition Streamlining and Transparency Act*, May 18, 2017.  
<https://www.congress.gov/115/bills/hr2511/BILLS-115hr2511ih.pdf>

<sup>2</sup> Advanced data search on [usaspending.gov](http://usaspending.gov) on June 21, 2017.

## **Procurement Through Online Marketplaces Could Benefit Department and Taxpayers But Needs Oversight (Sec. 101)**

We support DoD's utilizing online marketplaces to fill the needs of the warfighter and to take advantage of genuine commercial vendors, competitive buying, and lower prices. We hope that such a system will allow the government to leverage its buying power, receive genuine commercial costs and prices, and avoid any purchases from vendors on the suspension and debarment list that legally cannot do new business with the federal government.

However, online marketplace buying does not address longstanding concerns about the general "commercial item" definition that deprives agencies of adequate cost or pricing data and often results in buying goods that are **not actually sold** to the general public.<sup>3</sup> Previous attempts to lock DoD into prior commercial item designations and previous prices paid are ill-advised and will result in wasteful spending.<sup>4</sup> We hope that the success of the online marketplace will lead to a realization that commercial items procured under Federal Acquisition Regulation (FAR) Part 12 should also be actually sold in the commercial marketplace, especially those purchased without full and open competition.

## **Outsourcing Audits, Increasing Materiality Thresholds, And Other Audit-Related Provisions Risk Taxpayer Dollars (Section 102)**

This section hands over incurred costs audits to "qualified private auditors." Incurred cost audits are those performed after the award of the contract to ensure that billed costs are allowable and reasonable. Another provision in this section increases the materiality threshold that auditors—whether at DCAA or in a private auditing firm—would use when auditing incurred costs. A third proposal in the legislation creates a one-year time limit for these audits to occur. Although the Defense Contract Audit Agency (DCAA) can be slow and has room for improvement, it questioned over \$4 billion through incurred cost audits alone last year.<sup>5</sup> Given that roughly a quarter of those questioned costs are typically sustained, these audits saved taxpayers approximately a billion dollars just last year. These legislative provisions would harm future oversight of contract spending and put taxpayers at risk. We oppose the use of private auditors for the following reasons:

1. *The use of private auditors will exacerbate DCAA's staff shortage.*

We believe the dramatic changes proposed by Section 102 would present large risks to oversee DoD contracts with little, if any, benefit. DCAA has repeatedly stated that its largest obstacle is staffing—not a lack of money to hire additional staff, but repeated hiring freezes which disrupt the complex training process. On its face, using private auditors seems like a feasible solution,

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<sup>3</sup> Project On Government Oversight Blog, *POGO Supports DoD Effort to Redefine Commercial Items*, May 15, 2012. <http://www.pogo.org/our-work/letters/2012/co-cas-20120515.html>

<sup>4</sup> Project On Government Oversight Blog, *Shay Assad is Maligned, His Pro-Taxpayer Initiatives Blocked*, May 13, 2016. <http://www.pogo.org/blog/2016/05/shay-assad-is-maligned-taxpayer-initiatives-blocked.html>

<sup>5</sup> FY 2016 data on questioned costs from incurred cost audits are taken from the DCAA's Management Information System, which was provided to POGO through the Freedom of Information Act. The average sustention rate for non-forward-pricing audits was 24 percent in FY 2016, as shown in Appendix F of the DoD OIG's semi-annual reports.

but due to the specialized nature of DoD contract auditing—a much different practice from financial statement auditing—many contract auditors, such as those that are currently performing these audits for civilian agencies, are poached from DCAA. This only serves to exacerbate the problem, not solve it. We are also concerned that private auditors will only increase costs to taxpayers without helping to recover more money, especially with the negative financial impact of the proposed materiality thresholds, which will result in the loss of tens of millions of dollars every year. The focus should be on providing DCAA with the staff and tools that it needs to audit defense contracts, not supplement its workforce and put contractors in charge of overseeing other contractors.

## *2. Materiality Standard Changes Weaken Government Defenses Against Overcharges*

Materiality standards should be determined on a case-by-case basis, which might include the amount of the contractor cost submission. As written, this provision appears to create a double-standard by designating questioned costs under \$4,000 worth pursuing on small contracts, but ignoring infractions in excess of \$500,000 on large contracts. This provision will keep auditors who have found unsupported or questioned costs from including those findings in their audit report, thereby making it impossible to recover the money.

