



In For a Transdigm, Out for Billions

By Mandy Smithberger and Scott Amey

A recent report by the Department of Defense Inspector General shows that contracting laws are insufficient to make sure the military pays fair prices for the goods and services it purchases. The inspector general conducted the investigation after being asked by Members of Congress, who had become concerned that the TransDigm Group, having purchased numerous U.S. and European aircraft part manufacturers, might be using its position as a sole-source supplier for a number of military contracts to act as a “hidden monopolist” and charge excessive prices.¹ The Project On Government Oversight has repeatedly documented that excessive overcharges are the sign of a widespread problem in the acquisition process that hamstring the ability of the government to negotiate fair and reasonable prices.² Examples of overcharges by other companies include the Army being forced to pay Anham LLC \$71 for a pin that should have cost less than a nickel, and \$80 for a drain pipe segment that should have cost \$1.41.³ In another case Boeing overcharged the government \$13 million for 18 parts.⁴

While the inspector general report focuses on excessive overcharges by TransDigm, the company’s behavior demonstrates the many ways Congress’s recent changes to acquisition laws have legalized price gouging and increased the risks of waste and abuse. Pressure from

¹ Letter from Representative Ro Khanna (D-CA) to Acting Inspector General Glenn Fine requesting a review of TransDigm Group about potential waste, fraud, and abuse, March 20, 2017.

https://khanna.house.gov/sites/khanna.house.gov/files/032117_TransDigm_Letter.pdf; Letter from Senator Elizabeth Warren (D-MA) to Acting Inspector General Glenn Fine requesting a review of TransDigm Group avoiding providing cost information, May 19, 2017. <https://www.warren.senate.gov/imo/media/doc/2017-05-17%20Sen%20Warren%20letter%20to%20DODIG.pdf>

² Neil Gordon, “Congress Seeks Pentagon Watchdog Probe of Aircraft Parts Supplier,” Project On Government Oversight, March 23, 2017. <https://www.pogo.org/analysis/2017/03/congress-seeks-pentagon-watchdog-probe-of-aircraft-parts-supplier/>; Nick Schwellenbach, “Leaked Audit: Boeing Overcharged Army Up to 177,000 Percent on Helicopter Spare Parts,” Project On Government Oversight, June 28, 2011. <https://www.pogo.org/investigation/2011/06/leaked-audit-boeing-overcharged-army-up-to-177000-percent-on-helicopter-spare-parts/>; Mandy Smithberger, “The Unredacted Truth About Spare Parts Overcharges,” Project On Government Oversight, February 23, 2015. <https://www.pogo.org/analysis/2015/02/unredacted-truth-about-spare-parts-overcharges/>

³ Neil Gordon, “Spare Us Already: Investigators Find More Instances of Gross Overbilling on Defense Contracts,” Project On Government Oversight, August 1, 2011. <https://www.pogo.org/analysis/2011/08/spare-us-already-investigators-find-more-instances-of-gross-overbilling-on-defense-contracts/>

⁴ Department of Defense Inspector General, *Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract with Boeing to Support the Corpus Christi Army Depot*, May 3, 2011, p.78, i. <https://www.documentcloud.org/documents/204808-full-unredacted-dod-office-of-inspector-general>;

the defense industry, Congress, and some Pentagon insiders on the Defense Department to speed up acquisition through risky buying methods, including one known as Other Transaction Authority, makes excessive prices more likely.

The public may assume the prices contractors offer to the government are fair and reasonable. The Truthful Cost or Pricing Data statute (formerly known as the Truth in Negotiations Act) is meant to require contractors to submit certified current, accurate, and complete cost and pricing data to the government.⁵ Yet contractors only have to submit that data if the acquisition contract is above a certain price threshold. Congress continues to raise that threshold, reducing the number of goods and services for which the Defense Department and other agencies can obtain cost and pricing data.⁶ Congress has created additional “exceptions” as well,⁷ including one for a so-called “commercial item.”⁸ Items designated as commercial are exempt from certain taxpayer protection requirements because, at least in theory, the item is sold to the public, and market forces ensure fair and reasonable prices. That’s not always true in practice, however. The current definition of commercial items includes items that are “offered for sale, lease, or license” to the general public—even if a non-governmental customer has never actually purchased it—and items that are “of a type” that is commercially available.⁹ In many cases this definition has been allowed to apply to sole-source contracts, where there is no price competition.¹⁰ Contractors argue that a host of items are commercial in the hopes that the government will agree to buy those items without any information from the contractors about the real cost or prices of the goods or services.

In the most recent report, the inspector general estimated that TransDigm received \$16.1 million in excess profits for 46 parts sold to the Defense Logistics Agency and the Army from 2015 to 2017. The vast majority of the contracts they examined—45 of 47—were under statutory dollar thresholds, so they had “less restrictive requirements for determining price reasonableness.”¹¹ It should be noted that this estimate of excessive costs and prices was only possible because the inspector general had access to information that is not in the hands of the officials who negotiate contracts and agree to the final terms of the deal.

⁵ 10 U.S.C. § 2306a and 41 U.S.C. 3501 *et seq.*

⁶ Russell Rumbaugh, *Select Acquisition Reform Provisions in the House and Senate Versions of the FY2018 National Defense Authorization Act*, August 21, 2017, p. 4. <https://fas.org/sqp/crs/natsec/R44920.pdf>; Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. i. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

⁷ 10 U.S.C. § 2306a(a) and (b).

⁸ 10 U.S.C. § 2306a(b)(1)(B).

⁹ 41 U.S.C. § 103; Federal Acquisition Regulation, Subpart 2.101.

¹⁰ Department of Defense Inspector General, *The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts*, February 7, 2017, p. 4. <https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>; Department of Defense Inspector General, *U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price Was*, March 11, 2016, p. i. <https://media.defense.gov/2016/Mar/11/2001714219/-1/-1/1/DODIG-2016-059.pdf>

¹¹ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. i-iii. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

Specifically, the inspector general's report shows increased risks due to:

- A definition of commercial items that prevented contracting officers from questioning price reasonableness, even though the government was the only customer;
- Contracting officers having little recourse to challenge prices for items that had been designated as commercial when TransDigm Group companies refused to provide additional cost or pricing information;
- Congress increasing the thresholds for which transactions have to provide documentation demonstrating that prices are fair and reasonable;
- Forcing contracting officers to rely on old prices to determine price reasonableness;
- Forcing contracting officers to rely on previous determinations of whether an item is commercial.

The laws have contracting officers so hamstrung that it's too administratively burdensome to negotiate prices and ensure that the government—and therefore the American taxpayer—is getting a fair deal. Even asking to see a sticker price for accountability has become a tool of last resort.

Without a significant overhaul of buying laws, profiteering and waste will continue to unnecessarily increase costs for the military and syphon valuable resources from other Defense Department programs and from the warfighters. Such examples, including this latest example involving TransDigm, support then-Senator Harry Truman's observation about government contractors: "I have never yet found a contractor who, if not watched, would not leave the Government holding the bag."¹²

Some transactions for spare parts have avoided public scrutiny because the definition of "commercial items" doesn't actually require evidence that an item is sold in the marketplace. The current commercial item definition was developed by industry and enacted into law in the 1990s as part of so-called "acquisition reform."¹³ The definition prevents federal agencies from obtaining cost or pricing data even if there isn't adequate price competition—which would exist if there were a real commercial market for the service or item. As a result, the government has little to no information about the relative cost of a product or service it is purchasing, and has little ability to audit the numbers behind the price the government is paying.

The problems identified in the latest inspector general report reflect systemic and expensive problems for the Department and taxpayers. Previous inspectors general have found a litany of instances in which contractors overcharged the Department for spare parts.¹⁴ The

¹² Senator Harry S. Truman (D-MO), member of the Military Affairs Committee and the Military Subcommittee on Appropriations, 1941. https://www.senate.gov/artandhistory/history/common/generic/VP_Harry_Truman.htm

¹³ Project On Government Oversight, *Pick Pocketing the Taxpayer: The Insidious Effects of Acquisition Reform*, March 11, 2002. <https://www.pogo.org/report/2002/03/pick-pocketing-taxpayer-insidious-effects-of-acquisition-reform/>

¹⁴ See for example Department of Defense Inspector General, *Defense Logistics Agency Aviation Generally Purchased Sole-Source Spare Parts From the General Electric Company at Fair and Reasonable Prices, but*

inspector general's report identifies similar instances: TransDigm overcharged the Department by as much 4,451 percent for one part.¹⁵

Seeing the costs of these problems firsthand, the Department proposed that Congress redefine the definition of commercial items to only apply to goods and services actually sold to the general public in "like quantities."¹⁶ Instead, Congress expanded the definition of what could be considered commercial, making it easier for contractors to price gouge and more difficult for the government to prevent and recoup significant overcharging.¹⁷ This resulted in excessive costs that divert money from training, procurement, research and development, and other Department priorities.

An inspector general report on TransDigm in 2006 shows how contractors can claim an item is commercial even when the government is the only customer, and can abuse its market power for excessive profit. The IG's audit of the company found the Department paid \$5.3 million more than was fair and reasonable for 77 parts.¹⁸ These overcharges occurred, among other reasons, because contracting officers "wrongly considered prices to be reasonable based on competition between a sole-source manufacturer and dealers" who purchased the part from TransDigm.¹⁹ "A sole-source manufacturer and a dealer cannot compete independently when the dealer is reliant on the sole-source manufacturer to fill the Government requirement," the inspector general found.²⁰ TransDigm had essentially created a false market by selling the parts to other vendors. Contracting officers were further stymied because the company refused to provide information to support price increases.²¹ This report detailed just one of many instances in which the government bought commercial items without any actual or genuine competition. And such practices are likely to continue. Unless Congress institutes reforms to this definition and to the ability of contracting officers to have

Improvements Could Be Made, October 20, 2017. <https://media.defense.gov/2017/Nov/16/2001844769/-1/-1/1/DODIG-2018-004.PDF>; Department of Defense Inspector General, *The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts*, February 7, 2017.

<https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>; Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006. <https://media.defense.gov/2006/Sep/29/2001712572/-1/-1/1/06-122.pdf>

¹⁵ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. ii. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

¹⁶ Scott Amey, "Defense Department's New Definition of 'Commercial Item' Will Save Money," Project On Government Oversight, May 2, 2012. <https://www.pogo.org/analysis/2012/05/defense-departments-new-definition-of-commercial-item-will-save-money/>

¹⁷ Scott Amey, "Congress Locks Pentagon into Commercial Item Ripoffs," Project On Government Oversight, December 23, 2015. <https://www.pogo.org/analysis/2015/12/congress-locks-pentagon-into-commercial-item-ripoffs/>

¹⁸ Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, Executive Summary. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

¹⁹ Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. 11. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

²⁰ Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. 11. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

²¹ Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, pp. 3, 6. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

adequate access to cost and pricing data, contracting officers will continue to be, at best, blindfolded.²²

Jump ahead 11 years, and a Congressional investigation raised concerns that TransDigm acted as a “hidden monopolist,” acquiring small aerospace part manufacturers and increasing prices.²³ In 2017, Representative Ro Khanna (D-CA) pointed to examples of excessive price increases following acquisitions that included a cable assembly that went from \$1,737 to \$7,863, a motor rotor that went from \$654 to \$5,474, and a connector that went from \$310 to \$1,109.²⁴ Representatives Tim Ryan (D-OH) and Jackie Speier (D-CA) and Senator Elizabeth Warren (D-MA) raised concerns as well. These examples led one news article to label the company the “Martin Shkreli of defense contracting.”²⁵

The Pentagon’s then-pricing czar submitted a response to the IG’s recent report stating that new loopholes in pricing statutes allowing contractors to avoid providing cost and pricing information undermine the government’s ability to prevent “war profiteering” and “price gouging.”²⁶ For example, contracting officers who question the price reasonableness of an item or the assertion that an item is commercial must appeal to their bosses to put pressure on companies to provide additional information. Perhaps the most troubling example is how companies use these loopholes to extort more money from the Department while simultaneously undermining the ability of the military to meet their war needs: One subsidiary of TransDigm, AeroControlex, would not provide contracting officers justification for a \$747 unit price increase for a part needed to support war efforts in Iraq and Afghanistan. An Air Force independent review team found the company “took advantage of its superior position to force the prime contractor to pay higher prices for a military helicopter part by holding up the shipment.”²⁷ Such actions are not unprecedented: the Defense Logistics Agency paid Pentagon contractor Ontic what the agency believed to be higher than a fair and reasonable

²² Mandy Smithberger, “DoD Cost Analysis is like Pin the Tail on the Donkey,” Project On Government Oversight, February 26, 2015. <https://www.pogo.org/analysis/2015/02/dod-cost-analysis-is-like-pin-tail-on-donkey/>

²³ Letter from Representative Ro Khanna (D-CA) to Acting Inspector General Glenn Fine requesting a review of TransDigm Group about potential waste, fraud, and abuse, March 20, 2017. https://khanna.house.gov/sites/khanna.house.gov/files/032117_TransDigm_Letter.pdf

²⁴ Letter from Representative Ro Khanna (D-CA) to Acting Inspector General Glenn Fine requesting a review of TransDigm Group about potential waste, fraud, and abuse, March 20, 2017. https://khanna.house.gov/sites/khanna.house.gov/files/032117_TransDigm_Letter.pdf

²⁵ Martin Shkreli became infamous for raising the price of a drug from \$13 to \$750 after buying the marketing rights. Zach Carter, “Meet the Martin Shkreli of Defense Contracting,” *HuffPost*, March 23, 2017. https://www.huffingtonpost.com/entry/defense-contractor-monopoly-transdigm-mick-mulvaney_us_58d2f8dae4b0b22b0d19ad2a

²⁶ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 91. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

²⁷ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 25. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

price for helicopter spare parts—specifically, housing and insulation—because they worried further delays “jeopardized the readiness level of the CH-53 Sea Stallion helicopter.”²⁸

POGO has long supported narrowing the definition of a commercial item or service to mean goods or services that are actually sold to the general public at market prices in like quantities.²⁹ Such a change would be a significant improvement over the current definition that labels as commercial any goods or services “of a type” that are merely “offered” for sale or lease, a definition that allows labeling as commercial items or services that are never actually sold in the commercial marketplace.³⁰ The recent inspector general report shows why this change is overdue.

