Acquisition Reform Working Group

November 29, 2011

Dear Senator:

On behalf of the Acquisition Reform Working Group (ARWG), we are writing to express our views and recommendations regarding a number of amendments proposed for consideration during the Senate floor debate on the National Defense Authorization Act (NDAA) for FY 2012 (S. 1867). As additional amendments are filed, ARWG may submit further views.

ARWG is comprised of the Aerospace Industries Association, American Council of Engineering Companies, American Council of Independent Laboratories, National Defense Industrial Association, Professional Services Council, TechAmerica, The Associated General Contractors of America, The Coalition for Government Procurement and the U.S. Chamber of Commerce. We represent thousands of small, mid-sized and large companies and hundreds of thousands of employees that provide goods, services and personnel to the government.

Detection and Avoidance of Counterfeit Electronic Parts (Carl Levin, et. al. #1092)

ARWG understands and shares the government's concerns about the inclusion of counterfeit electronic parts in Department of Defense (DoD) systems. However, we have a number of concerns and recommendations for improving Amendment 1092 introduced by Senator Levin, and others. ARWG is currently developing a position paper on Amendment 1092 and will send it as an addendum to this letter as soon as it is complete.

Limitation on Defense Contractor Compensation (Barbara Boxer, et. al. #1206)

ARWG opposes Amendment 1206, introduced by Senator Boxer, and others. This amendment would impose severe restrictions on the allowable costs for executive compensation and expand the scope of application to all employees of a company. Today, the allowable cost for executive compensation is determined based on a statutory formula and calculated annually by the Office of Federal Procurement Policy (OFPP), which compares compensation of companies operating in the commercial marketplace with federal contractors. If adopted, Amendment 1206 could force companies to reduce its employees' compensation; in turn, these shrinking salaries will make the defense sector less attractive to top talent, which could then negatively impact DoD missions. Defense companies must compete for talent with commercial companies, and considering that the market drives such compensation, costs—with the exception of the top five executives—should be based upon the "reasonableness" standard that has always existed. This effect would be further compounded by broadening the scope of application to cover *all* federal contractor employees; highly skilled innovators and technology experts would likely focus their skill sets on the commercial market, thus eliminating the government's ability to develop effective critical mission solutions.

Amendment 1206 also inappropriately eliminates the current formula used to establish the cap and instead arbitrarily limits it to the salary level of the President. Furthermore, when calculating compensation, contractors would have to include *total* employee compensation—including salary, bonuses and deferred compensation and compare it to *only* the salary of the President. To maintain

robust management capabilities across the private sector, compensation reimbursement levels in the industries supporting the federal government need to be effectively linked to the dynamics of compensation practices in the rest of private industry. ARWG therefore opposes tying the cap to any arbitrary fixed amount and instead recommends that OFPP be required to review the current formula and make publicly available any recommendations for altering the formula. Until that review is completed, ARWG opposes expanding the scope of the cap under current law. The Senate Armed Services Committee-approved version of the bill currently includes language that would expand the cap to cover all senior executives of a federal contractor. While ARWG does not necessarily support such an expansion, it will have less negative impact than Amendment 1206. However, if the current Senate language is retained, the definition of "senior executives" should be clarified and limited to those employees with direct profit and loss responsibilities for the corporate entity.

Limitation on Use of Cost-Type Contracts (John McCain #1249)

ARWG opposes Amendment 1249, introduced by Senator McCain. This amendment would implement prohibitions on the use of cost-type contracts for production at any stage under a major defense acquisition program (MDAP) and would create a strong, unjustified preference for the use of fixed-price development in such programs. Section 818 of the FY 2007 National Defense Authorization Act implemented a number of reforms, created additional restrictions on using cost-type contracts, and required written justification for why a cost-type contract is necessary. Amendment 1249 would add to those restrictions by prohibiting the use of cost-type contracts for any production of MDAPs, even early low-rate initial production, and requiring additional steps and Congressional reporting before entering into cost-type contracts for MDAP development. Amendment 1249 would likely result in greater use of fixed-price contracts in situation where their use is inappropriate and less beneficial to government in the long run. The amendment sends a message to DoD contracting officers that their use of cost-type contracts will be under additional scrutiny, even after a contracting officer has negotiated the obstacles that this amendment would establish. This would increase the likelihood that decisions will be made to enter into fixed-price contracts simply to avoid Congressional oversight, even if a cost-type contract would clearly be in the best interest of the taxpayer for the development program in question.

The reporting requirements in the amendment would further slow the acquisition process. Hence, ARWG recommends that the Senate not adopt Amendment 1249. However, if the amendment is adopted, ARWG advises that it be modified to allow the Under Secretary of Defense for Acquisition Technology and Logistics broad discretion to approve the use of cost-type contracts in appropriate situations; eliminate or reduce the reporting burden associated with the appropriate use of fixed-price development contracts; and state that any changes to the DoD acquisition regulations clearly emphasize that the changes be prospective in nature for new programs started after the effective date of any regulations implementing the requirements of the amendment.

