



Acquisition Reform Working Group
Recommendations on H.R. 2511
Defense Acquisition Streamlining and Transparency Act
(Rep. Thornberry, May 18, 2017)
June 14, 2017

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About the Acquisition Reform Working Group

The Acquisition Reform Working Group (ARWG) is comprised of the Aerospace Industries Association; Associated Builders and Contractors, Inc; American Council of Engineering Companies; Financial Executives International’s Committee on Government Business; Information Technology Alliance for the Public Sector; National Defense Industrial Association; Professional Services Council; 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.

Should you have questions about these comments, perspectives and recommendations, please contact Cate Benedetti of the Professional Services Council at benedetti@pscouncil.org or 703-875-8059.

Section 102: Performance of Incurred Cost Audits

Recommendation:

ARWG supports the provision with modifications.

Discussion:

ARWG supports the objective of Section 102 of H.R. 2511, the Defense Acquisition Streamlining and Transparency Act, which relates to the performance of incurred cost audits. The section would:

- Require the Secretary of Defense to adhere to commercial standards for risk and materiality when auditing costs incurred under cost-type contracts;
- Add a section 820(b)(1)(f) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328) to transfer requirements related to auditing indirect costs and consolidate provisions on incurred cost auditing;
- Authorize contract management personnel in the Department to choose either the Defense Contract Audit Agency (DCAA) or a qualified private auditor (QPA) to audit incurred costs, require QPAs to audit at least 25 percent of incurred costs after September 1, 2020, require DCAA to pass a peer review by a commercial auditor, and prohibit DCAA from further auditing or reviewing audits performed by QPAs and would require the Secretary to treat DCAA and QPA audits equally.
- Specify a materiality standard for incurred cost audits based on private sector norms, for both DCAA and QPAs and require the Department to review private sector materiality standards every five years;
- Require incurred cost audits to be completed within one year after receipt of qualified cost submissions, or the submissions would be accepted in their entirety, unless the Department could demonstrate that the contractor withheld information necessary to perform the reconciliation audit.
- Direct the Comptroller General to conduct a report by April 1, 2025, on the relative timeliness, costs, and quality of incurred cost audits performed by DCAA and QPAs.

ARWG commends the Committee for addressing incurred cost audits and believes this is a strong step in the right direction to implementing efficient audit management and emphasizing audit practices and standards that are accepted by other audit groups without shifting significant risk to the Government. However, ARWG suggested the following edits to further clarify the language pertaining to incurred cost audits, what will constitute a “qualified” incurred cost submission and the language on the materiality exception as outlined below.

Suggested language:

SEC. 102. PERFORMANCE OF INCURRED COST AUDITS.

(a) IN GENERAL.—

(1) PERFORMANCE OF INCURRED COST AUDITS.—Chapter 137 of title 10, United States Code, is amended by inserting after section 2313a the following new section:

“§ 2313b. Performance of incurred cost audits

“(a) COMPLIANCE WITH STANDARDS OF RISK AND MATERIALITY.—For purposes of performing an incurred cost audit of costs associated with a contract of the Department of Defense, the Secretary of Defense shall comply with commercially accepted standards of risk and materiality.

“(b) AUDITS OF INDIRECT COSTS.—Notwithstanding any other provision of law, a contractor of the Department of Defense may present, and the Secretary of Defense shall accept without performing additional audits or reviews, a summary of audit findings on indirect costs of the contractor that were prepared by a commercial auditor if—

“(1) the contractor does not have a majority predominance of U.S. Government cost-type contracts as a percentage of total sales from all customers (U.S. Government and Non-U.S. Government) ~~from the contractors segments to whom the incurred costs audited would be charged directly or indirectly;~~

“(2) the commercial auditor previously performed an audit of the allowability, measurement, assignment to accounting periods, and allocation of indirect costs of the contractor; and

“(3) such audit was performed using relevant commercial ~~accounting-auditing~~ standards (such as Generally Accepted ~~Accounting Auditing Principles Standards~~) established by the Public Company Accounting Oversight Board (PCAOB), ~~for the~~ commercial auditing industry for the relevant accounting period.

“(c) SELECTION OF AUDITING ENTITY TO PERFORM INCURRED COST AUDITS.—(1) For an incurred cost audit of a contract of the Department of Defense for which an indirect cost audit has not been performed pursuant to subsection (b), the Defense Contract Management Agency or a contract administration office of a military department shall have the authority to select the Defense Contract Audit Agency or a ~~commercial qualified private~~ auditor to perform an incurred cost audit, based upon guidelines that—

“(A) are issued by an audit planning committee that is comprised of one representative from each of the office of the Under Secretary of Defense for Acquisition and Sustainment, the Defense Contract Management Agency, a contract administration office of a military department, and the Defense Contract Audit Agency;

“(B) ensures that, after September 1, 2020, not less than 25 percent of incurred costs are audited by qualified private auditors;
and

“(C) ensures that multi-year auditing is conducted only to address any backlog of incurred cost audits of the Defense Contract Audit Agency in existence on the date of the enactment of this section.