Numerous Exemptions to Pricing Transparency

Hamstringing Contracting Officers from Challenging Excessive Prices

“The best intentions of procurement personnel to obtain cost data can and often have been thwarted,” the director of the Defense Logistics Agency said in his response to the inspector general’s 2006 audit of TransDigm spare parts. “Absent statutory authority to obtain cost data under the [sole-source] circumstances of these buys, DLA contracting officers were obliged to base their price reasonableness decisions on price analyses of offered prices” rather than on certified accurate cost data.³¹ And if that offered price seems unreasonable, contracting officers have little recourse to challenge it.

While recent legislative changes have exacerbated these problems, the problems are longstanding. The Defense Department inspector general noted in the 2006 report that both the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1996 increased the difficulty of contracting officers to obtain cost data.³² This shouldn’t be surprising: the bill was literally written by contractors.³³ The result of legislative changes to the definition of commercial items is that items defined as commercial are exempt from most pricing mechanisms like the Truthful Cost or Pricing statute and the Cost Accounting

²⁸ Department of Defense Inspector General, *Ontic Engineering and Manufacturing Overcharged the Defense Logistics Agency for Sole-Source Spare Parts*, February 15, 2014, p. 17.

<https://media.defense.gov/2016/Apr/20/2001774183/-1/-1/1/DODIG-2014-110.pdf>

²⁹ Scott Amey, “Defense Department’s New Definition of ‘Commercial Item’ Will Save Money,” Project On Government Oversight, May 2, 2012. <https://www.pogo.org/analysis/2012/05/defense-departments-new-definition-of-commercial-item-will-save-money/>

³⁰ Federal Acquisition Regulation, Subpart 2.101.

³¹ Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. 37. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

³² Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, Executive Summary. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

³³ Project On Government Oversight, *Pick Pocketing the Taxpayer: The Insidious Effects of Acquisition Reform*, March 11, 2002. <https://www.pogo.org/report/2002/03/pick-pocketing-taxpayer-insidious-effects-of-acquisition-reform/>

Standards, which would require contractors to provide certified cost or pricing data.³⁴ Those and other procurement laws, standards, and regulations protect agencies and taxpayers, but decrease profits for contractors, who seem more than happy to not have them apply whenever possible.³⁵

A newer loophole, created by the fiscal year 2016 National Defense Authorization Act, eliminated the requirement that contracting officers first have the data to assess reasonableness before determining whether an item is commercial.³⁶ If the Department determines an item is commercial without first obtaining this data it loses its leverage to obtain the data necessary to negotiate fair prices.³⁷ The Department has felt the impacts of the loss of that leverage numerous times, including after a contracting officer designated an oil pump assembly housing manufactured by TransDigm's subcontractor, AeroControlex, as commercial without adequate documentation. When the contracting officer questioned a subsequent 71.8 percent hike in the price, AeroControlex would only provide commercial sales information, not certified data: "After the commercial determination was made, AeroControlex refused to provide more detailed cost data to support the substantial price increase."³⁸

While the Defense Department's ability to know pricing on goods and services has been impeded by commercial item designation—and therefore its ability to keep costs in check—these designations aren't the only thing resulting in increased spending. The Department's ability to use competition and pricing information to negotiate fair prices is also reduced on transactions that fall below the Simplified Acquisition Threshold and the Truthful Cost or Pricing Data contract amount thresholds. And Congress has continued to increase these thresholds.³⁹ Simplified acquisition thresholds are based on the idea that they are lower-dollar acquisitions and consequently should be considered lower risk, but the inspector general identified the reduced requirements for award under this threshold as "high risk" in its report

³⁴ Public Law 103-355, sections 8104 and 8203, October 13, 1994; Clinger-Cohen Act of 1996 (formerly called Information Technology Management Reform Act (ITMRA), Division E, National Defense Authorization Act for FY 1996 (P.L. 104-106, February 10, 1996); Project On Government Oversight, *Pick Pocketing The Taxpayer: The Insidious Effects of Acquisition Reform*, March 11, 2002. <https://www.pogo.org/report/2002/03/pick-pocketing-taxpayer-insidious-effects-of-acquisition-reform/>; See L. Elaine Halchin, "Other Transaction (OT) Authority" (RL34760), Congressional Research Service, July 15, 2011, pp. 19-22. <https://fas.org/sqp/crs/misc/RL34760.pdf>

³⁵ Paul E. Pompeo and Amanda J. Sherwood, "Three Recent Developments Impact TINA Compliance," Arnold and Porter, June 14, 2018. <https://www.arnoldporter.com/en/perspectives/publications/2018/06/three-recent-developments-impact-tina-compliance>

³⁶ National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, November 15, 2015, Sec. 852. <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf>

³⁷ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 93. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

³⁸ Department of Defense Inspector General, *Spare Parts Procurements from Transdigm, Inc.*, February 23, 2006, pp. 10-11. <https://media.defense.gov/2018/Oct/10/2002049899/-1/-1/1/D-2006-055.PDF>

³⁹ Section 805 of the fiscal year 2018 National Defense Authorization Act increased the simplified acquisition threshold to from \$150,000 to \$250,000, and Section 811 increased the Truth in Negotiation Act (TINA) threshold from \$750,000 to \$2 million; Department of Defense Inspector General, *Spare Parts Procurements from Transdigm, Inc.*, February 23, 2006, p. i. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

on Transdigm.⁴⁰ Contracting officers may not request certified cost and pricing data except in limited circumstances for transactions under the Truthful Cost or Pricing Data threshold, even if it's a sole-source procurement.⁴¹ It's only in cases with higher award amounts that contractors are required to provide access to certified cost or pricing information to ensure the government receives a fair price. As these thresholds increase, and the definition of commercial items expands, the government's access to cost or pricing data has shifted to be the exception rather than the rule. Congress has also legislated a "preference" for commercial buying,⁴² which continues to exclude more transactions from informed buying and government scrutiny.⁴³

The thresholds and commercial exemptions make it effectively impossible for contracting officers to get cost and pricing information, and companies can more easily increase prices if their contracts fall under these exemptions. When the government buys goods or services for contract amounts that fall below the thresholds or when it designates items it purchases as commercial, it is allowing companies to avoid turning over the certified data that would ensure fair and reasonable pricing. Even when the government requests other than certified pricing data for these transactions,⁴⁴ companies have refused to turn it over and government officials are then in the undesirable position of having to do their best to determine if prices are reasonable by using alternative methods like market research. Yet numerous inspector general reports have found that alternative methods are less effective than obtaining the certified data and more likely to lead to excessive prices.⁴⁵ Of the 47 TransDigm contracts the inspector general looked at, 32 contracts were below the simplified acquisition threshold, 13 were between the simplified acquisition threshold and the Truthful Cost or Pricing Data statute threshold, and 1 had a commercial item exemption. "The one contract in our sample awarded with a reasonable profit was the only contract for which the contracting officer used cost data to determine price reasonableness," the inspector general found. For every spare part they examined for which TransDigm didn't have to provide cost data the company earned

⁴⁰ FAR Subpart 13.203(a)(3) notes, "The administrative cost of verifying the reasonableness of the price for purchases [under the simplified acquisition threshold] may more than offset potential savings from detecting instances of overpricing." Federal Acquisition Regulation, Subpart 13.106(b). For commercial items the simplified acquisition threshold is \$7 million. Federal Acquisition Regulation, Subpart 13.500(a); Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 47.

<https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

⁴¹ FAR Subpart 15.403-1, "Prohibition on Obtaining Certified Cost or Pricing Data."; 10 U.S.C. § 2306a

⁴² 10 U.S.C. § 2377; 41 U.S.C. § 3307.

⁴³ 10 U.S.C. § 2306a(b)(1)(b) ("Submission of certified cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract ... for the acquisition of a commercial item")

⁴⁴ 10 U.S.C. § 2306a(d)

⁴⁵ Department of Defense Inspector General, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, February 6, 2008, p. 4. <https://media.defense.gov/2008/Feb/06/2001713062/-1/-1/1/08-048.pdf>; Department of Defense Inspector General, *Defense Logistics Agency Did Not Obtain Fair and Reasonable Prices for Meggitt Aircraft Braking Systems for Sole-Source Commercial Spare Parts*, May 8, 2015, p. i. <https://media.defense.gov/2015/May/08/2001713503/-1/-1/1/DODIG-2015-120.pdf>

“excess profits without detection by the contracting officers.”⁴⁶ Emails obtained by the House Oversight and Government Reform Committee showed “DOD [Defense Department] and TransDigm purposely structured contracts to stay below the Simplified Acquisition Threshold.”⁴⁷ A former sales director for TransDigm also told the Committee that the company shortened the terms of a contract (to reduce the cost of the transaction) to avoid triggering a threshold that would invoke Truthful Cost or Pricing Data requirements.⁴⁸

The amount of money is significant: One Pentagon official stated that in fiscal year 2018 the Department spent \$62.1 billion in commercial transactions.⁴⁹ But it can be difficult to track the full scope of how the Department is using its commercial buying authority. As the Government Accountability Office pointed out, the federal government’s system for tracking this spending (called the Federal Procurement Data System-Next Generation) “only captures information on whether or not commercial item acquisition procedures were used to acquire the product or service, and not whether items purchased are commercial or not commercial.”⁵⁰ The Department has a history of buying items designated as commercial, even when there’s no evidence there were any other customers.⁵¹

Claiming Commercial Deals, Charging Artisanal Prices

The Defense Department is the only customer for many of the goods and items labeled as “commercial,” and it pays excessive prices accordingly.⁵²

⁴⁶ Department of Defense Inspector General, *Acquisition: Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. ii, 13. <https://media.defense.gov/2006/Feb/23/2001712361/-1/-1/1/06-055.pdf>

⁴⁷ House Oversight and Reform Committee, *Supplemental Memorandum on Actions by TransDigm*, May 15, 2019, p. 7. https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-05-15.COR%20Supplemental%20Memo-5-15-19%20Hearing%20DOD%20IG%20Rept.%20on%20Excess%20Profits%20by%20TransDigm%20Group%20Inc_0.pdf

⁴⁸ House Oversight and Reform Committee, *Supplemental Memorandum on Actions by TransDigm*, May 15, 2019, p. 7. https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2019-05-15.COR%20Supplemental%20Memo-5-15-19%20Hearing%20DOD%20IG%20Rept.%20on%20Excess%20Profits%20by%20TransDigm%20Group%20Inc_0.pdf

⁴⁹ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 92. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

⁵⁰ Government Accountability Office, *Defense Contracts: Recent Legislation and DOD Actions Related to Commercial Item Acquisitions*, July 17, 2017, Executive Summary. <https://www.gao.gov/assets/690/685875.pdf>

⁵¹ Project On Government Oversight, *Taxpayers Carry the Load: The C-130J Cargo Plane Does Not*, March 15, 2005. <https://www.pogo.org/report/2005/03/taxpayers-carry-load-c-130j-cargo-plane-does-not/>; Scott Amey, *POGO urges Congress to review Hamilton Sundstrand’s 9-year no-bid commercial item spare parts contract*, November 27, 2006. <https://www.pogo.org/letter/2006/11/pogo-urges-congress-to-review-hamilton-sundstrands-9-year-no-bid-commercial-item-spare-parts-contract/#10>

⁵² See for example Department of Defense Inspector General, *Defense Logistics Agency Aviation Potentially Overpaid Bell Helicopter for Sole-Source Commercial Spare Parts*, July 3, 2014, p. 28. http://www.pogoarchives.org/strauss/reports/fouo_dodig_2014_088_dla_aviation_bell_helicopter.pdf

