

August 3, 2017

Senator John McCain
Chairman
Senate Armed Services Committee

Senator Jack Reed
Ranking Member
Senate Armed Services Committee

Dear Chairman McCain and Ranking Member Reed:

On behalf of the over 400 members of the Professional Services Council, I write today to convey PSC's position on several provisions contained in Titles VIII and IX of your Committee's Fiscal Year 2018 National Defense Authorization Act (S. 1519). I respectfully request that your Committee take the below concerns into account throughout this year's NDAA cycle until the legislation is signed into law.

PSC supports the following provisions:

SEC. 801 and SEC. 829: Sec. 801 would repeal Section 325 of the FY 2010 National Defense Authorization Act (P.L. 111-84), which imposed a "temporary" prohibition on the Department's authority to consider using public-private competitions for other than inherently governmental functions. There has been nothing "temporary" about the 2010 provision; it has operated as a de facto permanent prohibition on the Department's ability to even consider the merits of such technique. The Department has previously requested the repeal of the limitation, and PSC supports that request to give the Department the flexibility to evaluate using public-private competitions when in the Department's best interest. Similarly, PSC opposes Sec. 829 to constrain DoD's use of competition in service contracting, which would contradict the goals of Sec. 801.

SEC. 813: To increase to \$1 million the threshold for cost or pricing data and Truth in Negotiations Act (TINA) requirements. As the Committee report notes, Sec. 824 of the FY17 NDAA set a goal for DoD to reduce the money contractors spend on bid and proposal costs, acknowledging the transaction cost for both the government and industry for every purchase order subject to TINA. PSC believes that increasing the TINA threshold would significantly reduce B&P costs without reducing DoD's visibility into higher risk contracts. PSC urges an even further increase in the TINA threshold to \$5 million. As reported in a 2015 DoD study, TINA compliance-related proposal costs were estimated to account for 50-60% of total B&P costs, or roughly 2-3% of contract value, with no discernable benefits for contracts under \$5 million.

SEC. 818: To require outcome-based and performance-based requirements for service contracts. PSC supports outcome-oriented acquisitions and believes this approach will improve service delivery throughout the acquisition lifecycle. Better use of outcome-based contracts will provide both the government and the contractor community with flexibilities to provide for cost-effective solutions that better incorporate innovation to meet agency requirements.

SEC. 822: To enhance post award debriefing rights and amend the timelines for GAO consideration of bid protests. PSC appreciates the Committee’s focus on efforts to provide contractors with additional information after a contract award and to create a more meaningful dialogue between the government and offerors. The protest process, while a necessary tool to hold agencies accountable, can be lengthy and expensive for all parties involved. Comprehensive debriefings can reduce the instances where a protest is filed for the purpose of forcing disclosure of the Department’s award rationale and analysis. PSC also supports the language contained in subsection (D), to establish the current expedited process timeline of 65 days as the primary process, while ensuring GAO retains the authority to extend the deadline to 100 days for large complex protests.

SEC. 825: PSC strongly supported Sec. 813 of the FY17 NDAA to limit the misuse of lowest price technically acceptable (LPTA) source selection criteria for certain services contracts and strongly supports Sec. 825(b) in this year’s bill. Lowering the reporting threshold for DoD from \$10 million to \$5 million will significantly enhance Congress’ ability to conduct oversight during the implementation of Sec. 813 and continue to ensure the Department is securing the best value for the taxpayer during the acquisition process.

SEC. 836: To prohibit the use of LPTA source selection criteria for major defense acquisition programs. While PSC believes that LPTA has a role in the acquisition toolbox, the Department has relied on this criteria in too many instances where it simply does not result in the most effective programs that obtains the best value for the taxpayer. PSC believes that major defense acquisition programs fall into this category.

SEC. 851-855: Provisions Related to Commercial Items. PSC appreciates the Committee’s continued efforts to encourage DoD to use commercial items where possible. In July 2017, GAO issued a report showing contracts awarded by the Department using commercial item procedures have gradually declined between fiscal years 2007 and 2016. Reversing this trend will allow DoD to take advantage of innovation in the commercial marketplace that will lead to reduced acquisition costs.

SEC. 894: To amend the requirements for the Defense Contract Audit Agency’s annual report. PSC appreciates the Committee’s acknowledgment that DCAA is not properly accounting for all outstanding contract audits and urges the Congress to take further actions to reduce the backlog of incurred cost audits. Including targeted reforms that allow for the use of independent, third party auditors would begin to address the unacceptable backlog and would be a step in the right direction to implementing efficient audit management for the Department.