“(2)(A) Not later than September 1, 2020, the Secretary of Defense shall award an indefinite delivery-indefinite quantity task order contract to two or more qualified private auditors to perform incurred cost audits of costs associated with contracts of the Department of Defense.

“(B) The Defense Contract Management Agency, a contract administration office of a military department, or the Defense Contract Audit Agency may issue a task order to perform an incurred cost audit to a qualified private auditor under a task order contract awarded under subparagraph (A). Such task order may be issued only to a qualified private auditor that certifies that pursuant to relevant commercial auditing standards, such as Generally Accepted Auditing Standards established by the Public Company Accounting Oversight Board (PCAOB), the qualified private auditor has no conflict of interest in performing such an audit.

“(C) The Defense Contract Audit Agency may not conduct further audit or review of ~~an~~ incurred costs nor an incurred cost audit where an audit was performed by a qualified private auditor pursuant to this section.

“(3)(A) Effective September 1, 2022, the Defense Contract Audit Agency may issue unqualified audit findings for an incurred cost audit only if the Defense Contract Audit Agency is peer reviewed by a commercial auditor and passes such peer review.

“(B) The peer review referred to in subparagraph (A) shall occur not less frequently than once every three years.

“(4) The Secretary of Defense shall consider the results of an incurred cost audit performed under this section without regard to whether the Defense Contract Audit Agency or a qualified private auditor performed the audit.

“(5) The contracting officer for a contract that is the subject of an incurred cost audit shall have the sole discretion to accept or reject an audit finding on direct costs of the contract.

“(d) MATERIALITY STANDARDS FOR INCURRED COST AUDITS.—(1) Not later than September 1, 2020, and except as provided in paragraph (2), the minimum materiality standard used by an auditor shall—

“(A) for an incurred cost audit of costs in an amount less than or equal to \$100,000 be 4 percent of ~~such costs~~ the total Incurred Cost Proposal value;

“(B) for an incurred cost audit of costs in an amount greater than \$100,000 but less than \$500,000, be \$2,000 plus 2 percent of ~~such costs~~the total Incurred Cost Proposal value;

“(C) for an incurred cost audit of costs in an amount greater than \$500,000 but less than \$1,000,000, be \$5,000 plus 1 percent of ~~such costs~~the total Incurred Cost Proposal value;

“(D) for an incurred cost audit of costs in an amount greater than \$1,000,000 but less than \$5,000,000, be \$8,000 plus 0.9 percent of ~~such costs~~the total Incurred Cost Proposal value;

“(E) for an incurred cost audit of costs in an amount greater than \$5,000,000 but less than \$10,000,000, be \$13,000 plus 0.8 percent of ~~such costs~~the total Incurred Cost Proposal value;

“(F) for an incurred cost audit of costs in an amount greater than \$10,000,000 but less than \$50,000,000, be \$23,000 plus 0.7 percent of ~~such costs~~the total Incurred Cost Proposal value;

“(G) for an incurred cost audit of costs in an amount greater than \$50,000,000 but less than \$100,000,000, be \$73,000 plus 0.6 percent of ~~such costs~~the total Incurred Cost Proposal value;

“(H) for an incurred cost audit of costs in an amount greater than \$100,000,000 but less than \$500,000,000, be \$153,000 plus 0.52 percent of ~~such costs~~the total Incurred Cost Proposal value;
and

“(I) for an incurred cost audit of costs in an amount greater than \$500,000,000, be \$503,000 plus 0.45 percent of ~~such costs~~the total Incurred Cost Proposal value.

“(2) An auditor that performs an incurred cost audit under this section may use a materiality standard of a lesser amount than the materiality standard described under paragraph (1) with respect to a particular qualified incurred cost submission from a contractor based on an assessment of risk presented by such qualified incurred cost submission when the cognizant Defense Contract Management Agency (DCMA) Contracting Officer approves the lesser materiality amount. The risk shall be assessed by the auditor in accordance with generally accepted government auditing standards and guidance issued by the Secretary of Defense.