The opportunities for waste and abuse have only increased over time. For example, the fiscal year 2016 National Defense Authorization Act included a provision that weakened pricing by requiring contracting officers to follow previous commercial item determinations by their own and other components.⁵³ As a result, contracting officers may be locked into treating an item as commercial even if the government is now the only customer. Challenging that determination requires an appeal to the head of contracting for their agency.⁵⁴

In the past the Department has abused this designation. For example, the Air Force initially used a commercial item acquisition strategy for its new tanker program, and also tried to purchase C-130J and C-17 transport planes under that authority as well.⁵⁵

Relying on previous determinations is leading to “price gouging,” according to the Pentagon’s former pricing czar. The change to the law came directly from Honeywell, a global technology contractor.⁵⁶ Unsurprisingly, Honeywell is now trying to convince the Department that a Chinook helicopter engine it manufactures is commercial—and worth 100 percent more than the Department previously paid.⁵⁷

Waste Through “Historical Pricing”

Contractors and their allies have long been pushing for contracting officials to rely on historical pricing in an attempt to reduce oversight of their cost information.⁵⁸ While relying on historical pricing can be valid for establishing an initial benchmark for price negotiations, the Federal Acquisition Regulation previously required contracting officials to do the analysis necessary to determine that these prices *remained* valid over time. In one instance, the Defense Department inspector general found in 2015 that contracting officials failed to follow this requirement and were relying on prices from a 10-year-old contract, even though more

⁵³ 10 U.S.C. § 2306a(b)(4)(A) (stating that the contracting officer “may presume” an item is commercial if it was previously designated so); National Defense Authorization Act for Fiscal Year 2016, Public Law 114-92, November 15, 2015, Sec. 851. <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf>

⁵⁴ 10 U.S.C. § 2306a(b)(4)(B)

⁵⁵ Department of Defense Inspector General, *Acquisition: Acquisition of the Boeing KC0767A Tanker Aircraft* (D-2004-064), March 29, 2004, p. ii. <https://media.defense.gov/2004/Mar/29/2001712733/-1/-1/1/04-064.pdf>; “Written Testimony of POGO’s Danielle Brian on DoD’s Use of ‘Commercial’ Acquisition and ‘Other Transaction Authority’ before the Senate Armed Services Committee, Airland Subcommittee,” March 15, 2005. <https://www.pogo.org/testimony/2005/03/written-testimony-of-pogos-danielle-brian-on-dods-use-of-commercial-acquisition-and-other-transaction-authority-before-senate-armed-services-committee/>

⁵⁶ Austin Wright and Leigh Munsil, “In House bill, arms makers wrote their own rules,” *Politico*, December 12, 2015. <https://www.politico.com/story/2015/05/in-house-bill-arms-dealers-wrote-their-own-rules-117842>; Mandy Smithberger and Scott Amey, “Thornberry Buying Industry Commercial-Item Policies,” April 28, 2015. <https://www.pogo.org/analysis/2015/04/thornberry-buying-industry-commercial-item-policies/>

⁵⁷ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 93. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

⁵⁸ Austin Wright and Leigh Munsil, “In House bill, arms makers wrote their own rules,” *Politico*, May 12, 2015. <https://www.politico.com/story/2015/05/in-house-bill-arms-dealers-wrote-their-own-rules-117842>; Dina Rasor, “‘Should Cost’ vs. ‘Did Cost’: How the Military-Industrial Complex Swindles Billions of our Dollars,” *Truthout*, November 8, 2011. <https://truthout.org/articles/should-cost-vs-did-cost-how-the-military-industrial-complex-swindles-billions-of-our-dollars/>

recent information was available to determine whether the price was fair and reasonable.⁵⁹ The problems with this approach become obvious when applied in an actual commercial context—who would want to buy an HD TV for the \$2,000 it once cost when it now only costs \$200?⁶⁰ But while consumers can walk away or go to another store when they are offered outdated and inflated prices, the Department is often stuck paying what the contractor wants to charge.

Industry finally succeeded in locking the Department into past prices paid as part of the fiscal year 2016 National Defense Authorization Act. At the time the House Armed Services Committee put the proposal forward, POGO told the authorizing committees:

Using recent prices paid by the government in the determination of price reasonableness will harm the government and severely limit the government's ability to access any cost or pricing information from contractors selling commercial goods or services. Historic pricing data is insufficient to determine fair and reasonable prices and will result in new bad deals being made based on old bad deals. DoD could be locked in to such a designation despite subsequent changes to the item or military unique requirements that alter the item from its commercial nature. Any continuation of commercial item designations could require DoD to buy commercial items that no longer have a commercial market, and thereby pay excessive costs or prices or settle on timeworn products. Moreover, we are concerned that these provisions, which alter the process for determining commercial items, will only exacerbate overpayment problems identified by the GAO [Government Accountability Office] and DoD IG.⁶¹

The latest inspector general report on TransDigm confirmed that relying on historical price analysis was unreliable. "Prices for parts had become inflated over time, and some parts appeared to be inflated at the time the Government first purchased the part further compounding the excess profits."⁶² As a result, TransDigm "earned excess profit up to 4,436 percent on 34 parts it sold to the DLA and the Army."⁶³ While it is easy to blame TransDigm, Congress created the problem, and agencies are placed in the undesirable position of relying on outdated, and often outrageous, prices.

⁵⁹ Department of Defense Inspector General, *Summary of DoD Office of Inspector General Spare-Parts Pricing Audits: Additional Guidance is Needed*, March 31, 2015, p. 8.

<https://media.defense.gov/2018/Sep/07/2001962916/-1/-1/1/DODIG-2015-103.PDF>

⁶⁰ Scott Amey, "Congress Locks Pentagon into Commercial Item Ripoffs," Project On Government Oversight, December 23, 2015. <https://www.pogo.org/analysis/2015/12/congress-locks-pentagon-into-commercial-item-ripoffs/>

⁶¹ Danielle Brian, Liz Hempowicz, Jacob Marx, Mandy Smithberger, and Scott Amey, "POGO Letter to Conferees on the FY 2016 National Defense Authorization Act," June 25, 2015, p. 5.

https://docs.pogo.org/letter/2015/fy16_ndaa_conference_20150625.pdf

⁶² Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. ii. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

⁶³ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 14. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

Outsourcing Agency Acquisition Authority?

Generally, the government should be determining its own needs and how best to procure services or goods to meet those needs in an affordable way. The Federal Acquisition Streamlining Act created a preference for purchasing commercial items.⁶⁴ Recently, the U.S. Court of Appeals for the Federal Circuit ruled for the first time that this requirement meant the government could be punished for inadequately considering commercial items that may not meet the government's requirements. In that case specifically, the Court found the Army acted in violation of the Federal Acquisition Streamlining Act when it created its own intelligence analysis software system without sufficiently considering a commercial system offered by Palantir, a contractor that wanted to sell its technology to the Army.⁶⁵ As a result of that action, Palantir recently won the Army contract, which could be worth more than \$800 million.⁶⁶

The system developed by the Army was troubled; more than a decade in, it had spent more than \$3 billion developing its own software.⁶⁷ But the Court's decision was not based on performance, and could make it even more difficult for program officers to feel confident they can resist powerful companies trying to sell the Department wares it doesn't want.⁶⁸ As will be described in further detail, that problem will become even more pernicious as the Department expands its use of Other Transaction Authority.

Other Transaction Authority Expands Risk of Fraud, Waste, and Abuse

Those concerned about the abuse of commercial item buying authorities should be similarly worried by "other transaction authority," also known as OTA. Unlike traditional contracts, where the government specifies its requirements for goods and services, other transaction agreements give companies the power to define what they'll do, including pricing, deliverables, and intellectual property rights. The agreements are also generally not subject to many protections against waste, fraud, and abuse in federal contracting laws and

⁶⁴ 10 U.S.C. § 2377.

⁶⁵ Palantir USG, Inc. v. U.S., No. 17-1465 (Fed. Cir. 2018); Jared Serbu, "Court: Army ignored law's preference for commercial items in major intel procurement," *Federal News Network*, September 17, 2018.

<https://federalnewsnetwork.com/acquisition/2018/09/court-army-ignored-laws-preference-for-commercial-items-in-major-intel-procurement/>

⁶⁶ Shane Harris, "Palantir wins competition to build Army intelligence system," *Washington Post*, March 26, 2018.

https://www.washingtonpost.com/world/national-security/palantir-wins-competition-to-build-army-intelligence-system/2019/03/26/c6d62bf0-3927-11e9-aaae-69364b2ed137_story.html

⁶⁷ Jen Judson, "NDAA Requires Army To Buy Intelligence Software Commercially," *Defense News*, November 30, 2016. <https://www.defensenews.com/land/2016/11/30/ndaa-requires-army-to-buy-intelligence-software-commercially/>

⁶⁸ For more on Palantir's influence campaign see Robert Draper, "Boondoggle Goes Boom," *The New Republic*, June 19, 2013. <https://newrepublic.com/article/113484/how-pentagon-boondoggle-putting-soldiers-danger>

regulations.⁶⁹ Many of the changes Congress made to other transactions⁷⁰ may have been intended to reduce costs and increase innovation, but as adopted, other transactions lack the management tools necessary to prevent the risks of waste and abuse.

The hope was that this authority would lead to more innovation, but this comes at significant risk.⁷¹

Are the Risks Worth the Rewards?

First established in 1958 in response to the launch of Sputnik, the authority—and subsequent expansions of it—was meant to advance our technological edge by increasing innovation and attracting nontraditional contractors.⁷² OTAs are not subject to the Truthful Cost or Pricing Data statute, Cost Accounting Standards, or a number of provisions in the Federal Acquisition Regulation (FAR) in order to accomplish those goals.⁷³ In many ways, the government has bought into the idea of OTAs based on a fallacy. A previous Defense Department Inspector General analysis of OTAs for prototypes in 2000 found that instead of bringing in nontraditional contractors, 97 percent of the money awarded was going to traditional contractors.⁷⁴ A *Federal News Network* investigation using data from 2015 to 2017 found that about two-thirds of the money awarded to companies through this authority went to traditional contractors.⁷⁵ This may be in part because this authority can be used to buy weapon systems even though those are typically supplied by large defense contractors that already sell goods and services to the government.⁷⁶ Even these findings may not reflect the

⁶⁹ Other Transaction agreements are not subject to “the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS), competition requirements, the Truth in Negotiations Act, the Procurement Integrity Act, Cost Accounting Standards, audit access for examination of contractor records by auditing agencies, the Bayh-Dole Act, and transparency protections.” Scott Amey, “Other Transactions: Do the Rewards Outweigh the Risks?” Project On Government Oversight, March 15, 2019.

<https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks/>

⁷⁰ “Other transactions” is a term commonly used to refer to the authority to enter into transactions other than contracts, grants, or cooperative agreements.

⁷¹ Scott Maucione, “As OTAs grow, traditional contractors are reaping the benefits,” *Federal News Network*, July 17, 2018. <https://federalnewsnetwork.com/contracting/2018/07/as-otas-grow-prime-contractors-are-reaping-the-benefits/>

⁷² Moshe Schwartz and Heidi M. Peters, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress*, Congressional Research Service, February 22, 2019, p. 1, 6.

<https://fas.org/sgp/crs/natsec/R45521.pdf>

⁷³ Scott Amey, “Other Transactions: Do the Rewards Outweigh the Risks?” Project On Government Oversight, March 15, 2019. <https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks/>

⁷⁴ “Statement of Donald Mancuso, Deputy Inspector General Department of Defense, Before the Subcommittee on Readiness and Management Support of the Senate Committee on the Armed Services on Defense Acquisition,” April 26, 2000, p. 15. <https://media.defense.gov/2017/Apr/18/2001734016/-1/-1/1/00-118.PDF>

⁷⁵ Scott Maucione, “As OTAs grow, traditional contractors are reaping the benefits,” *Federal News Network*, July 17, 2018. <https://federalnewsnetwork.com/contracting/2018/07/as-otas-grow-prime-contractors-are-reaping-the-benefits/>

⁷⁶ Moshe Schwartz and Heidi M. Peters, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress*, Congressional Research Service, February 22, 2019, p. 25.