Timely Payment of Small Business Concerns (Al Franken #1197)

ARWG opposes Amendment 1197, introduced by Senator Franken. This amendment would require prime contractors to pay small business subcontractors within thirty days of being paid by the federal government. Today, contractors do not pay subcontractors, regardless of size, until the contractor receives an accurate invoice and evidence that the work was performed. This amendment would eliminate any measure requiring that a small business subcontractor submit an accurate invoice or provide any evidence that it performed the requirements of the contracts in a satisfactory fashion. No current auditing standard could support such a standard.

Furthermore, this amendment is not needed because of similar provisions recently enacted. Last year, Congress passed the Small Business Jobs Act (the Jobs Act, P.L. 111-240). Section 1334 of the Jobs Act established the requirement that a prime contractor notify the contracting officer in writing whenever a payment to a subcontractor is reduced or is ninety days or more past due for goods or services provided for the contract and for which the federal agency has paid the contractor. The prime contractor also is required to include in the written notice the reason for the reduction in payment or the failure to pay a subcontractor. The contracting officer must consider the prime contractor's unjustified untimely or reduced price payments to subcontractors when evaluating the prime contractor's performance. As required by the Jobs Act, the contracting officer must record the identity of a prime contractor with a history of unjustified, untimely payments to subcontractors in the Federal Awardee Performance Information and Integrity System (FAPIIS). Furthermore, this amendment fails to recognize that there may be situations in which a small business subcontractor fails to provide necessary invoice documents, thus delaying its payment for reasons solely attributable to the subcontractor.

The Small Business Administration (SBA) has already issued proposed rules implementing these provisions. ARWG recommends that, at the very least, Congress allow SBA to finish its rulemaking process, allow for the companion Federal Acquisition Regulatory (FAR) Council to make any needed changes to the FAR based on the SBA rulemaking, and allow time to assess how the Jobs Act provisions are working.

Fighting Fraud to Protect Taxpayers (Patrick Leahy #1186)

ARWG opposes Amendment 1186, introduced by Senator Leahy. The amendment, while identical to the S. 890 favorably reported by the Senate Judiciary Committee on May 19, 2011—without a written report—purports to "protect taxpayers", the amendment actually is a significant expansion of the authority of the Secret Service to conduct commercial activities for undercover operations, creates new federal crimes and creates a new revolving fund that circumvents the appropriations process. CBO estimates that the bill would cost $70 million under the "pay-go" rules. While ARWG does not take a position on the substantive provisions in the bill, the NDAA should not be the vehicle for the consideration of this non-germane legislation.

Additional Definition Relating to Production of Specialty Metals Within the United States (Sherrod Brown #1262)

ARWG opposes Amendment 1262 introduced by Senator Sherrod Brown. This amendment would rewrite the definition of the term "produced" as it relates to specialty metals at a time when the Department of Defense has this very issue under review at the direction of the House and Senate Armed Services Committees (see Sec. 823, National Defense Authorization Act for Fiscal Year 2011, Pub. L. 111-383). ARWG believes that the current definition of "produced" has undergone considerable review within DoD and that there is no evidence to suggest that current law is unworkable or unreasonable. On the other hand, there will be significant turmoil if there is yet another interim change to a complex, yet successful and balanced, approach to protecting domestic specialty metals capabilities. It would make little sense for the Senate to prejudge the outcome of a DoD review that Congress directed by adopting this amendment, which would both preempt that review and dictate an outcome that favors a single segment of the specialty metals industry. There is no evidence to suggest that this amendment is predicated on any analysis or that the pending DoD review would result in an outcome unfavorable to the steel constituency Senator Brown represents. The SMART Coalition respectfully urges the Committee to avoid the parochialism reflected in the amendment and to permit DoD to complete its review in accordance with existing Congressional direction.

Public-Private Competition for Conversion of Department of Defense Functions to Performance by Contractors (Scott Brown # 1088)

ARWG supports Amendment 1088, introduced by Senator Scott Brown. The amendment would lift the temporary moratorium on public-private competitions, which was implemented through Section 325 of the FY 2010 National Defense Authorization Act. Section 325 temporarily suspended the authority to initiate public-private competitions until (1) the Secretary of Defense provided a report to Congress on the conduct of such competitions; (2) the Comptroller General conducted an assessment of the report; and (3) the Secretary of Defense certified the Department's compliance with certain manpower requirements. On June 28, 2011, DoD submitted the required report and the Government Accountability Office (GAO) published its assessment on September 26, 2011. This amendment strikes the certification requirement in Section 325. Language similar to Amendment 1088 is included in the House-passed version of the NDAA. ARWG strongly believes that DoD should have all the tools available to it to manage a multi-sector workforce; public-private competitions are one such tool that allows DoD to inject greater competition and efficiencies into its workforce management decisions.