“(3) Not later than September 1, 2020, and every 5 years thereafter, the Secretary of Defense shall submit to the congressional defense committees a report on commercially accepted standards of risk and materiality for performing incurred cost audits. The report ~~may~~shall contain recommendations to modify the materiality standards under paragraph (1) ~~to be~~ consistent if necessary to maintain consistency with such commercially accepted standards of risk and materiality.

“(e) TIMELINESS OF INCURRED COST AUDITS.—(1) The Secretary of Defense shall ensure that all incurred cost audits performed pursuant to subsection (c) are performed in a timely manner.

“(2) The Secretary of Defense shall notify a contractor within 30 days after receipt of an incurred cost submission from the contractor whether the submission is a qualified incurred cost submission.

“(3) Audit findings shall be issued for an incurred cost audit not later than one year after the date of receipt of a qualified incurred cost submission.

“(4) If audit findings are not issued within one year after the date of receipt of a qualified incurred cost submission, such qualified incurred cost submission shall be considered accepted in its entirety unless the Secretary of Defense can demonstrate that the contractor unreasonably withheld information necessary to perform the incurred cost audit.

“(f) REVIEW OF AUDIT PERFORMANCE.—Not later than April 1, 2025, the Comptroller General of the United States shall provide a report to the congressional defense committees that evaluates for the period beginning on 19 September 1, 2020, and ending on August 31, 2023—

“(1) the timeliness, individual cost, and quality of incurred cost audits, set forth separately by incurred cost audits performed by the Defense Contract Audit Agency and by qualified private auditors;

“(2) the cost to contractors of the Department of Defense for incurred cost audits, set forth separately by incurred cost audits performed by the Defense Contract Audit Agency and by qualified private auditors;

“(3) the effect, if any, on other types of audits conducted by the Defense Contract Audit Agency that results from incurred cost audits conducted by qualified private auditors; and

“(4) the capability and capacity of commercial auditors to conduct incurred cost audits for the Department of Defense.

“(g) DEFINITIONS.—In this section:

“(1) The term ‘commercial auditor’ means a private entity engaged in the business of performing audits.

“(2) The term ‘incurred cost audit’ means an audit of charges to the Government by a contractor under a cost-type contract or a contract that is not a fixed-price contract.

“(3) The term ‘materiality standard’ means a dollar amount of misstatements, including omissions, contained in an incurred cost audit that would be material if the misstatements, individually or in the aggregate, could reasonably be expected to influence the economic decisions of the Government made on the basis of the incurred cost audit.

“(4) The term ‘qualified incurred cost submission’ means a submission by a contractor of costs incurred under a cost-type contract or a contract that is not a fixed-price contract that has been qualified by the Department of Defense as sufficient to conduct an incurred cost audit. An incurred cost submission is qualified when it includes the appropriate components from the following list: the following components if applicable:

- (A) Summary of all claimed indirect expense rates, including pool, base and calculated indirect rate.
- (B) General and Administrative expenses (final indirect cost pool). Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts).
- (C) Overhead expenses (final indirect cost pool). Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) for each final indirect cost pool.
- (D) Occupancy expenses (intermediate indirect cost pool). Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) and expense reallocation to final indirect cost pools.
- (E) Claimed allocation bases, by element of cost, used to distribute indirect costs.
- (F) Facilities Capital Cost of Money factors computation.
- (G) Reconciliation of books of account (i.e., General Ledger) and claimed direct costs by major cost element.
- (H) Schedule of direct costs by contract and subcontract and applied indirect expense.
- (I) Certificate of final indirect costs.

“(5) The term ‘qualified private auditor’ means a commercial auditor—

“(A) that performs audits in accordance with generally accepted government auditing standards of the Comptroller General of the United States; and

“(B) that has been peer reviewed, consistent with commercially accepted peer review processes, and has passed such peer review.”.

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2313a the following new item:

“2313b. Performance of incurred cost audits.”.

(b) CONFORMING AMENDMENT.—Section 190 of title 10, United States Code, as proposed to be added by section 820(b)(1) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114–328; 130 Stat. 2274), is amended by striking subsection (f).

Section 103. Modifications to **Certified** Cost or Pricing Data and Reporting Requirements

Objective:

The House Armed Services Committee is committed to reducing wasteful spending and eliminating bureaucratic obstacles.

Solution:

Increase TINA threshold to \$5.0M

Congress wants DoD to reduce contractor overhead:

Last year, the NDAA set a goal for DoD to reduce the amount of money contractors spend on bid and proposal costs, suggesting that B&P costs are an area of wasteful spending. To date, the Department has not taken any action. Yet, as reported in a 2015 DoD study, in a sole source environment ranging from \$700k to \$5M TINA compliance related proposal costs is estimated to account for 50-60% of total B&P costs which are roughly 2-3% of contract value.