<https://fas.org/sgp/crs/natsec/R45521.pdf>. Chris Cornillie, “A Closer Look at the Pentagon’s \$2 Billion a Year OTA

whole story. The nonpartisan Congressional Research Service noted that the Department of Defense does “not have sufficiently reliable data upon which to conduct analysis on the use of OTs.”⁷⁷

And some of the services acquired by agencies across the federal government through this authority are far from innovative. For instance, government data shows that agreements under this authority have been used to acquire management support, custodial/janitorial services, video surveillance, and canine teams.⁷⁸

OTAs are also billed as a mechanism to speed up acquisition.⁷⁹ On that count, the Congressional Research Service found that the Defense Department has not tracked information to confirm or disprove this claim, making the claim “impossible to objectively assess.”⁸⁰ A recent article in the industry-sympathetic *Contract Management* magazine makes the case that many successful OTAs could have been done through traditional contracting practices, and that rhetoric around OTAs was “misplaced ‘hype.’”⁸¹ The article concluded:

OTs are a valuable acquisition tool if used correctly; however, they are not a panacea for all ills. There is reason for concern that the “hype” which OTs have recently attracted could influence Congress and high-level executive branch officials into halting further improvement upon the convention federal acquisition process.⁸²

There have been a number of instances in the past in which we have seen OTAs used on large, risky programs that should have received the enhanced oversight that would come by awarding the contract through the regular acquisition process specified in the Federal Acquisition Regulation rather than the hands-off approach that comes with OTAs. For example, the Army initially tried to purchase \$157 billion in land and air vehicles through the

Pipeline,” *Bloomberg Government at Federal News Network*, January 22, 2019.

<https://federalnewsnetwork.com/fiscal-2019-federal-contracting-playbook/2019/01/a-closer-look-at-the-pentagons-2-billion-a-year-ota-pipeline-2/>

⁷⁷ Moshe Schwartz and Heidi M. Peters, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress*, Congressional Research Service, February 22, 2019, p. 11.

<https://fas.org/sqp/crs/natsec/R45521.pdf>

⁷⁸ Scott Amey, “Other Transactions: Do the Rewards Outweigh the Risks?” Project On Government Oversight, March 15, 2019. <https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks/>

⁷⁹ Anthony Capaccio, “Pentagon’s Fast-Track Funding Lacks Reliable Data, Report Finds,” *Bloomberg*, February 25, 2019. <https://www.bloomberg.com/news/articles/2019-02-25/pentagon-s-fast-track-funding-lacks-reliable-data-report-finds>

⁸⁰ Moshe Schwartz and Heidi M. Peters, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress*, Congressional Research Service, February 22, 2019, p. 16.

<https://fas.org/sqp/crs/natsec/R45521.pdf>

⁸¹ Jerome Gabig and Richard Raleigh, “Debunking the Hype Involving ‘Other Transaction Authority,’” *Contract Management*, March 2019, p. 44. <https://wilmerandlee.com/debunking-the-hype-involving-other-transaction-authority>

⁸² Jerome Gabig and Richard Raleigh, “Debunking the Hype Involving ‘Other Transaction Authority,’” *Contract Management*, March 2019, p. 50. <https://wilmerandlee.com/debunking-the-hype-involving-other-transaction-authority>

OTA, and only converted it to a FAR contract after then-Senate Armed Services Committee Chair John McCain (R-AZ) questioned the costs and risks of the approach.⁸³

The Air Force has also used OTAs for the Evolved Expendable Launch Vehicle program, which, at the time, was one of the largest other transactions for weapon prototypes the Department had ever negotiated. The Government Accountability Office warned that the use of OTAs in this case would make it more difficult for the Department to protect the government's interests.⁸⁴ The United Launch Alliance, a joint venture between Boeing and Lockheed Martin that became the sole company participating in the program, received a nearly \$1 billion annual subsidy from taxpayers to support the program.⁸⁵ Costs for the program doubled over initial estimates, resulting in two critical Nunn-McCurdy unit cost breaches, requiring the overruns to be reported to Congress.⁸⁶

As Congress and the Department consider the use of OTAs, it may be that agreements for some of the goods and services purchased through that mechanism should be converted to contracting vehicles that restore protections to taxpayers and the government—mainly, Federal Acquisition Regulation Part 15 contracts.

Increasing Innovation or Avoiding Competition?

Competition generally improves performance, increases innovation, and reduces costs for goods and services. Yet under OTAs, follow-on production contracts can be awarded without competition if “competitive procedures were used” to select parties that participated in the initial OTA and if the prototype was “successfully completed.”⁸⁷

The use of this authority must be carefully overseen. Bid protests are one check to ensure competition is fair, but protest jurisdiction largely does not apply to other transactions except in very narrow circumstances. The Army tried to award a \$950 million OTA to contractor REAN Cloud to provide cloud migration, but the Government Accountability Office intervened and sided with competing company Oracle's bid protest.⁸⁸ Industry boosters falsely claimed GAO's

⁸³ Andrew Feickert, *The Army's Future Combat System (FCS): Background and Issues for Congress*, RL32888, Congressional Research Service, April 28, 2005, p. 6. <http://pogoarchives.org/m/dp/dp-CRS-RL32888-2005.pdf>

⁸⁴ Government Accountability Office, *Evolved Expendable Launch Vehicle: DOD Guidance Needed to Protect Government's Interest*, June 11, 1998, pp. 3-4. <https://www.gao.gov/assets/230/225857.pdf>

⁸⁵ Senate Armed Services Committee, “Chairman McCain Sends Letter on Russian Rocket Engines and U.S. National Security Space Launch Program,” December 9, 2015. <https://www.armed-services.senate.gov/press-releases/chairman-mccain-sends-letter-on-russian-rocket-engines-and-us-national-security-space-launch-program>

⁸⁶ Steven A. Hildreth, *National Security Space Launch at a Crossroads*, Congressional Research Service, May 13, 2016, p. 6. <https://fas.org/sgp/crs/natsec/R44498.pdf>

⁸⁷ 10 U.S.C. § 2371b(a), (f)(2).

⁸⁸ Government Accountability Office, “Press Statement on Bid Protest filed by Oracle,” May 31, 2018. https://www.gao.gov/about/press-center/press-releases/read/oracle_bid_protest.htm; Billy Mitchell, “From \$1B to nothing: GAO rules against REAN cloud deal after Oracle protest,” *fedscoop*, May 31, 2018. <https://www.fedscoop.com/1b-nothing-gao-rejects-rean-cloud-deal-oracle-protest/>

action improperly constrained agencies.⁸⁹ But what the GAO actually did was show how agencies weren't using this authority properly, and re-established that the GAO has jurisdiction to review whether an agency's *use* of an OTA complies with the law.⁹⁰ In a subsequent decision, the GAO further clarified its authority and said it did not include jurisdiction over protests of OTA *award* decisions.⁹¹ Congressional and agency oversight should be as vigilant as GAO in making sure this authority is used properly.

Congress should also re-examine how "nontraditional contractor" is defined. Under current law "an entity" that is a subsidiary or business unit of a major federal contractor such as Raytheon or SAIC could be considered nontraditional if it has its own business identifier, has not previously been subject to "cost accounting standards," and has not previously had a contract or subcontract with the Department.⁹² Traditional contractors can also be exempted from oversight on prototype OTAs if there is at least one nontraditional contractor under this definition that is participating in the project to a "significant extent." What Congress meant by significant extent, however, remains undefined.⁹³ Other transactions awarded through consortia, including joint ventures, may be another avenue for traditional contractors to benefit from the OTA system.

Intellectual Property Rights: Paying the Costs, Not Reaping the Benefits

When taxpayers fund research and development for goods or weapon systems, most would assume that they would be able to benefit from the return on their investment. The Army, for example, wants to own technical data rights up-front to be able to avoid excessive costs on repairs and upgrades to the systems it buys, so it recently developed a policy to more strategically obtain these rights.⁹⁴ Contractors have claimed that the government wanting

⁸⁹ Bill Greenwalt, "GAO Decision Threatens US Military Dominance; Reject It," *Breaking Defense*, June 27, 2018. <https://breakingdefense.com/2018/06/gao-decision-threatens-us-military-dominance-reject-it/>

⁹⁰ Kenneth Patton, "GAO Says Oracle Protest Did Not Make Policy; Criticizes Greenwalt Op-Ed," *Breaking Defense*, July 9, 2018. <https://breakingdefense.com/2018/07/gao-says-oracle-protest-did-not-make-policy-criticizes-greenwalt-op-ed/>

⁹¹ Government Accountability Office, *MD Helicopters, Inc.*, B-417379, April 4, 2019. <https://www.gao.gov/assets/700/698281.pdf>

⁹² Public Law 111-383, § 866(g)(1) (2011). 10 U.S.C. § 2302(9); "Is My Firm a Nontraditional Defense Contractor?," U.S. Army Tank Automotive Research, Development and Engineering Center. <https://tardec.army.mil/pages/airs/resources/Is%20my%20firm%20a%20Nontraditional%20Defense%20Contractor.pdf>

⁹³ 10 U.S.C. § 2371b(d)(1)(A).

⁹⁴ Connie Lee, "Army Eyes Upfront Purchases of Technical Data Rights," *National Defense*, November 1, 2017. <http://www.nationaldefensemagazine.org/articles/2017/11/1/army-eyes-ownership-of-technical-data-rights;>

Devon L. Suits, "Army secretary approves new intellectual property management policy," *Army News Service*, December 11, 2018.

https://www.army.mil/article/214881/army_secretary_approves_new_intellectual_property_management_policy

these rights was a barrier to doing business with the government.⁹⁵ The Defense Department has offered OTAs as an alternative to allow companies to retain the rights to profit from programs and research that were funded by taxpayers.⁹⁶

Unfortunately, we have seen a number of examples of how the Army's concerns about paying unnecessary and excessive costs when they don't own the intellectual property rights have been well-founded. Some weapons manufacturers hide behind intellectual property rights to resist turning over information to the government that might allow cheaper or more efficient operations. By holding onto information like manufacturing or operational data, the company can maintain a profitable monopoly on providing support services for the duration of a weapon system's lifetime.⁹⁷ In one notorious case, thanks to its failure to secure intellectual property rights, the Air Force was paying \$10,000 each for toilet seat covers on its C-5 Galaxy cargo planes.⁹⁸ As Senator Chuck Grassley (R-IA) pointed out, "Any American can tell you that 10,000 dollars for a toilet seat cover is ridiculous."⁹⁹

The government might have an out to be able to claim intellectual property rights through the Bayh-Dole Act, which gives the government "march-in rights" to allow other companies to produce otherwise patented technologies at a lower price.¹⁰⁰ But under OTAs this becomes significantly more difficult, as they are exempt. As industry lawyer Angela Styles has pointed out, "Enhanced IP [intellectual property] protection is the most significant benefit of OTAs [for industry], so make sure to use it."¹⁰¹

⁹⁵ Government Accountability Office, *Federal Acquisitions: Use of 'Other Transaction' Agreements Limited and Mostly for Research and Development Activities* (GAO-16-209), January 7, 2016, p. 12.

<https://www.gao.gov/assets/680/674534.pdf>; "Statement of Jack L. Brock, Jr., Managing Director, Acquisition and Sourcing Management, General Accounting Office, before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives, on 'Intellectual Property: Industry and Agency Concerns Over Intellectual Property Rights'" (GAO-02-723T), May 10, 2002, pp. 8-10.

<https://www.gao.gov/new.items/d02723t.pdf>

⁹⁶ "Statement of Jack L. Brock, Jr., Managing Director, Acquisition and Sourcing Management, General Accounting Office, before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives, on 'Intellectual Property: Industry and Agency Concerns Over Intellectual Property Rights'" (GAO-02-723T), May 10, 2002, pp. 11-12. <https://www.gao.gov/new.items/d02723t.pdf>

⁹⁷ Dan Grazier, "Defense Contractors Holding the Pentagon Hostage with Service Contracts," Project On Government Oversight, November 30, 2017. <https://www.pogo.org/investigation/2017/11/defense-contractors-holding-pentagon-hostage-with-service-contracts/>

⁹⁸ Aaron Gregg, "The Air Force's \$10,000 toilet seat cover," *Washington Post*, July 14, 2018.

https://www.washingtonpost.com/business/capitalbusiness/the-air-forces-10000-toilet-cover/2018/07/14/c33d325a-85df-11e8-8f6c-46cb43e3f306_story.html

⁹⁹ Senator Charles Grassley, "Prepared Floor Statement by Senator Chuck Grassley of Iowa On the Need for Aggressive Oversight at the U.S. Department of Defense," July 11, 2018.

<https://www.grassley.senate.gov/news/news-releases/grassley-10000-toilet-seat-cover-doesnt-pass-smell-test-dod-flushing-taxpayer>

¹⁰⁰ 35 U.S.C. §§ 201-212; 10 U.S.C. §§ 2320-2321; Dan Grazier, "Why Do Air Force Planes Need \$10,000 Toilet Seat Covers?" *The American Conservative*, June 14, 2018.

<https://www.theamericanconservative.com/articles/why-do-air-force-planes-need-10000-toilet-seat-covers/>

¹⁰¹ Angela Styles, "Other Transaction Authority - Big Rewards, Risks," *National Defense*, September 27, 2018.