PSC *opposes* the following provisions:

SEC. 821: To require a losing bid protester to pay the processing costs incurred by GAO associated with the protest and require the withholding of certain payments to an incumbent contractor in instances where the incumbent contractor is protesting an award that subsequently results in a bridge contract to the incumbent contractor. PSC believes this provision will undercut the fundamental purpose of the bid protest process—to hold agencies accountable for following the law and their procurement procedures—and would create a clear conflict of interest where

GAO could appear to be given a financial reward for ruling against a protester. We also oppose the payment withholding requirements on bridge contracts and believe that enactment of Sec. 822, which PSC supports, will do more to achieve the goal of limiting protests than any “loser-pay” provision.

SEC. 830 and 831: To require contracting officers to include workplace safety and health violations in contracting decisions. PSC strongly opposes these provisions, which are unnecessary and unworkable. Less than four months ago, Congress passed and the President signed into law a Congressional Review Act resolution overturning the August 25, 2016 “Fair Pay and Safe Workplaces” Federal Acquisition Regulation (FAR) rule. Often referred to as the “blacklisting” regulation, this rule imposed requirements on contractors and contracting officers similar to this provision. The Department of Labor already has ample oversight capabilities and accountability mechanisms to ensure that contractors abide by federal labor laws. If any problems arise within that process, PSC continues to believe that the government should devote the necessary resources to fix it using existing mechanisms, rather than establish a parallel, duplicative and burdensome process through the procurement system.

SEC. 938: To transition the background and security investigations for DoD personnel from the National Background Investigations Bureau (NBIB) in the Office of Personnel Management (OPM) to the Defense Security Services (DSS). PSC appreciates the Committee’s attempt to address the unacceptable backlog and lengthy wait times for individuals obtaining a security clearance. PSC opposes this provision because creating a parallel process and duplicative regime in the Department will drain resources, cause further delays, hinder process improvements and undermine efforts to move the government toward true reciprocity across departments and agencies. PSC is further concerned that this provision is at best premature; the FY17 NDAA included a directive to the Secretary to provide Congress with an implementation plan for DSS to conduct background investigations. To our knowledge, this report has yet to be received by the Committees. Accordingly, PSC opposes this section and urges the Committee to review the forthcoming implementation plan and the ongoing actions of the NBIB prior to determining whether to proceed with shifting this responsibility.

PSC *recommends* additional provisions:

PSC requests that your Committee work to include two proposals included in DoD’s Legislative package for Fiscal Year 2018 submitted to Congress on July 3, 2017. While the below proposals were submitted after your Committee’s markup of the FY18 NDAA, PSC believes there is ample time to include these provisions in the final legislation.

Service Contract Inventory Reporting Requirements:

DoD’s proposed legislation would raise the threshold for the Service Contract Inventory Reporting Requirements. PSC agrees with DoD that: “Despite the good intention underlying this provision, the inventory process has produced limited value for the significant amount of effort required of contractors and related work required of agencies.” The current reporting requirements ignore the fact that DoD captures annual data on the aggregate amount spent on services contracts as well as detailed data about subcategories of services contract spending. PSC contends that these existing data are far more useful for agency planning than any data on contractor personnel headcounts.

Furthermore, the intent of this reporting was to provide the government information giving them an actual inventory of activities performed by service contractors. Since contractors are required only to report dollars and the number of full-time equivalents, there is no context for job or skill type, qualifications or the like. Since the user agency cannot know whether the reported information was for an administrative position or for a technical, in-demand professional, it has little value.

Raising the applicability threshold to contracts over \$3,000,000, as DoD proposed, would be a step in the right direction. PSC urges the Committee to go further and repeal the requirement in its entirety.

Executive Compensation Reporting Requirements:

DoD's proposed legislation would revise the executive compensation reporting requirements and apply them only to contracts or subcontracts that are subject to the Cost Accounting Standards. PSC applauds the Department for recognizing the unnecessary burden these requirements place on contractors and advocating for a change to the statute.

Since these regulations were imposed, PSC has demonstrated that the information collected is not necessary or accurate, the government does not use the information provided for any meaningful purpose, and the industry's reporting burden is substantially underestimated.

DoD's proposal echoes these concerns. The accompanying section-by-section analysis from DoD stated in part: "Generally, executive compensation data is not used in making procurement decisions; the FAR Council's determination that this reporting requirement is responsible for more than 55,000 hours of paperwork burden each year does not reflect the burden incurred by [covered] first tier subcontractors who are not registered in the GSA System for Award Management (SAM); and [the requirement's] unnecessary exposure of contractor business information creates a disincentive to do business with the government."

While we are encouraged by DoD's proposal, neither the government's concerns nor ours would be alleviated by exempting certain contracts and subcontracts. Accordingly, PSC urges Congress to repeal the mandate in its entirety.

Conclusion:

PSC is grateful for your continued leadership in support of the men and women in uniform and the contractor community that supports them. I thank you for your time and consideration of this request and look forward to continuing to work with you. As always, PSC is available at your convenience to respond to any questions or concerns the Committee has.

Respectfully,



Alan Chvotkin
Executive Vice President and Counsel