Changing TINA threshold would reduce overhead:

Increasing the TINA threshold would significantly reduce B&P costs without reducing DoD's visibility into higher risk contracts. One large defense contractor reports that changing the threshold from \$2.5M to \$5.0M would decrease the number of TINA submitted proposals by 50%. Another prime contractor reports a 25% reduction in the number of TINA submitted proposals. In another example where a contractor had 450 first tier subcontractors, 266 subcontracts or 60% of the subcontracts were worth less than \$750,000, another 347 subcontracts or 77% were worth less than \$2.5M, and another 385 proposals or 85% were worth less than \$5.0M. Yet, the remaining 65 subcontracts (450 minus 385) reflect 90% of the subcontractor costs. A focused review on the highest value 65 subcontracts make most sense.

Transactional cost savings and cost-benefit:

There is a huge transactional cost for both the government and industry for every purchase order subject to TINA. Not only is it the cost to gather and audit the detailed data, but also the cycle time to conduct the transactions. Negotiation of a sole source contract can take years. A single subcontract or purchase order averages six months. Increasing the TINA threshold could remove months from this process. This would improve cycle times for getting under contract and getting capability to the warfighter. The enormity of the costs and impact has to be weighed against the risk, and used for the highest risk proposals. The number of covered proposals can be reduced significantly while retaining a high percentage of dollars covered by TINA.

DoD has many oversight tools:

The title of this provision should be modified to read "Modifications to *certified* cost or pricing data and reporting requirements." There will still be many competitive awards and awards subject to TINA. Even for those that would no longer be subject to TINA, the government has many tools to assure price reasonableness through market research and access to other than cost and pricing data. Many of the contractors that would have additional purchase orders exempted would still be subject to business system reviews giving DoD access into the integrity of the contractor's systems.

DoD has failed to implement pilot program testing efficacy of raising TINA threshold to \$5M:

Discussions about acquisition reform typically center on the proper balance of risk. Section 899 of the FY15 NDAA authorized DoD to conduct a pilot program to test the efficacy of raising the TINA threshold to \$5M. The Department had an opportunity to identify to Congress the potential negative impact of an increase to the TINA threshold but failed to do so. Congress should now take action and demand a risk based approach to contracting by raising the threshold to \$5M.

Industry must submit price proposals that can be audited but they are not:

Industry often feels that DoD has an insatiable appetite for data but in turn does not utilize the provided information in a meaningful way. To demonstrate, in 2015, DCAA completed 26 TINA audits. DoD demands certified auditable data but does not audit this data in any meaningful way.

SEC. 103. MODIFICATIONS TO COST OR PRICING DATA AND REPORTING REQUIREMENTS.

(a) Modifications to Submissions of Cost or Pricing Data.—

(1) Title 10.--Subsection (a) of section 2306a of title 10, United States Code, is amended—

(A) by striking ``December 5, 1990'' each place it appears and inserting ``June 30, 2018'';

(B) by striking ``December 5, 1991'' each place it appears and inserting ``July 1, 2018'';

(C) by striking ``\$100,000'' each place it appears and inserting ``\$750,000'';

(D) in paragraph (1)--

(i) in subparagraphs (A)(i), (B)(i), (C)(i), (C)(ii), and (D)(i), by striking ``\$500,000'' and inserting ``~~2,500,000~~ 5,000,000'';

and

(ii) in subparagraph (B)(ii), by striking ``\$500,000'' and inserting ``\$750,000'';

(E) in paragraph (6), by striking ``December 5, 1990'' and inserting ``June 30, 2018''; and

(F) in paragraph (7), by striking ``to the amount'' and all that follows through ``higher multiple of \$50,000.'' and inserting ``in accordance with section 1908 of title 41.''. .

(2) Title 41.--Section 3502 of title 41, United States Code, is amended—

(A) in subsection (a)--

(i) by striking ``October 13, 1994'' each place it appears and inserting ``June 30, 2018'';

(ii) by striking ``\$100,000'' each place it appears and inserting ``\$750,000'';

(iii) in paragraphs (1)(A), (2)(A), (3)(A), (3)(B), and (4)(A), by striking ``\$500,000'' and inserting ``~~2,500,000~~ 5,000,000''; and

(iv) in paragraph (2)(B), by striking ``\$500,000'' and inserting ``\$750,000'';

(B) in subsection (f), by striking ``October 13, 1994'' and inserting ``June 30, 2018''; and

(C) in subsection (g), by striking ``to the amount'' and all that follows through ``higher multiple of \$50,000.'' and inserting ``in accordance with section 1908.''. .