<http://www.nationaldefensemagazine.org/articles/2018/9/27/ethics-corner-other-transaction-authority---big-rewards-risks>

Rebalancing our Budget to Put the Public before Defense Contractors

The TransDigm case points to many of the problems with the current acquisition system, which exposes the Department of Defense and taxpayer dollars to waste and potentially compromised operations. Most of the transactions the inspector general examined were below the thresholds that would have required the company to provide cost and pricing information. Without that oversight, the inspector general found the Department was repeatedly being ripped off by the company.

POGO supports cutting procurement costs, buying faster, encouraging innovation, and bringing nontraditional companies to the government procurement table. But the overall effect of the so-called acquisition reforms that were purportedly meant to accomplish these goals is that the Department is almost defenseless against overcharges. Congress has effectively turned the budget of the Department of Defense into a near-limitless font for crony capitalism and sole-source contracts where the Defense Department has very little information about what it is buying. To ensure the Department knows what it's buying, can easily buy truly commercial items while preventing contractors from gaming definitions, and can hold contractors accountable for charging excessive prices, we recommend that Congress do the following:

- Revise the definition of commercial items to apply only to what is sold on the open market to the general public in substantial quantities, as previously proposed by the Department of Defense.¹⁰²
- Direct that the Federal Acquisition Regulation be amended to require contractors to provide certified cost or pricing data to contracting officers before receiving a sole-source contract of more than \$500,000.
- Require the Department of Defense to track which companies refuse to provide pricing information. This should include requiring contracting officers to report contractors' refusal to turn over cost and pricing information to the Federal Awardee Performance and Integrity Information System (FAPIIS) and the Contractor Performance Assessment Reporting System (CPARS).
- Restore the simplified acquisition threshold to \$100,000.
- Ask the Government Accountability Office to review the programs awarded through OTAs and as commercial item acquisitions, and consider whether those programs should be converted to FAR Part 15 contracts.
- Require the Defense Department to report on how OTs are used and evaluate whether the agreements are increasing innovation.

¹⁰² Scott Amey, "Defense Department's New Definition of 'Commercial Item' Will Save Money," Project On Government Oversight, May 2, 2012. <https://www.pogo.org/analysis/2012/05/defense-departments-new-definition-of-commercial-item-will-save-money/>

- Ask the Government Accountability Office to evaluate awards to nontraditional contractors in order to assess whether OTAs are increasing competition.
- Prohibit the Cost Accounting Standards Board (CAS) from rescinding any existing standards, and ensure cost accounting standards apply whenever a sole-source contract is awarded, or whenever flexible pricing arrangements are provided for in a contract.
- Consider recreating the Renegotiation Board to allow for overseeing and capturing excessive profits for companies that receive \$10 million or more from the Department of Defense. At the very least, this kind of mechanism to recover waste and overcharges should be implemented for sole-source contracts, as recommended by former Pentagon pricing czar Shay Assad.¹⁰³
- Fund and prioritize pre-award audits of contractor pricing proposals in order to give improved insight into contractor pricing and prevent wasteful spending.
- Examine whether other transactions awarded through consortia are bringing new vendors to the government or shielding traditional contractors from oversight, and consider implementing reforms to limit the use of consortia if they are not serving the purpose of OTAs.
- Revise the definition of nontraditional contractors to prohibit any vendor who has accepted a FAR contract from being eligible.
- Strengthen protections for taxpayers' rights to intellectual property information paid for through government awards, and make it a presumption that a contracting officer will secure these rights up-front unless a contractor obtains a waiver. Any such waivers should be sent to the appropriate oversight committees and be evaluated by the Government Accountability Office.

¹⁰³ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 94. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

Chart A: Department of Defense Inspector General Reports Questioning Spare Part Costs

Report	Costs Questioned	Efforts to Obtain Cost or Pricing Data
<i>Review of Parts Purchased From TransDigm Group, Inc. (February 25, 2019)</i>	TransDigm “earned \$16.1 million in excess profits for 46 parts” sold for \$26.2 million. ¹⁰⁴ The majority of spare parts contracts were under the simplified acquisition or the Truth in Negotiations Act (TINA) thresholds. ¹⁰⁵ Four spare parts were designated as commercial items. ¹⁰⁶	“When contacting officers requested cost data for 16 of the 47 contracts we reviewed, TransDigm denied 15 requests for uncertified cost data and fulfilled only the request for certified cost data for the one contract above the TINA threshold that had no exceptions.” ¹⁰⁷
<i>Followup Audit: Military Sealift Command Management of Spare Parts Inventory and Purchases for Sealift Program Roll-On/Roll-Off</i>	“Officials could not provide evidence that the contractor adequately competed or provided justification for not competing 3 of the 9 purchases over \$25,000 or 5 of the 12 purchases between \$3,000 and	“This occurred because the contracting officer did not provide adequate oversight of the contractor to ensure compliance with the competition requirements for the contract.” ¹⁰⁹

¹⁰⁴ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. iii. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

¹⁰⁵ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 11. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

¹⁰⁶ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 32. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

¹⁰⁷ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 8. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

¹⁰⁹ Department of Defense Inspector General, *Followup Audit: Military Sealift Command Management of Spare Parts Inventory and Purchases for Sealift Program Roll-On/Roll-Off Ships*, October 20, 2017, p. 6. <https://media.defense.gov/2017/Nov/16/2001844769/-1/-1/1/DODIG-2018-004.PDF>

<i>Ships (October 20, 2017)</i>	\$25,000, made during FY 2016.” ¹⁰⁸	
<i>The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts for the C-5 Aircraft (February 7, 2017)</i>	“[The Air Force’s] contracting officer may not have purchased the 11 commercial spare parts, valued at \$58.8 million, from LM Aero at fair and reasonable prices.” ¹¹⁰	Air Force officials requested, but did not obtain sales data or only reviewed certain invoices and price data in the subcontractor’s office (and had to sign a nondisclosure agreement). ¹¹¹ The sales data officials relied on “did not justify the contract prices for 3 of the 11 commercial spare parts reviewed, valued at \$9.2 million.” ¹¹² The Air Force should “assess and determine whether it is appropriate to request a \$5.3 million voluntary refund.” ¹¹³
<i>U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price</i>	The audit reviewed whether the Air Force purchased sole-source commercial F117 engine sustainment services at fair and reasonable prices. ¹¹⁴ “The Air Force spent \$[REDACTED] billion on F117	“Pratt & Whitney provided limited data on one commercial customer. However, Pratt & Whitney did not provide requested cost data because of concerns about appropriate

¹⁰⁸ Department of Defense Inspector General, *Followup Audit: Military Sealift Command Management of Spare Parts Inventory and Purchases for Sealift Program Roll-On/Roll-Off Ships*, October 20, 2017, p. i.

<https://media.defense.gov/2017/Nov/16/2001844769/-1/-1/1/DODIG-2018-004.PDF>

¹¹⁰ Department of Defense Inspector General, *The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts*, February 7, 2017, p. i.

<https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>

¹¹¹ Department of Defense Inspector General, *The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts for the C-5 Aircraft*, February 7, 2017, pp. 7, 8.

<https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>

¹¹² Department of Defense Inspector General, *The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts for the C-5 Aircraft*, February 7, 2017, p. 8.

<https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>

¹¹³ Department of Defense Inspector General, *The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts for the C-5 Aircraft*, February 7, 2017, p. 10.

<https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>

¹¹⁴ Department of Defense Inspector General, *U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price Was*, March 11, 2016, p. i. <https://media.defense.gov/2016/Mar/11/2001714219/-1/-1/1/DODIG-2016-059.pdf>

Was (March 11, 2016)	engine sustainment services for FY 2012 through FY 2014 without knowing whether it paid a fair and reasonable price.” ¹¹⁵ But DoD IG had previously estimated the Air Force would pay \$3.76 billion over the next 7 years. ¹¹⁶	safeguards to protect the data so that the Air Force could not obtain and use data in pending contract negotiations.” ¹¹⁷
Defense Logistics Agency Did Not Appropriately Determine Fair and Reasonable Prices for F108 Engine Sole-Source Commercial Parts (February 16, 2016)	“The contracting officer did not request or obtain additional data necessary to determine if the maximum value contract price of nearly \$1 billion was fair and reasonable” on the sole-source commercial contract. ¹¹⁸	“The contracting officer did not request additional data to support CFM’s proposed prices prior to acceptance. ... CFM officials informed her multiple times they did not have cost data. Therefore, the contracting officer assumed she would not receive cost data if she requested the information.” ¹¹⁹ The contracting officer also stated that she did not request the data “because she would have to elevate any denials, adding time to the contract award process. Further, the contracting officer stated that she was not willing to miss her

¹¹⁵ Department of Defense Inspector General, *U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price Was*, March 11, 2016, p. v. <https://media.defense.gov/2016/Mar/11/2001714219/-1/-1/1/DODIG-2016-059.pdf>

¹¹⁶ Department of Defense Inspector General, *U.S. Air Force May Be Paying Too Much For F117 Engine Sustainment*, December 22, 2014, p. iv. <http://www.pogoarchives.org/straus/dodig-f117engine-20150224.pdf>

¹¹⁷ Department of Defense Inspector General, *U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price Was*, March 11, 2016, p. 1. <https://media.defense.gov/2016/Mar/11/2001714219/-1/-1/1/DODIG-2016-059.pdf>

¹¹⁸ Department of Defense Inspector General, *Defense Logistics Agency Did Not Appropriately Determine Fair and Reasonable Prices for F108 Engine Sole-Source Commercial Parts*, February 16, 2016, p. i. [https://media.defense.gov/2018/Nov/08/2002061137/-1/-1/1/DODIG-2016-047%20\(REDACTED\).PDF](https://media.defense.gov/2018/Nov/08/2002061137/-1/-1/1/DODIG-2016-047%20(REDACTED).PDF)

¹¹⁹ Department of Defense Inspector General, *Defense Logistics Agency Did Not Appropriately Determine Fair and Reasonable Prices for F108 Engine Sole-Source Commercial Parts*, February 16, 2016, p. 13. [https://media.defense.gov/2018/Nov/08/2002061137/-1/-1/1/DODIG-2016-047%20\(REDACTED\).PDF](https://media.defense.gov/2018/Nov/08/2002061137/-1/-1/1/DODIG-2016-047%20(REDACTED).PDF)

		contract award milestones.” ¹²⁰
<i>Defense Logistics Agency Aviation Generally Purchased Sole-Source Spare Parts From the General Electric Company at Fair and Reasonable Prices, but Improvements Could Be Made (July 24, 2015)</i>	<p>While prices were largely fair and reasonable, “the contracting officer did not adequately support the commercial item determinations</p> <p>[including missteps related to prior commercial determinations] for sole-source spare parts. ... As a result, the contracting officer may not obtain the appropriate cost or pricing data required to develop an effective bargaining position during future negotiations.”¹²¹</p>	“The contracting officer requested that GE provide other-than-certified cost or pricing data,” which was obtained. ¹²²
<i>Improvements Needed on DoD Procurements from Robertson Fuel Systems (June 25, 2015)</i>	“Contracting officers applied the commercial item definition to items procured on Robertson sole-source contracts without evidence of commercial sales and without evidence that the item was of a type customarily used by the general public. This inhibited the contracting officers’ ability to develop an effective bargaining position and gave the contractor significant control in contract negotiations. In addition, DoD	“Contracting officers did not request, or Robertson refused to provide, other-than-certified cost or pricing data to support fair and reasonable price determinations. ... After Robertson refused to provide additional cost data to support price reasonableness, ACC contracting officials elevated one contract to the Director, Defense Pricing.” The

¹²⁰ Department of Defense Inspector General, *Defense Logistics Agency Did Not Appropriately Determine Fair and Reasonable Prices for F108 Engine Sole-Source Commercial Parts*, February 16, 2016, p. 14.