Small Business Innovative Research Program/Small Business Technology Transfer Program (Landrieu #1115)

ARWG supports Amendment 1115, introduced by Senator Landrieu. The SBIR and STTR are essential to ensuring that small businesses may continually invest in research and development, resulting in job creation and innovative solutions for the federal government. The inability to enact a long-term authorization of the program has led to its instability and questions within industry about whether SBIR is viable. ARWG supports reauthorizing the SBIR and STTR programs.

Expedited Hiring Authority for Defense Information Technology/Cyber Workforce (Gillibrand #1187)

ARWG supports Amendment 1187, introduced by Senator Gillibrand. Amendment 1187 provides temporary authority for DoD to use expedited hiring authority procedures to on-board critical skills for information technology or cyber capabilities because of a shortage of candidates or a critical hiring need. ARWG recognizes DoD's need to build its cyber workforce and the challenges of hiring such persons through the "regular" government hiring process. ARWG also supports the reporting requirement and the sunset provision in the amendment.

Secretary of Defense Assessment of Independent Commission to Reform Federal Acquisition Rules (Inhofe #1340)

ARWG supports Amendment 1340 introduced by Senator Inhofe. The proliferation of acquisition regulations and policies increases the cost of goods, services and solutions to the government, serves as a barrier to entry to the government marketplace for new entrants, and creates an adversarial environment between buyers and suppliers. This amendment could lead to the creation of an independent commission to simplify federal acquisition rules and guidance.

While ARWG supports the amendment, we offer the following recommendations to improve it:

Sec. 889(a) "Findings" should be updated to reflect the following facts:

- There are over 600 separate statutory provisions affecting acquisitions in the Department of Defense;

- Between January 1 and November 21, 2011, there have been 19 proposed, 9 interim and 53 final DoD-unique FAR rules plus an additional 9 proposed, 13 interim; and 24 final government-wide FAR rules.

Sec. 889(b) should be amended to affirmatively require DoD to establish the independent commission, not merely assess the feasibility and advisability of launching such a panel. The findings clearly suggest that such a commission is needed. Hence, ARWG recommends that Sec. 899(b) be rewritten to read as follows:

> "(1) ESTABLISHMENT- Not later than 180 days after the date of enactment of this Act, the Under Secretary of Defense for Acquisition, Technology and Logistics shall establish under the sponsorship of the Defense Acquisition University an advisory panel on reforming, streamlining and codifying acquisition regulations and processes.
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> (2) MEMBERSHIP- The panel shall be composed of at least nine individuals who are recognized experts in acquisition laws and procurement policy. In making appointments to the advisory panel, the Under Secretary shall ensure that the members of the panel reflect diverse experiences in the public and private sectors. At least two members shall be academics from the private sector, two members shall be appointed from Industry and five shall be appointed from government, at least one of which shall be from the civilian agencies.
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> (3) DUTIES- The panel shall--
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> > (i) Complete a comprehensive review of current Federal and Defense acquisition rules affecting defense acquisition.
> > (ii) Address the history, rationale and effects of the proliferation of the documents, rules, and regulations relating to the Federal and Defense acquisition process.
> > (iii) Analyze the impact of current Federal and Defense acquisition rules on increasing open competition, small business participation, and execution of contracts.
> > (iv) Analyze the impact of current Federal and Defense acquisition rules on warfighter access to the latest technologies and weapon systems.
> > (v) Make such recommendations as the panel considers appropriate regarding potential changes to statutes, regulations, executive orders, OMB memoranda and directives, regulations, and procedures relating to the Federal and Defense acquisition process.
> > (vi) Conduct a cost analysis of the existing Federal and Defense acquisition regulatory and policy system on defense acquisitions to include internal administrative costs and the fully burdened cost to industry in implementing and complying with regulations and policies.
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> (4) REPORT- Not later than 720 days after the date of enactment of this Act, the advisory panel shall transmit a final report on the actions of the panel to the Under Secretary of Defense for Acquisition, Technology and Logistics.
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> > (i) The final report shall contain a detailed statement of the findings and conclusions of the panel, the proposed codification of acquisition policies prepared pursuant to subsection (b), and such additional recommendations for such legislation as the Panel considers appropriate.

(ii) The Secretary of Defense shall transmit the final report of the Under Secretary of Defense for Acquisition, Technology and Logistics, together with such comments as he deems appropriate, to the congressional defense committees not later than 60 days after the advisory panels submits the final report.