October 4, 2022

The Honorable Gary Peters
Chairman
U.S. Senate Committee on Homeland
Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Rob Portman
Ranking Member
U.S. Senate Committee on Homeland
Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Peters, Ranking Member Portman, and Members of the Committee:

The Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

I write today to express concerns with several provisions of S. 4623, the AGILE Procurement Act of 2022.¹ The bill contains various provisions that have been championed by government contractors and their industry trade associations for years, and POGO opposes some of the bill’s provisions.

Specifically, Section 6 of the bill contains two provisions that POGO firmly opposes. Section 6(b) establishes a “barriers to entry working group” at the Office of Federal Procurement Policy, ostensibly to make recommendations for removing or changing procurement regulations that govern the contracting process. This working group appears to be another attempt to weaken important contracting policies that protect taxpayers. It follows on the heels of a similar industry-led effort to water down contracting policies, the Section 809 Panel, which recently examined Defense Department contracting policies.² These reform-seeking panels are nothing more than

¹ Advancing Government Innovation with Leading-Edge Procurement Act of 2022, S. 4623, 117th Cong., (2022), https://www.congress.gov/bill/117th-congress/senate-bill/4623/text?q=%7B%22search%22%3A%5B%22s%22%5D%2C%22s%22%3A%5B%224623%22%5D%2C%22s%22%3A%5B%225D%2C%22s%22%3A%5B%22D%7D%7D&r=2&s=5.
cover for companies and industry associations to influence so-called blue ribbon panels, pushing for less transparency and fewer, if any, taxpayer accountability protections in the spending of over $600 billion a year.³

The establishment and placement of the working group in the Office of Federal Procurement Policy is particularly troubling, as that office has a well-earned reputation for being in-house advocates for the contracting industry, often championing industry-proposed contracting “reforms” as ardently as industry itself.⁴ POGO has no confidence that an Office of Federal Procurement Policy-led effort will be anything more than a thinly veiled industry initiative to weaken, yet again, contracting policies designed to ensure competition, and in particular, fair and reasonable pricing of government contracts.

POGO also firmly opposes Section 6(c) of the bill, an unnecessary doubling of the threshold to trigger modified Cost Accounting Standards coverage, which applies to cost-based contract pricing arrangements, including cost-reimbursement contracts.⁵ Despite claims in the committee’s August 4, 2022, press release that there are “challenges” and “barriers” to win contracts for small businesses,⁶ this change will in fact have no impact whatsoever on small businesses, which are exempt from the Cost Accounting Standards.⁷ It will, however, serve as a basis for accounting gimmicks by large companies with cost-based contracts that are unwilling to comply with, or that are seeking to evade compliance with, basic provisions of modified Cost Accounting Standards coverage. That coverage is more than an audit issue. It is also a framework for requiring consistency in pricing and reimbursement of costs billed to the government when cost-based contracts and cost-based pricing arrangements are used by agencies and contractors.⁸ Raising the Cost Accounting Standards threshold is a win for companies seeking to evade accountability and a loss for protecting taxpayer dollars.

Lastly, POGO has concerns about Section 7 of the bill, the purpose of which is to enhance the use of employee stock ownership plans under government contracts. POGO supports such plans, but not the sole source follow-on provisions in the bill. Creating a sole source justification for companies that use those plans is fraught with danger. This was made evident nearly 10 years ago, when the government didn’t exercise options to continue its contracts with U.S.

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Investigations Services. In 1996, in a move to privatize government work, the employee-owned company was formed and handed a sole source contract to perform employee background checks for agencies. The employee-owners were eventually bought out for reportedly $500 million by a private equity firm in 2003, but the near monopoly over that work led to performance issues, the loss of the contracts, and the layoff of thousands of employees.

POGO is aware that the AGILE bill cross-references and extends to civilian agencies a similar provision that is in the fiscal year 2022 National Defense Authorization Act, but we suggest that the committee await word of success from the Defense Department’s pilot program before extending this concept to civilian procurement agencies. The Government Accountability Office is expected to report on the pilot program in 2024.

Pundits bragged about the success of the U.S. Investigations Services contact at one time, but as that history shows, employee-owners were enriched and the taxpayers were left with a company that cut corners and performed poorly.

Accordingly, we urge the committee to remove from the bill the referenced provisions in Section 6, and extensively revise or remove Section 7 to avoid creating de facto sole source contracting. If the committee is serious about improving the federal contracting process, it needs to guard against inclusion of provisions that will likely lead to price gouging or limitations on the use of competitive contracting processes.

Thank you for your time and consideration of this important matter. If you have any questions, or if you would like to update me about the bill, please contact me at scott.amey@pogo.org.

Sincerely,

Scott H. Amey
General Counsel

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14 National Defense Authorization Act for Fiscal Year 2022, S. 1605, 117th Cong., § 874(f) [see note 13].