[https://media.defense.gov/2018/Nov/08/2002061137/-1/-1/1/DODIG-2016-047%20\(REDACTED\).PDF](https://media.defense.gov/2018/Nov/08/2002061137/-1/-1/1/DODIG-2016-047%20(REDACTED).PDF)

¹²¹ Department of Defense Inspector General, *Defense Logistics Agency Aviation Generally Purchased Sole-Source Spare Parts From the General Electric Company at Fair and Reasonable Prices, but Improvements Could Be Made*, July 24, 2015, p. 4. <https://media.defense.gov/2015/Jul/24/2001714150/-1/-1/1/DODIG-2015-153.pdf>

¹²² Department of Defense Inspector General, *Defense Logistics Agency Aviation Generally Purchased Sole-Source Spare Parts From the General Electric Company at Fair and Reasonable Prices, but Improvements Could Be Made*, July 24, 2015, pp. 6, 10-11. <https://media.defense.gov/2015/Jul/24/2001714150/-1/-1/1/DODIG-2015-153.pdf>

	did not obtain the necessary data to determine if the \$77 million it spent on these contracts was fair and reasonable.” ¹²³	Director was able to get the company to provide additional information. ¹²⁴
<i>Defense Logistics Agency Did Not Obtain Fair and Reasonable Prices for Meggitt Aircraft Braking Systems for Sole-Source Commercial Spare Parts (May 8, 2015)</i>	Contracting officers relied on previous contract prices and did not adequately document that parts were commercial. “As a result, DLA potentially overpaid ... approximately \$8.5 million of \$17 million paid for 32 sole-source commercial spare parts reviewed. In addition, DLA may overpay as much as \$70.5 million on 47 of 51 parts over the remaining term of the contract. When projected across the contract for all 5 years, DLA will overpay approximately \$106.8 of \$294.9 million.” ¹²⁵	“The contracting officer stated he did not request cost data from the MABS companies to further support the proposed prices of specific parts because the MABS companies had historically refused to provide cost data to DoD to support their commercial parts prices.” ¹²⁶
<i>U.S. Air Force May be Paying Too Much for F117 Engine Sustainment (December 22, 2014)</i>	Pratt and Whitney refusing to provide information to evaluate F117 engine sustainment services meant the Air Force “does not know whether the \$1.54 billion already spent ... or if the estimated billions of dollars it intends to spend over	“[Air Force] contracting officials repeatedly requested commercial sales and cost data to support the price for F117 engine sustainment services. Pratt and Whitney repeatedly refused to provide it. To assist [Air Force]

¹²³ Department of Defense Inspector General, *Improvements Needed on DoD Procurements from Robertson Fuel Systems*, June 25, 2015, p. i. <https://media.defense.gov/2015/Jun/25/2001713514/-1/-1/1/DODIG-2015-137.pdf>

¹²⁴ Department of Defense Inspector General, *Improvements Needed on DoD Procurements from Robertson Fuel Systems*, June 25, 2015, p. 11. <https://media.defense.gov/2015/Jun/25/2001713514/-1/-1/1/DODIG-2015-137.pdf>

¹²⁵ Department of Defense Inspector General, *Defense Logistics Agency Did Not Obtain Fair and Reasonable Prices for Meggitt Aircraft Braking Systems for Sole-Source Commercial Spare Parts*, May 8, 2015, p. i. <https://media.defense.gov/2015/May/08/2001713503/-1/-1/1/DODIG-2015-120.pdf>

¹²⁶ Department of Defense Inspector General, *Defense Logistics Agency Did Not Obtain Fair and Reasonable Prices for Meggitt Aircraft Braking Systems for Sole-Source Commercial Spare Parts*, May 8, 2015, p. 17. <https://media.defense.gov/2015/May/08/2001713503/-1/-1/1/DODIG-2015-120.pdf>

the next 7 years is a fair and reasonable price.”¹²⁷ The F117 engine sustainment contract was sole-source and commercial.¹²⁸

contracting officials, senior DoD and AF leadership requested this data but were also unsuccessful.”¹²⁹ The IG also found that “Pratt and Whitney’s unwillingness to provide requested sales and cost data exploited the sole-source situation and may have resulted in the AF paying unreasonable prices for F117 engine sustainment services.”¹³⁰ When asked by the IG for cost data, Pratt and Whitney refused, arguing that such data could be used by the Air Force in forthcoming negotiations and requested that the IG not release its report until those negotiations concluded. The company also did not comply with a subpoena issued by the IG.¹³¹

Naval Supply Systems Command Needs to Improve Cost Effectiveness of Purchases for the

In a sole-source commercial item contract, the IG found that the Navy “may be overpaying Raytheon. In addition ... [The Navy] cannot quantify the work Raytheon performed for the

”Raytheon could not provide [unit price] data because of deficiencies in its accounting system and inability to track costs at the piece part level.”¹³³

¹²⁷ Department of Defense Inspector General, *U.S. Air Force May Be Paying Too Much For F117 Engine Sustainment*, December 22, 2014, p. i. <https://media.defense.gov/2014/Dec/22/2001713454/-1/-1/1/DODIG-2015-058.pdf>

¹²⁸ Department of Defense Inspector General, *U.S. Air Force May Be Paying Too Much For F117 Engine Sustainment*, December 22, 2014, p. i. <https://media.defense.gov/2014/Dec/22/2001713454/-1/-1/1/DODIG-2015-058.pdf>

¹²⁹ Department of Defense Inspector General, *U.S. Air Force May Be Paying Too Much For F117 Engine Sustainment*, December 22, 2014, p. 12. <https://media.defense.gov/2014/Dec/22/2001713454/-1/-1/1/DODIG-2015-058.pdf>

¹³⁰ Department of Defense Inspector General, *U.S. Air Force May Be Paying Too Much For F117 Engine Sustainment*, December 22, 2014, p. 14. <https://media.defense.gov/2014/Dec/22/2001713454/-1/-1/1/DODIG-2015-058.pdf>

¹³¹ Department of Defense Inspector General, *U.S. Air Force May Be Paying Too Much For F117 Engine Sustainment*, December 22, 2014, p. 14. <https://media.defense.gov/2014/Dec/22/2001713454/-1/-1/1/DODIG-2015-058.pdf>

¹³³ Department of Defense Inspector General, *Naval Supply Systems Command Needs to Improve Cost Effectiveness of Purchases for the Phalanx Close-In Weapon System*, December 19, 2014, p. 11. <https://media.defense.gov/2018/Jul/23/2001945902/-1/-1/1/DODIG-2015-053.PDF>

<i>Phalanx Close-In Weapon System (December 19, 2014)</i>	\$69.6 million spent on the current performance-based logistics contract.” “Overall, our price-reasonableness analysis identified that [the Navy] would have potentially overpaid approximately \$17.8 million net.” ¹³²	
<i>Air Force Life Cycle Management Center’s Management of F119 Engine Spare Parts Needs Improvement (December 19, 2014)</i>	The Air Force may have been overcharged for \$2.3 million in “obsolete spare parts,” on a sole-source, 10-year contract to provide parts for the F119. ¹³⁴	Pratt and Whitney could not provide prices for 4,433 spare parts in the Air Force’s central repository or 6,186 parts in its operating base level inventory. ¹³⁵
<i>Military Sealift Command Oversight of Excess Spare-Parts Inventory and Purchases for Sealift Program Roll-On/Roll-Off Ships Needs Improvement</i>	Military Sealift Command “did not ensure that Patriot Contract Services (PCS) had acceptable justifications for 13 spare-parts purchases not adequately competed. ... MSC potentially overpaid for parts procured without adequate competition and paid about \$63,674 more than [the Defense Supply System] price	“MSC’s failure to review PCS’s justification for the inadequate competition increased the risk that MSC paid more than necessary.” ¹³⁷

¹³² Department of Defense Inspector General, *Naval Supply Systems Command Needs to Improve Cost Effectiveness of Purchases for the Phalanx Close-In Weapon System*, December 19, 2014, p. i,6.

<https://media.defense.gov/2018/Jul/23/2001945902/-1/-1/1/DODIG-2015-053.PDF>

¹³⁴ Department of Defense Inspector General, *Air Force Life Cycle Management Center’s Management of F119 Engine Spare Parts Needs Improvement*, December 19, 2014, pp. 2, 15. <https://www.muckrock.com/foi/united-states-of-america-10/dod-ig-air-force-life-cycle-management-centers-management-of-f119-engine-spare-parts-needs-improvement-15265/#file-52893>

¹³⁵ Department of Defense Inspector General, *Air Force Life Cycle Management Center’s Management of F119 Engine Spare Parts Needs Improvement*, December 19, 2014, p. 38. <https://www.muckrock.com/foi/united-states-of-america-10/dod-ig-air-force-life-cycle-management-centers-management-of-f119-engine-spare-parts-needs-improvement-15265/#file-52893>

¹³⁷ Department of Defense Inspector General, *Military Sealift Command Oversight of Excess Spare-Parts Inventory and Purchases for Sealift Program Roll-On/Roll-Off Ships Needs Improvement*, September 9, 2014, p. 16. <https://media.defense.gov/2014/Sep/09/2001713398/-1/-1/1/DODIG-2014-106.pdf>

(September 9, 2014)	for 28 of 76 parts purchased.” ¹³⁶	
<i>Defense Logistics Agency Aviation Potentially Overpaid Bell Helicopter for Sole-Source Commercial Spare Parts (July 3, 2014)</i>	“DLA potentially overpaid Bell about \$9 million on 33 of 35 sole-source commercial spare parts reviewed. ... DLA may overpay as much as \$2.6 million over the next 12 months on future orders under this contract.” ¹³⁸ Potential overpayments were the result of the contracting officer not sufficiently determining whether the prices were fair and reasonable. ¹³⁹ Cost data was supplied to the IG only after a subpoena was issued to Bell, a power that isn’t available to the contracting officer.	“The Director [of the Defense Logistics Agency] explained that Bell has consistently refused to provide cost data for commercial parts; therefore, DLA does not believe they have the ability to obtain cost data.” ¹⁴⁰
<i>Defense Logistics Agency and Maritime Paid Too Much for High Mobility Multipurpose Wheeled Vehicle</i>	In a sole-source commercial contract “contracting officials paid an additional \$26.3 million for escalation [labor] rates that were not supported” or request cost data before purchasing \$563.2 million in parts. AM General credited DoD \$1.62	Contracting officers did not request sales or cost data to analyze price reasonableness, instead relying on other “primary and secondary” sources. ¹⁴²

¹³⁶ Department of Defense Inspector General, *Military Sealift Command Oversight of Excess Spare-Parts Inventory and Purchases for Sealift Program Roll-On/Roll-Off Ships Needs Improvement*, September 9, 2014, p. i.

<https://media.defense.gov/2014/Sep/09/2001713398/-1/-1/1/DODIG-2014-106.pdf>

¹³⁸ Department of Defense Inspector General, *Defense Logistics Agency Aviation Potentially Overpaid Bell Helicopter for Sole-Source Commercial Spare Parts*, July 3, 2014, p. i.

http://www.pogoarchives.org/strauss/reports/fouo_dodig_2014_088_dla_aviation_bell_helicopter.pdf

¹³⁹ Department of Defense Inspector General, *Defense Logistics Agency Aviation Potentially Overpaid Bell Helicopter for Sole-Source Commercial Spare Parts*, July 3, 2014, p. 4.

http://www.pogoarchives.org/strauss/reports/fouo_dodig_2014_088_dla_aviation_bell_helicopter.pdf

¹⁴⁰ Department of Defense Inspector General, *Defense Logistics Agency Aviation Potentially Overpaid Bell Helicopter for Sole-Source Commercial Spare Parts*, July 3, 2014, p. 16.

http://www.pogoarchives.org/strauss/reports/fouo_dodig_2014_088_dla_aviation_bell_helicopter.pdf

¹⁴² Department of Defense Inspector General, *Defense Logistics Agency Land and Maritime Paid Too Much for High Mobility Multipurpose Wheeled Vehicle Repair Parts*, April 4, 2014, Summary.

http://s3.amazonaws.com/fcmd/documents/documents/000/003/787/original/MacAndrews_and_Forbes_-_Humvee_Parts_Audit_DODIG_SUMMARY.pdf?1430853901

Repair Parts (April 4, 2014)	million for overpayments related to \$1.5 million in overpayments for parts. ¹⁴¹	
Ontic Engineering and Manufacturing Overcharged the Defense Logistics Agency for Sole-Source Spare Parts (February 15, 2014)	“DLA paid approximately \$8 million more than is fair and reasonable for 21 sole-source spare parts [and] will spend approximately \$11 million more than is fair and reasonable over the next 5 years if no change is made.” ¹⁴³	“DLA contracting officials did not obtain fair and reasonable prices for sole-source spare parts purchased from Ontic for 21 parts, valued at \$26.2 million,” instead relying on “previous DoD purchase prices without determining the price reasonableness of the historical prices.” ¹⁴⁴ “Negotiations spanned 14 months and eventually were elevated to the DLA Division Chief and Ontic’s Director of Contracts, because Ontic failed to provide requested cost and pricing data in a timely manner. ... DLA determined the price was not fair and reasonable but was the best attainable price and that further delays in awarding the contract jeopardized the readiness level of the CH-53 Sea Stallion helicopter.” ¹⁴⁵

¹⁴¹ Department of Defense Inspector General, *Defense Logistics Agency Land and Maritime Paid Too Much for High Mobility Multipurpose Wheeled Vehicle Repair Parts*, April 4, 2014, Summary.

http://s3.amazonaws.com/fcmd/documents/documents/000/003/787/original/MacAndrews_and_Forbes_-_Humvee_Parts_Audit_DODIG_SUMMARY.pdf?1430853901

¹⁴³ Department of Defense Inspector General, *Ontic Engineering and Manufacturing Overcharged the Defense Logistics Agency for Sole-Source Spare Parts*, February 15, 2014, p. i.