(b) Requirements for Defense Contract Audit Agency Report.—

(1) In general.--Section 2313a of title 10, United States Code, is amended--

(A) in subsection (a)(2)--

(i) in subparagraph (A)--

(I) by inserting ``and dollar value'' after ``number''; and

(II) by inserting `` , set forth separately by type of audit'' after ``pending'';

(ii) in subparagraph (C), by inserting `` , both from the date of receipt of a qualified incurred cost submission (as defined in section 2313b of this title) and from the date the audit begins'' after ``audit'';

(iii) by amending subparagraph (D) to read as follows:

``(D) the sustained questioned costs, set forth separately by type of audit, both as a total value and as a percentage of the total questioned costs for the audit;'';

(iv) by striking subparagraph (E); and

(v) by inserting after subparagraph (D) the following new subparagraphs:

``(E) the aggregate cost of performing audits, set forth separately by type of audit;

``(F) the ratio of sustained questioned costs to the aggregate costs of performing audits, set forth separately by type of audit; and

``(G) the total number and dollar value of audits that are pending for a period longer than one year as of the end of the fiscal year covered by the report, and the fiscal year in which the qualified submission was received, set forth separately by type of audit;'';

and

(B) by adding at the end the following new subsection:

``(d) Sustained Questioned Costs Defined.--The term `sustained questioned costs' means questioned costs that were recovered by the Federal Government as a result of contract negotiations related to such questioned costs.''.

(2) Exemption to report termination requirements.--Section 1080 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1000; 10 U.S.C. 111 note), as amended by section 1061(j) of the National Defense Authorization Act for Fiscal Year 2017 (Public Law 114-328), does not apply to the report required to be submitted to Congress under section 2313a of title 10, United States Code.

(c) Adjustment to Value of Covered Contracts for Requirements Relating to Allowable Costs.--Subparagraph (B) of section 2324(1)(1) of title 10, United States Code, is amended by striking ``to the equivalent'' and all that follows through ``higher multiple of \$50,000.''' and inserting ``in accordance with section 1908 of title 41.''.

Section 201: Requirement to Emphasize Reliability and Maintainability in Weapon System Design

Issue:

Prime contractors would be held strictly liable for a weapon system end item required to meet certain reliability and maintainability (R&M) requirements. This liability would continue for an indefinite period, even after government acceptance of the end item. Moreover, this liability for meeting R&M requirements could extend to fielded weapon systems- even though the prime contractor has no control over how the government sustains the end item or uses the end item operationally. Finally, prime contractors would be forced to assume this extended liability without the prospect of additional consideration.¹

Discussion:

Section 201(d) would upend settled law regarding the role of acceptance in transferring liability from the contractor to the government. Traditionally, inspection- to include testing- is the “primary means of ensuring that the government receives the quality of work for which it bargained.”² Acceptance of the end item by the government precludes further claims against the contractor for an end item that does not meet contractual requirements absent latent defects, fraud or an express warranty.³

By contrast, Section 201(d) would extend a contractor’s liability for a weapon system end item meeting R&M requirements well beyond the government’s acceptance of that end item. Specifically, Section 201(c) (3) mandates that the government will recoup value from the contractor if the end item fails to meet R&M requirements after a certain time. Section 201 (c)(4) gives the government program manager the authority to select the time when the end item’s performance will be measured against R&M requirements. Section 201(c)(4) envisions that this time may be after the end item is accepted, fielded and used operationally.

Section 201(d) would also expand the government’s rights under the latent defects doctrine. A “latent defect” is “a defect that exists at the time of acceptance but cannot be discovered by a reasonable inspection.”⁴ To prevail on a latent defect claim, the government must prove that:

- (1) a defect existed in the contractor’s work based on the specification, (2) the defect existed when the government accepted the work, (3) a reasonable inspection would not have revealed the defect, and (4) the defect caused injury to the government.⁵

¹ Cf. Discussion of criteria for use of warranties in FAR Subpart 46.7. Use of a warranty is “not mandatory.” FAR 46.703 specifically anticipates the cost of a warranty to the government in part as “the contractor’s charge for accepting deferred liability...”

² John Cibinic, Jr. *et. al.*, *Administration of Government Contracts*, 776 (CCH, 4th ed. 2006).

³ *Id* at 848-849. See also FAR 52.246-2(k) (“Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise specified in the contract.”)

⁴ FAR 2.101.

⁵ See *supra* note 2, at 850-851.