Raising the materiality thresholds also undermines DCAA's effectiveness in one of its most important roles—deterring contractor abuses. Codifying these limits sends the message that some infractions do not matter—a message with potentially massive financial consequences for taxpayers. Rather than a congressionally mandated policy, materiality standards should be determined by the auditors, who have direct knowledge of the known and expected risks, as well as each contractor's audit history.

## *3. Weakening Oversight of the Majority of Questioned Costs*

The proposed bill removes DCAA's authority to conduct an audit or review of an incurred cost audit performed by a private auditor. Placing that kind of trust in private auditors is a recipe for defective audits. The potential for interference and collusion between contractors and auditors creates the risk of audits that fail to identify millions in questioned and unallowable costs. The result: DoD and taxpayers will pay contractors millions of undeserved dollars.

In addition, requiring a minimum of 25 percent of incurred costs audits to be performed by private auditors by 2020 is bad policy. Such a policy is not based on data, but on the hope that private auditors will outperform DCAA. At most, the degree to which private auditors are brought in to supplement DCAA's work should be based on the success of the audits performed and the program as a whole, rather than an arbitrary quota.

POGO has found that service contractors often cost significantly more than federal employees.<sup>6</sup> Multiple failed efforts by the Internal Revenue Service to use private tax debt collectors, which

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<sup>6</sup> Project On Government Oversight, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, September 13, 2011. <http://www.pogo.org/our-work/reports/2011/co-gp-20110913.html>; Project On Government

resulted in program costs offsetting the amount of revenue collected, should make Congress wary of mandating the use of private auditors without first ensuring that they are the best workforce to protect taxpayers.

Included with this provision is the requirement that DCAA pass a commercial peer review audit in order to issue unqualified audit findings. This places a private company in the position of determining what a government agency can and cannot do. Although DCAA is likely to pass any peer review, the Government Accountability Office or an Inspector General would be a more appropriate entity to conduct such a review rather than a commercial entity.

#### *4. Dramatically shortening DCAA's audit deadlines will leave millions on the table*

By shortening the time in which incurred cost audits must be completed to one year after receipt of qualified cost submissions, this section significantly diminishes the ability of the government to ensure that it is paying fair prices. The provision further requires that the cost submission be “accepted in its entirety unless the Secretary of Defense can demonstrate that the contractor unreasonably withheld information necessary to perform the incurred cost audit.” While it is harder to conduct a thorough audit long after the fact, the passage of time does not somehow make paying for unsupported costs any less damaging to the taxpayer.

DCAA has shown significant progress in meeting their agreed-to dates over the past five years, rising steadily from 32 to 79 percent, and in increasing customer satisfaction in the area of timeliness.<sup>7</sup> We oppose this provision in the bill because it places speed above accuracy and completeness, as well as incentivizing contractors to reasonably withhold information and delay the process to have their costs accepted by default. This shortened deadline is a gift to contractors and will result in the loss of millions of taxpayer dollars, especially in wartime when profiteering is rife and audits might be delayed.

#### **Increasing Truth In Negotiations Act Thresholds Likely to Increase Overcharges (Sec. 103)**

We oppose the increases in the Truth in Negotiations Act (TINA) thresholds. Those thresholds establish the contract amount that require offerors, contractors, and subcontractors to make certified cost or pricing data available to federal agencies. In practice, those thresholds ensure that taxpayers are not being gouged.<sup>8</sup> Section 103 of the bill would increase the TINA threshold from \$750,000 to \$2.5 million. A 2015 study by the Under Secretary of Defense, Acquisition, Technology, and Logistics examined another proposal to increase TINA thresholds for prime contractors and found it was “unlikely to provide cost savings to DoD.”<sup>9</sup> Raising the threshold to submit certified cost and pricing data both sends a message that “minor” infractions do not

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Oversight, *IRS Gears Up for Third Try at Outsourced Tax Collection*, September 30, 2016.

<http://www.pogo.org/blog/2016/09/irs-gears-up-for-third-try-at-outsourced-tax-collection.html>

<sup>7</sup> Defense Contract Audit Agency, *Report to Congress on FY 2016 Activities Defense Contract Audit Agency*, March 31, 2017, p. 17. [http://www.dcaa.mil/DCAA\\_FY2016\\_Report\\_to\\_Congress.pdf](http://www.dcaa.mil/DCAA_FY2016_Report_to_Congress.pdf)

<sup>8</sup> 10 U.S.C. § 2306a and 41 U.S.C. § 3502.