<https://media.defense.gov/2016/Apr/20/2001774183/-1/-1/1/DODIG-2014-110.pdf>

¹⁴⁴ Department of Defense Inspector General, *Ontic Engineering and Manufacturing Overcharged the Defense Logistics Agency for Sole-Source Spare Parts*, February 15, 2014, p. 3.

<https://media.defense.gov/2016/Apr/20/2001774183/-1/-1/1/DODIG-2014-110.pdf>

¹⁴⁵ Department of Defense Inspector General, *Ontic Engineering and Manufacturing Overcharged the Defense Logistics Agency for Sole-Source Spare Parts*, February 15, 2014, p. 17.

<https://media.defense.gov/2016/Apr/20/2001774183/-1/-1/1/DODIG-2014-110.pdf>

<p><i>Air Force Life Cycle Management Center Could Not Identify Actual Cost of F119 Engine Spare Parts Purchased From Pratt and Whitney (February 10, 2014)</i></p>	<p>A version of the report released to the <i>Dayton Daily News</i> reported the Air Force could not determine if it paid Pratt and Whitney fair and reasonable prices for F-22 Raptor engine parts as part of a sole-source cost-plus-fee \$1.6 billion sustainment contract.¹⁴⁶</p>	<p>”The [Air Force] requests and receives all cost or pricing data from Pratt and Whitney required to complete negotiations. However, the [Air Force] contracting officers did not take full advantage of the provided cost or pricing data, because [they] focused their negotiations on quantities of F119 engine spare parts rather than unit prices. ... The contracting officers relied on full engine costs previously negotiated on a prior production contract rather than negotiating individual unit costs of F119 engine spare parts.”¹⁴⁷</p>
<p><i>U.S. Army Contracting Command Did Not Obtain Fair and Reasonable Prices for Communications Equipment (December 5, 2013)</i></p>	<p>“[Army Contracting Command] potentially overpaid up to \$3.3 million for communications equipment purchased for the Afghan National Security Forces,” because the contracting officer didn’t “obtain fair and reasonable prices” or “most favored</p>	<p>“The [Contracting Officer] assigned during the pre-award process requested commercial sales data from Datron for 298 items but accepted that Datron only provided data for 23 items.”¹⁴⁹ For 40 of 75 that had commercial customers, the government did not pay the lower commercial price.</p>

¹⁴⁶ Barrie Barber, “Defense department report questions amount spent on F-22 spare parts,” *Dayton Daily News*, October 10, 2014. <https://www.daytondailynews.com/news/local-military/defense-department-report-questions-amount-spent-spare-parts/eai6LD0mTSRWGwb6nY48DI/>; Department of Defense Inspector General, *Air Force Life Cycle Management Center Could Not Identify Actual Cost of F119 Engine Spare Parts Purchased from Pratt and Whitney*, February 10, 2014, p. 2. https://docs.pogo.org/document/2019/DOD+IG+report_searchable2.pdf

¹⁴⁷ Department of Defense Inspector General, *Air Force Life Cycle Management Center Could Not Identify Actual Cost of F119 Engine Spare Parts Purchased from Pratt and Whitney*, February 10, 2014, p. 6. https://docs.pogo.org/document/2019/DOD+IG+report_searchable2.pdf

¹⁴⁹ Department of Defense Inspector General, *U.S. Army Contracting Command Did Not Obtain Fair and Reasonable Prices for Communications Equipment*, December 5, 2013, p. 5. <https://media.defense.gov/2013/Dec/05/2001713324/-1/-1/1/DODIG-2014-020.pdf>

	customer price on 40 of 75 commercial sales items.” ¹⁴⁸	For one part, this resulted in an overpayment of \$614,258.50 for manpack transceivers. ¹⁵⁰
<i>Improved Guidance Needed to Obtain Fair and Reasonable Prices for Sole-Source Spare Parts Procured By the Defense Logistics Agency From The Boeing Company (June 7, 2013)</i>	“DLA Aviation paid approximately \$13.7 million in excess of fair and reasonable prices” on 1,469 delivery orders valued at \$27.2 million for sole-source spare parts. ¹⁵¹ The IG stated, “If prices are not corrected, DLA Aviation will continue to overpay on future sole-source spare parts procured from Boeing.” ¹⁵²	DLA did not require its officers to conduct fair and reasonable price analyses, nor require reviews of pricing for long-term contracts. Boeing did not maintain complete cost and pricing data “because DLA Aviation contracting officers did not conduct adequate contract oversight as required by the FAR.” ¹⁵³
<i>Pricing and Escalation Issues Weaken the Effectiveness of the Army Contract with Sikorsky to Support the Corpus Christi Army Depot</i>	“Sikorsky charged the Army \$11.8 million or 51.4 percent more ... than fair and reasonable for 28 parts. If prices are not corrected [Army] officials will pay excessive profits of approximately \$16.6 million over the remaining 2 years of the contract.” ¹⁵⁴ This	“Pricing problems also occurred because Sikorsky officials proposed, and AMCOM officials accepted, questionable cost or pricing data that had no relationship to the actual price Sikorsky negotiated with its subcontractors.”

¹⁴⁸ Department of Defense Inspector General, *U.S. Army Contracting Command Did Not Obtain Fair and Reasonable Prices for Communications Equipment*, December 5, 2013, p. i.

<https://media.defense.gov/2013/Dec/05/2001713324/-1/-1/1/DODIG-2014-020.pdf>

¹⁵⁰ Department of Defense Inspector General, *U.S. Army Contracting Command Did Not Obtain Fair and Reasonable Prices for Communications Equipment*, December 5, 2013, p. 8.

<https://media.defense.gov/2013/Dec/05/2001713324/-1/-1/1/DODIG-2014-020.pdf>

¹⁵¹ Department of Defense Inspector General, *Improved Guidance Needed to Obtain Fair and Reasonable Prices for Sole-Source Spare Parts Procured By the Defense Logistics Agency From The Boeing Company*, June 7, 2013, p. i.

<https://media.defense.gov/2017/Oct/31/2001835927/-1/-1/1/DODIG-2013-090.PDF>

¹⁵² Department of Defense Inspector General, *Improved Guidance Needed to Obtain Fair and Reasonable Prices for Sole-Source Spare Parts Procured By the Defense Logistics Agency From The Boeing Company*, June 7, 2013, p. 4.

<https://media.defense.gov/2017/Oct/31/2001835927/-1/-1/1/DODIG-2013-090.PDF>

¹⁵³ Department of Defense Inspector General, *Improved Guidance Needed to Obtain Fair and Reasonable Prices for Sole-Source Spare Parts Procured By the Defense Logistics Agency From The Boeing Company*, June 7, 2013, pp. 3, 4.

<https://media.defense.gov/2017/Oct/31/2001835927/-1/-1/1/DODIG-2013-090.PDF>

¹⁵⁴ Department of Defense Inspector General, *Pricing and Escalation Issues Weaken the Effectiveness of the Army Contract with Sikorsky to Support the Corpus Christi Army Depot*, September 8, 2011, p. i.

<https://media.defense.gov/2011/Sep/08/2001712905/-1/-1/1/11-104redacted.pdf>

(September 8, 2011)	contract was for “noncompetitive spare parts.” ¹⁵⁵ Sikorsky agreed to refund \$1 million for certain overpriced spare parts in this case.	Additionally, “Sikorsky officials proposed, and [Army] officials accepted, questionable cost or pricing data that had no relationship to the actual price Sikorsky negotiated with its subcontractors.” ¹⁵⁶
<i>Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract with Boeing to Support the Corpus Christi Army Depot (May 3, 2011)</i>	“Boeing charged the Army about \$13 million or 131.5 percent more (\$23 million versus \$10 million) than fair and reasonable prices for the 18 parts. During the audit, Boeing issued the Army a credit for \$324,616 for one of the defectively priced parts. After [the IG] issued the draft report, Boeing provided additional refunds of about \$1.3 million.” ¹⁵⁷	“Neither the Army nor Boeing officials performed adequate cost or price analyses to establish the reasonableness of the proposed subcontract prices that were used to support negotiated prices. ... Boeing officials routinely proposed, and [Army] officials accepted, egregiously deficient cost or pricing data.” ¹⁵⁸ Boeing furnished outdated prices for quantities of one and “certified cost or pricing data that were not complete, accurate, and current at the time of the material certification cutoff date (seven parts).” ¹⁵⁹

¹⁵⁵ Department of Defense Inspector General, *Pricing and Escalation Issues Weaken the Effectiveness of the Army Contract with Sikorsky to Support the Corpus Christi Army Depot*, September 8, 2011, p. 4.

<https://media.defense.gov/2011/Sep/08/2001712905/-1/-1/1/11-104redacted.pdf>

¹⁵⁶ Department of Defense Inspector General, *Pricing and Escalation Issues Weaken the Effectiveness of the Army Contract with Sikorsky to Support the Corpus Christie Army Depot*, September 8, 2011, p. 4.

<https://media.defense.gov/2011/Sep/08/2001712905/-1/-1/1/11-104redacted.pdf>

¹⁵⁷ Department of Defense Inspector General, *Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract with Boeing to Support the Corpus Christi Army Depot*, May 3, 2011, p. i.

<https://assets.documentcloud.org/documents/204808/full-unredacted-dod-office-of-inspector-general.pdf>

¹⁵⁸ Department of Defense Inspector General, *Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract with Boeing to Support the Corpus Christi Army Depot*, May 3, 2011, p. 26.

<https://www.documentcloud.org/documents/204808-full-unredacted-dod-office-of-inspector-general>

¹⁵⁹ Department of Defense Inspector General, *Excess Inventory and Contract Pricing Problems Jeopardize the Army Contract with Boeing to Support the Corpus Christi Army Depot*, May 3, 2011, p. 26.

<https://www.documentcloud.org/documents/204808-full-unredacted-dod-office-of-inspector-general>

<p>Lean Six Sigma Project – Defense Logistics Agency/Honeywell Long-Term Contract Model Using One-Pass Pricing for Sole-Source Parts (February 18, 2011)</p>	<p>In a sole-source spare parts contract, repricing based on advice from DLA Cost/Price, DoD IG, DCAA, and DECMA led to being able to reduce prices by about \$9.5 million or 9.4 percent for future procurements.¹⁶⁰</p>	<p>The price reduction was due to access to Honeywell sales data as well as other pricing data.¹⁶¹</p>
<p>Procuring Noncompetitive Spare Parts Through an Exclusive Distributor (February 6, 2008)</p>	<p>“DoD contracting officers were unable to effectively negotiate prices or obtain best value for noncompetitive spare parts procured through Dutch Valley Supply. As a result, DoD paid about \$3.0 million (75.0 percent) more than the fair and reasonable prices for 33 parts that cost about \$6.9 million. ... If problems are not addressed, DoD will pay about \$17.8 million more than fair and reasonable prices for the same items over the next 6 years.”¹⁶²</p>	<p>“Dutch Valley Supply did not negotiate prices proposed by single-source manufacturers unless DoD contracting officers questioned the reasonableness of the price.”¹⁶³ “DoD contracting officers primarily relied on ineffective tools such as price analysis, cost analysis of dealer costs, and dealer competition to support price reasonableness decisions.”¹⁶⁴</p>

¹⁶⁰ Department of Defense Inspector General, *Lean Six Sigma Project – Defense Logistics Agency/Honeywell Long-Term Contract Model Using One-Pass Pricing for Sole-Source Parts*, p. i <https://media.defense.gov/2011/Feb/18/2001712196/-1/-1/1/D-2011-042.pdf>; Department of Defense Inspector General, *Semiannual Report to the Congress*, October 1, 2010–March 31, 2011, p. 97. <https://www.dodig.mil/Portals/48/Documents/SAR/SAR-1-oct-2010-31-mar-2011.pdf?ver=2017-02-02-152055-667>

¹⁶¹ Department of Defense Inspector General, *Lean Six Sigma Project – Defense Logistics Agency/Honeywell Long-Term Contract Model Using One-Pass Pricing for Sole-Source Parts*, pp. 8, 15 <https://media.defense.gov/2011/Feb/18/2001712196/-1/-1/1/D-2011-042.pdf>

¹⁶² Department of Defense Inspector General, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, February 6, 2008, pp. i-ii. <https://media.defense.gov/2008/Feb/06/2001713062/-1/-1/1/08-048.pdf>

¹⁶³ Department of Defense Inspector General, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, February 6, 2008, p. 8. <https://media.defense.gov/2008/Feb/06/2001713062/-1/-1/1/08-048.pdf>

¹⁶⁴ Department of Defense Inspector General, *Procuring Noncompetitive Spare Parts Through an Exclusive Distributor*, February 6, 2008, p. 4. <https://media.defense.gov/2008/Feb/06/2001713062/-1/-1/1/08-048.pdf>