Of note, the government must show that the performance failure was actually caused by the defect.⁶ The courts have held that performance failures that occur by events after acceptance do not establish contractor liability.⁷ While Section 201(d) does not explicitly use that term, the idea of a latent defect is captured in the proposed remedies language that a contractor...“identifies the cause of failure in the system design, develops an engineering change, and ...modifies all end items to be delivered or already delivered under the contract.”

This remedies language in Section 201(d) does not condition the government’s ability to recoup value from a contractor on a showing that the contractor’s design defect actually caused the failure to meet R&M requirements. Instead the language would hold the contractor strictly liable for the end item’s failure to meet these R&M requirements. Moreover, Section 201(d) does not take into account the possibility of intervening events- including the government’s own actions- that may be the cause of the end item failing to meet these R&M requirements.

There are valid public policy reasons not to hold the contractor liable in this fashion. The R&M requirements developed through the Joint Capabilities Integration and Development System (JCIDS) process are tied to assumptions about how an end item will be used operationally. These assumptions are captured in the Operational Mode Summary/Mission Profile (OMS/MP). The OMS/MP “describes the operational tasks, events, durations, frequency and environment in which the materiel solution is expected to perform each mission and each phase of the mission.”⁸ As the Requirements Sponsor selects performance attributes for a proposed system, the Sponsor must consider whether the combination of these performance attributes are consistent with the OMS/MP.⁹ The OMS/MP is provided to the Program Manager (PM) and informs the PM’s decision about acquisition strategy, including lifecycle sustainment.¹⁰ The OMS/MP must also be provided to the Milestone Decision Authority (MDA) during milestone reviews as capabilities documents are reviewed and validated.¹¹ The OMS/MP is also typically provided to industry as part of the Request for Proposals.¹² This combination of requirements and assumptions form the basis of a contractor’s proposal including pricing and acceptance of risk.

Once an end item is delivered, this link between requirements and assumptions is severed. The warfighter may use or modify the end item operationally (e.g. addition of steel plate to HMMWVs in Iraq in 2003-2004 for IED protection) in a manner the contract did not specify nor the contractor anticipated. If the reliability of that end item suffers as a result of that use or modification, the contractor should not be held liable for the actions of the government. Similarly, the warfighter may sustain (or fail to sustain) the fielded end item with no involvement of the production contractor and in a manner not anticipated by the production contract or contractor. Many intervening causes- including poor logistics planning by

⁶ See supra note 2, at 861.

⁷ Id.

⁸ DODI 5000.02, Enclosure 1, Table 2.

⁹ See JCIDS Manual, Appendix A, Enclosure D, page D-A-6.

¹⁰ See DODI 5000.02, p. 19.

¹¹ See DODI 5000.02, Enclosure 1, Table 2.

¹² See DODI 5000.02, Enclosure 1, Table 2.

the government, spares/parts/test equipment shortages, DMSMS issues, poor CLS performance- may affect a fielded end item's maintainability performance. Again, the production contractor should not be held liable for the actions of the government or other contractors.

Additionally, while the use of R&M as an evaluation factor is not currently prohibited, its use as a significant factor or sub-factor in source selection for an MDAP as set forth in the proposed 10 U.S.C. 2442(c)(3) is fraught with complications stemming from an inherent inability for contracting personnel to objectively assess performance risk for end items beyond a reasonable length of time after acceptance simply from proposal representations about future performance. Unsubstantiated proposal assertions of long term performance to meet R&M evaluation criteria would undermine the source selection process, lead to poor decision making and create protracted bid protest litigation risk.

Recommendation:

- (1) The contract performance provision is unworkable. If implemented, this provision will lead to costly claims litigation, delays in providing weapons systems to the warfighter, and increased costs to the taxpayer. Strike the statutory change in Section 201(a) recommended as 10 U.S.C 2442(d) in its entirety.
- (2) Proposed subsection 10 U.S.C. 2442(c)(3) should be revised to require that any DFARS guidance on R&M as an evaluation factor or sub-factor be limited to objective criteria that can be validated through reliable metrics and not be based solely on representations about future performance without further proof.

Section 204: Improvement of Planning for Acquisition of Services

Issue:

This section requires the Secretary of Defense to ensure sufficient data are collected and analyzed to support the validation of requirements for services contracts and for DoD's planning, programming and budgeting processes, including taking into account DoD's available resources and total force management policies and procedures.

Beginning on October 1, 2022, the Secretary shall annually submit to Congress information on services contracts that clearly and separately identifies the amount requested for each category of services to be procured by each DoD activity, based on a common enterprise data structure developed by the Secretary.

In addition, each secretary of a military department, and the Secretary of Defense for the defense agencies, shall regularly analyze past spending patterns and anticipated future requirements for the procurement of services.