<sup>9</sup> Office of the Under Secretary of Defense, Acquisition, Technology, and Logistics, *Eliminating Requirements Imposed on Industry Where Costs Exceed Benefits*, 2015, p. 96. <http://www.acq.osd.mil/fo/docs/Eliminating-Requirements-Imposed-on-Industry-Study-Report-2015.pdf>

matter and deprives the government of a valuable source of contracting data—data which can be used to improve other aspects of the acquisition process.

The Department of Defense executes numerous prime contract actions with an aggregate value in the billions on non-commercial, non-competitive requirements valued between \$750,000 and \$2,500,000. If the TINA threshold is increased in 2018 and contractors refuse to hand over any cost or pricing data, DoD will have to waste time and resources conducting market research, or else it will buy blind. There will be no assurances that contractors are selling goods and services at fair and reasonable prices. The potential increase to the TINA threshold will lead to wasteful defense spending.

### **Improvement of Planning for Acquisition of Services (Sec. 204)**

We support the Committee's effort to improve service contract planning and spending. For years, Congress and DoD have ignored the hundreds of billions of dollars spent on service contracts each year. As a result, we did not support the efforts to gut the inventory of contracted services in the Fiscal Year 2017 National Defense Authorization Act.<sup>10</sup> Those inventories provide a very limited, but essential look into the DoD's use of contractors to supplement the military and civilian workforces. That said, forcing the DoD to plan and analyze service contract spending in the past as well as in anticipation of future requirements should have a positive impact on human resources planning, budgeting, performance, and readiness. We anticipate that improved data collection and analysis will assist DoD in making informed decisions, but those decision must be tied to the implementation of the Enterprise-wide Contractor Manpower Reporting Application (ECMRA) and the staffing of the Total Force Management Support Office (TFMSO) in DoD's Personnel and Readiness office.

Specifically, POGO recommends:

- Section 204 should be amended so that 10 U.S.C. § 2329(a)(1) references that the data collected should be related to the level of effort and direct labor cost using the ECMRA, regardless of scope or value of the contract. This would ensure that existing systems are integrated with DoD's collection and analysis of service contract data.
- The language proposed in 2329(a)(2) should mention that service contracts, regardless of scope or value, should be evaluated consistent with 10 U.S.C. §§ 2461 and 2463.
- 2329(a)(3) should include references that decisions, regardless to scope or value, should be made pursuant to 10 U.S.C. §§ 129 and 129a.

The data analysis section found at 2329(c) should state that “The Secretary of Defense shall regularly analyze past spending patterns, *level of effort expressed as contracted full time equivalent based on contractor direct labor hours and costs*...” We also think that the analysis of past spending in 2329(c)(3) should:

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<sup>10</sup> Pub. Law 114-328, Sect. 812 (increasing the threshold for contractors to have to report service contracts and reducing the information in the inventories). <https://www.congress.gov/114/bills/s2943/BILLS-114s2943enr.pdf>

- be undertaken within the context of the overall military and civilian workforces for similar requirements and activities of each Defense Agency, Department of Defense Field Activity, command, or military installation;
- take into consideration Department of Defense total force management policies and procedures established in accordance with sections 129, 129a, 2461, 2463, 2464, 2465, 2466, 2469, and 2472 of this title; and
- ensure that work determined to be inherently governmental is not being contracted out, and, to the maximum extent practicable, work determined to be critical or closely associated with inherently governmental functions is not being contracted out so as to preclude an overreliance on contracted support for core Department of Defense missions.

By linking the bill's language to existing laws, the inventories of contracted services, and the ECMRA, DoD will be poised to save money and improve staffing and readiness. Right-sizing the DoD workforce and saving billions of dollars at the same is a win-win for DoD, taxpayers, and the men and women who have volunteered to risk their lives for our nation.

We appreciate your consideration and attention to reforming the Department of Defense's acquisition system and would welcome an opportunity to meet with you or your staff to discuss these issues. Please contact Scott Amey, POGO's General Counsel, at 202-347-1122 for more information.

Sincerely,



Danielle Brian  
Executive Director