<p><i>Procurement of Propeller Blade Heaters for the C-130 Aircraft (August 27, 2007)</i></p>	<p>“We calculate [DoD] could have achieved cost savings of about \$2 million for the Air Force and the taxpayer, if the blade heater requirement had been competed when two approved sources became available. We also calculate that the Air Force will pay \$1 million more than necessary.”¹⁶⁵</p>	<p>“Sundstrand refused to negotiate catalog prices for commercial items based on price analysis of previous cost-based prices, refused to provide DLA contracting officers with ‘uncertified’ cost or pricing data for commercial catalog items, and terminated Government access to the Sundstrand cost history system.”¹⁶⁶</p>
<p><i>Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation (September 29, 2006)</i></p>	<p>DoD paid prices “significantly higher than the prices paid by some commercial customers,” including \$15.05 for a straight pin sold to others for \$3.88 and \$85.02 for an insulation sleeve that had previously cost \$8.51.¹⁶⁷ The \$860 million sole-source commercial item contract was for a period of nine years.¹⁶⁸ The IG found questionable commercial item determinations on “basically all” spare parts that exempted Hamilton Sundstrand from submitting cost or pricing</p>	<p>The IG said it had “fundamental differences” with the Air Force’s commercial pricing strategy, specifically that it was inappropriate to “enter into or proceed with a strategic supplier initiative with a contractor that refuses to provide DoD contracting officers cost information when requested.”¹⁷¹ The result was that the DoD was “forced to rely primarily on price analysis of previous Government prices that had been determined not to be</p>

¹⁶⁵ Department of Defense Inspector General, *Procurement of Propeller Blade Heaters for the C-130 Aircraft*, August 27, 2007, p. ii. <https://media.defense.gov/2007/Aug/27/2001711995/-1/-1/1/07-119.pdf>

¹⁶⁶ Department of Defense Inspector General, *Procurement of Propeller Blade Heaters for the C-130 Aircraft*, August 27, 2007, p. 33. <https://media.defense.gov/2007/Aug/27/2001711995/-1/-1/1/07-119.pdf>

¹⁶⁷ Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006, pp. 37, 41. <https://www.documentcloud.org/documents/6140126-DoD-IG-Report-Hamilton-Sundstrand.html>

¹⁶⁸ Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006, p. i. <https://www.documentcloud.org/documents/6140126-DoD-IG-Report-Hamilton-Sundstrand.html>

¹⁷¹ Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006, p. iii. <https://www.documentcloud.org/documents/6140126-DoD-IG-Report-Hamilton-Sundstrand.html>

	<p>data.¹⁶⁹ The IG stated, “This strategy places the Government at high risk of paying excessive prices and profits and precludes good fiduciary responsibility for DoD funds.”¹⁷⁰</p>	<p>fair and reasonable by DLA and on previous audits.”¹⁷²</p>
<p><i>Spare Parts Procurements from TransDigm, Inc. (February 23, 2006)</i></p>	<p>“This audit was initiated in response to a Defense Hotline allegation that AeroControlex was charging the Defense Logistics Agency excessive prices and using the commercial item definition to avoid the Federal requirement to provide cost or pricing data.”¹⁷³ The IG stated that if the “problems are not addressed, the Defense Logistics Agency will pay about \$31.8 million more than fair and reasonable prices for the same items over the next 6 years.”¹⁷⁴</p>	<p>“After the commercial determination was made, AeroControlex refused to provide more detailed cost data to support the substantial price increase.”¹⁷⁵ “When contracting officers requested information other than cost or pricing data to support substantial price increases, TransDigm routinely refused to provide the requested data.”¹⁷⁶</p>

¹⁶⁹ Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006, p. i. <https://www.documentcloud.org/documents/6140126-DoD-IG-Report-Hamilton-Sundstrand.html>

¹⁷⁰ Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006, pp. ii. <https://www.documentcloud.org/documents/6140126-DoD-IG-Report-Hamilton-Sundstrand.html>

¹⁷² Department of Defense Inspector General, *Commercial Contract for Noncompetitive Spare Parts With Hamilton Sundstrand Corporation*, September 29, 2006, p. 15. <https://www.documentcloud.org/documents/6140126-DoD-IG-Report-Hamilton-Sundstrand.html>

¹⁷³ Department of Defense Inspector General, *Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. i. <https://media.defense.gov/2018/Oct/10/2002049899/-1/-1/1/D-2006-055.PDF>

¹⁷⁴ Department of Defense Inspector General, *Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. 3. <https://media.defense.gov/2018/Oct/10/2002049899/-1/-1/1/D-2006-055.PDF>

¹⁷⁵ Department of Defense Inspector General, *Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, pp. 10-11. <https://media.defense.gov/2018/Oct/10/2002049899/-1/-1/1/D-2006-055.PDF>

¹⁷⁶ Department of Defense Inspector General, *Spare Parts Procurements from TransDigm, Inc.*, February 23, 2006, p. 15. <https://media.defense.gov/2018/Oct/10/2002049899/-1/-1/1/D-2006-055.PDF>

Chart B: Major Changes to Obtaining Fair and Reasonable Cost Information

Policy Change	Impact
Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. Law 103-355)	Reduced oversight on a large number of government purchases, in part by undermining the Truth in Negotiations Act (TINA), later renamed the Truthful Cost or Pricing Data statute, requirements to submit accurate cost or pricing data. The law created an exception to supplying cost or pricing data for “commercial items that are sold in substantial quantities to the general public.”
Clinger-Cohen Act (Federal Acquisition Reform Act of 1996) (Pub. Law 104-106)	Further relaxed acquisition oversight and expanded the definition of, and exemptions available to, so-called "commercial items." ¹⁷⁷ Specifically, the law exempted all commercial items, not only those sold in substantial quantities.
Sec. 831, FY 2013 National Defense Authorization Act (NDAA) (Pub. Law 112-239)	Required the Department of Defense (DoD) to issue guidance on commercial items, which included looking at previous prices, policies for requesting uncertified cost information, and banning a request for additional cost information if there are “sufficient non-Government sales to establish reasonableness of price.”

¹⁷⁷ For more analysis see Project On Government Oversight, *Pick Pocketing The Taxpayer: The Insidious Effects of Acquisition Reform*, March 11, 2002. <https://www.pogo.org/report/2002/03/pick-pocketing-taxpayer-insidious-effects-of-acquisition-reform/>

Sec. 815, FY 2015 NDAA (Pub. Law 113-291)	Allowed DoD to use simplified acquisition procedures for “commercial items.” The simplified acquisition threshold at the time was \$150,000. ¹⁷⁸
Sec. 851, FY 2016 NDAA (Pub. Law 114-92)	Required DoD to create a publicly available database to oversee the making of commercial item determinations. The law also promoted using prior commercial item determinations and placed burdens on contracting officers who did not abide by a prior commercial item determination.
Sec. 852, FY 2016 NDAA (Pub. Law 114-92)	Significantly restricted a contracting officer’s ability to obtain actual cost or pricing information on major weapon systems. ¹⁷⁹
Sec. 853, FY 2016 NDAA (Pub. Law 114-92)	Locked the DoD into paying past prices regardless of whether they are fair and reasonable, and made it burdensome for contracting officers to challenge price reasonableness.
Sec. 855, FY 2016 NDAA (Pub. Law 114-92)	Reconfirmed the need for market research for commercial items. It also mandated that officials could not enter into “a contract in excess of the simplified acquisition threshold for information technology products or services that are not commercial items unless the head of the agency determines in writing that no commercial items are suitable to meet the agency’s needs,” establishing a strong preference for commercial items and adding burdens on government officials.
Sec. 856, FY 2016 NDAA (Pub. Law 114-92)	Limited the ability of contracting officers to increase protections for taxpayers by converting commercial item contracts to Federal Acquisition Regulation (FAR) Part 15 (noncommercial)

¹⁷⁸ Federal Acquisition Regulation, Subpart 2.101 (defining “Simplified acquisition threshold”), December 26, 2014. https://www.acquisition.gov/sites/default/files/archives/pdf/FAR_22.pdf

¹⁷⁹ The DoD’s former pricing czar wrote of the change, “Obtaining cost data is a last resort,” and a contracting officer can only request it after exhausting information on similar items, prices for alternatives, or any other information other than certified pricing information from the company performing work for the DoD. Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 93. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

	contracts. For procurements above \$100 million, the head of contracting has to provide approval.
Sec. 857, FY 2016 NDAA (Pub. Law 114-92)	Commercial items and services provided by nontraditional defense contractors may be treated as commercial, opening up DoD to additional awards without cost or pricing information.
Sec. 872, FY 2017 NDAA (Pub. Law 114-328)	Allowed contractors to provide “information or analysis” of the value of a commercial item for determining price reasonableness, rather than cost and pricing data. ¹⁸⁰
Sec. 873, FY 2017 NDAA (Pub. Law 114-328)	Removed public access to commercial item determination information.
Sec. 874, FY 2017 NDAA (Pub. Law 114-328)	Provided express language that certain laws, including “defense-unique” laws and contract clauses, are not applicable to commercial items, promoting a hands-off position on commercial buying. The term “defense-unique” wasn’t defined in the law, increasing the risk of buying products and services that have no commercial market without knowing if the price is fair or reasonable.
Sec. 875, FY 2017 NDAA (Pub. Law 114-328)	Promoted so-called commercial buying by requiring the DoD to use commercial or non-governmental standards in lieu of military standards and specifications. Military specifications can only be used when the commercial standard isn’t “cost effective.”
Sec. 876, FY 2017 NDAA (Pub. Law 114-328)	Established a preference for commercial services, which is now codified at 10 U.S.C. § 2377 and 41 U.S.C. § 3307, and has been enforced by a federal court. ¹⁸¹

¹⁸⁰ “The so-called ‘value based pricing’ concepts are no more than an industrial code word for unfettered price gouging....We found no evidence in any of the visits with those companies that they rely on ‘value based’ pricing.” Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group, Inc.*, February 25, 2019, p. 91. <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>

¹⁸¹ *Palantir USG, Inc. v. U.S.*, No. 17-1465, USCA Fed. Cir. (September 13, 2018). http://www.ca9.uscourts.gov/sites/default/files/Palantir_17-1465.Opinion.9-13-18.pdf

Sec. 877, FY 2017 NDAA (Pub. Law 114-328)	Exempted contractors from providing information on price reasonableness for items valued at less than \$10,000 that will be used in the performance of multiple DoD contracts.
Sec. 878, FY 2017 NDAA (Pub. Law 114-328)	Prevented contracting officers from assessing whether services are offered at a fair and reasonable price if the contractor is a nontraditional defense contractor.
Sec. 805, FY 2018 NDAA (Pub. Law 115-91)	Increased the simplified acquisition threshold to \$250,000, which restricted DoD's access to certain cost or pricing data.
Sec. 811, FY 2018 NDAA (Pub. Law 115-91)	Prohibited contracting officers from obtaining certified cost and pricing data to prevent price gouging for purchases under \$2,000,000. Before this change was implemented, the DoD said increasing the thresholds was "unlikely to provide cost savings." ¹⁸² Additionally, the law permitted contractors to supply uncertified cost or pricing data rather than certified data.
Sec. 812, FY 2018 NDAA (Pub. Law 115-91)	Eliminated the requirement to provide cost and pricing information to show the government is paying a fair and reasonable price if the product is "similar" to another item deemed commercial, regardless of whether that item is the same. The provision also added a waiver of cost or pricing certification requirements.
Sec. 846, FY 2018 NDAA (Pub. Law 115-91)	Created an e-commerce portal for parts, which may have created a false impression of fair and reasonable prices.
Sec. 847, FY 2018 NDAA (Pub. Law 115-91)	Revised the definition of commercial to include nondevelopmental items developed exclusively at private expense and sold in substantial quantities on a competitive basis to multiple foreign governments. The expanding definition of

¹⁸² 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>

	commercial items inhibits contracting officers from obtaining information to determine if prices are fair and reasonable.
Sec. 848, FY 2018 NDAA (Pub. Law 115-91)	Locked the DoD into previous commercial item determinations regardless of whether that item is actually sold to the general public in like quantities, which increases the likelihood DoD will continue to buy, and be overcharged for, items that aren't actually commercial.
Sec. 836, FY 2019 NDAA (Pub. Law 115-232)	Separated commercial items into commercial products and commercial services.
Sec. 837, FY 2019 NDAA (Pub. Law 115-232)	Backdated laws, expanding the list of contract clauses that do not apply to commercial products and services to October 13, 1994. This provision promoted a hands-off approach to commercial product and service contracts. This provision also amended laws to mention "commercial products."
Sec. 838, FY 2019 NDAA (Pub. Law 115-232)	Waived competition requirements to determine price reasonableness if an item is purchased through an e-commerce portal and there is more than one supplier, even if it's actually a false market because there is only one company that manufactures the item.
Sec. 839, FY 2019 NDAA (Pub. Law 115-232)	Mandated a review of why contractor compliance laws and contract clauses do not exempt commercial products or services. This is an effort to further make commercial items free of pricing, labor, environmental, and transparency requirements that protect DoD and the public.