Each of the "Services Requirements Review Boards" (required to be established by DoD Instruction 5000.74 (1/5/16)) shall evaluate each requirement for a services contract, taking into consideration total force management policies, available resources, and the analyses required to be conducted.

Effective October 1, 2018, the Secretary of Defense shall ensure that a requirements owner shall plan for the need for a service to avoid the use of a bridge contract. On first use of a bridge contract of less than \$10 million, the requirements owner and contracting officer shall provide an update on the status of the bridge contract (including the rationale for using the bridge contract) to the commander or senior defense official for the activity. Upon first use of a bridge contract of greater than \$10 million, the requirements owner and contracting officer shall provide an update on the status of the bridge contract (including the rationale for using the bridge contract) to the military department senior acquisition executive or other named defense official, as appropriate. On second use of a bridge contract less than \$10 million, notice shall be provided to more senior designated officials.

Except for the analyses required above, other provisions of this section do not apply to contingency operations, humanitarian assistance or national security emergencies.

Discussion:

For the past several years, spending on services contracts has dominated the purchase of all goods and services in the department. ARWG supports the value of the department's buying activities planning for the use of their services contracts. In our view, the Department already does extensive planning for its services contracts and is required to do more as directed by DoD Instruction 5000.74. In addition, DoD already has a taxonomy for cataloging the nature of its services contracts and capturing the spend data within those categories. Finally, for the past four years Congress has imposed a cap on the total dollar value of all services contracts awarded by the Department, and in the FY17 NDAA imposed a cap on the total amount of services contracts awarded for staff augmentation.

Recommendation:

ARWG does not concur that bridge contracts are, by definition, a reflection of the failure to plan for follow on work. Occasionally, action outside the control of the buying activity compels such action, such as from a failure to get long-term stable funding early enough in the planning cycle or a third-party protest of a solicitation provision or an award decision. At a minimum, there should be exemptions (not requiring waivers) where funding or unknowable procurement-related problems create the need for a bridge contract.

Finally, given the wide variation of services contracts and the wide variation of the dollar value of such contracts, imposing even a reporting requirement on low dollar value bridge contracts will chill the smart use of appropriate bridge contracts by buying activities; this was borne out by the limited value of the Navy “trip wires” program that sought to constrain the use of bridge contracts.

We note that nothing in the provision covers the circumstance where the second use of a bridge contract is greater than \$10 million.

Section 301: Enhancements to the Civilian Program Management Workforce

Issue:

This section has three major subsections.

Subsection (a) requires the Secretary of Defense to implement, not later than June 1, 2019, a program manager development program for the professional development of experienced civilian personnel with the potential to become a program manager of an MDAP program. Within one year after enactment, the Secretary shall provide to the HASC and SASC a comprehensive plan to implement the program. The plan shall include twelve elements specified in this provision. The Acquisition Workforce Development Fund may be used to pay the base salary of personnel temporarily assigned to a development rotation or training program of at least six months duration.

Subsection (b) requires the Secretary of Defense, within one year after enactment, to establish a job series for program and project management in DoD, taking into account any regulations issued by OPM to implement the requirements of the government-wide program management activity enacted through Section 861 of the FY 17 NDAA to achieve consistency to the extent practicable.

Subsection (c) requires the Secretary of Defense, within 30 days after enactment, to enter into a contract with an independent research entity to carry out a comprehensive study of financial incentives for DoD MDAP program managers. The study shall include at least three specific elements provided in the subsection. A report on this study shall be provided to the Secretary within 9 months after enactment, and the Secretary shall report to the congressional defense committees not later than 30 days after receipt of the study report.

Discussion:

In the Chairman's introductory statement, he refers to concerns that some MDAP programs do not conduct enough development testing and recommends that the section would require DoD to evaluate the strategy for developing and expanding the use of tools that facilitate cost-effective developmental testing. Nothing in the bill as introduced addresses developing testing or expanding the tools available to facilitate such testing.

Recommendation:

ARWG supports the creation of a career job series for a DoD program and project managers, consistent with the government-wide program enacted last year. We recommend that the creation of the job series under subsection (b) be made effective no later than the start of the development program established under subsection (a). In addition, we recommend that the development program be available for significant DoD programs other than MDAP programs, as the Secretary may prescribe; for example, certain information technology or services contracts deserve experienced program manager leadership. Finally, ARWG sees the value of collecting the information under subsection (c) but does not support using an FFRDC to perform such work.

Section 302: Improvements to the Hiring and Training of the Acquisition Workforce

Issue:

Section 302 includes five provisions to improve the hiring and training of the DoD acquisition workforce.

Subsection (a) permits the use of funds from the Defense Acquisition Workforce Development Fund to be used to pay the salaries of personnel to manage the Fund, based on guidance to be issued by the Secretary of Defense within 180 days after enactment.

Subsection (b) requires that the Comptroller General, not later than January 15, 2019, to submit a report to the congressional defense committees on the effectiveness of hiring and retention flexibilities for the acquisition workforce.

Subsection (c) requires the Under Secretary for Acquisition and Sustainment, not later than December 31, 2018, to report to the defense congressional committees on an assessment of the effectiveness of industry certifications and training programs available to the defense acquisition workforce. The report shall address four elements specified in the provision.

Subsection (d) requires the Comptroller General, not later than January 15, 2019, to submit to the congressional defense committees a report on acquisition-related training for personnel working on acquisition matters but not considered part of the Department's formal acquisition workforce. The report shall address at least six elements specified in the provision.

Subsection (e) requires the Director of DCAA, within 180 days after enactment, to provide a briefing to the HASC and SASC relating to the DCAA workforce that addresses five elements specified in the provision.

Discussion:

ARWG concurs with the Chairman's statement that the hiring, training, and retention of highly qualified civilian defense acquisition personnel is vital to maintaining military readiness, increasing the department's buying power, and achieving substantial long-term savings. In addition, the Chairman's statement urges that planning for any workforce reduction affecting the civilian acquisition workforce take into consideration the potential long-term effects of those reductions on cost, technical baseline, and warfighting capability. However, nothing in this section addresses any of these issues. Rather, other than subsection (a), none of the provisions are immediately actionable. Much of the information included in subsection (e) is already included in the DCAA annual report to Congress. See http://www.dcaa.mil/DCAA_FY2016_Report_to_Congress.pdf at 4.

Recommendation:

While the information to be gained from the other reports can be helpful, and ARWG strongly supports increasing government-industry exchange programs and joint training sessions, the reports will take too long to compile and submit and thus will unnecessarily defer action by Congress or the department for another three years. We recommend significantly shortening the timeline for each of the required reports.

Section 303: Extension and Modifications to Acquisition Demonstration Project

Issue:

This section extends the current Acquisition Demonstration Project, which was first established in 1996, from its current sunset date of December 31, 2020 to a new date of December 31, 2023. In addition, the section requires the Secretary of Defense to develop an implementation strategy for major improvements in the demonstration project addressing at least five action elements specified in the section. Within one year after enactment, the Secretary shall brief the HASC and SASC on the implementation strategy.

Discussion:

The “AcqDemo” program has had a checkered history, with notable successes and some limitations. While the program primarily addresses a small portion of the department’s acquisition workforce, it was “tested” over the past ten years to determine whether its design could be replicated across a broader segment of the department’s workforce. There is no action required of the Secretary to implement the changes, but only to brief the committees on the implementation strategy. In its 2014 report on the program, RAND found retention of high-quality employees was 24 percent higher in the AcqDemo program versus that for similar employees in the GS pay plan.¹

Recommendation:

ARWG recommends that the Secretary first brief the committees on the implementation strategy within six months after enactment and, if approved, then plan to implement the strategy ninety days after the briefing. Congress should defer extending the AcqDemo program until FY19 to determine whether the program as then in effect should be continued as a pilot, made permanent, or terminated.

¹ See Guo C., Hall-Partyka P., Gates, S.M., Retention and Promotion of High-Quality Civil Service Workers in the Department of Defense Acquisition Workforce, (Santa Monica, CA: RAND Corporation, 2014) 70, RR748.

Section 304: Acquisition Positions in the Offices of the Secretaries of the Military Departments

Issue:

This section has three subsections identical in content applicable to each of the three military departments. Each subsection allows the cap on civilian employees within each military department to be exceeded in order to retain qualified acquisition personnel from OSD (AT&L) or the Joint Staff if the position is no longer required in OSD or the Joint Staff because of the restructuring required by the FY17 NDAA and that the position would not be filed in OSD or the Joint Staff.

Discussion:

Each of the military departments has a personnel ceiling on civilian employees. The FY16 NDAA mandated that more acquisition work be devolved from OSD to the military departments and major buying activities. In addition, the FY17 NDAA requires a restructuring of the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics. While the broad outlines of the Department's restructuring plan were announced, as of June 1, many of the details have not been announced. Thus, to ensure the department has flexibility in designing its implementation, this provision would allow for a waiver of the civilian employee cap for positions transferred from OSD to any one of the military departments.

Recommendation:

ARWG supports the provision but recommends that the exemption from the civilian employee cap remains for only a limited period of time for each service, such as three years.