

September 6, 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 amendments submitted to the Fiscal Year 2018 National Defense Authorization Act (S. 1519/ H.R. 2810). Building on PSC's August 3, 2017 letter regarding the SASC-reported bill, I respectfully request that your Committee now take the below concerns into account during Senate floor consideration.

PSC supports the following amendments:

Amendment #368, Senator Duckworth: To strike Section 821, which would require a losing bid protester to pay the processing costs incurred by DoD associated with the protest. In addition, Section 821 would 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 has been vocal in its opposition to establishing a "loser-pay" fee structure for Government Accountability Office (GAO) bid protests and penalizing incumbent contractors who file protests. PSC understands that here are concerns regarding "frivolous" protests. However, in 2009, GAO recommended against establishing a "frivolous" standard, stating their regulations and procedures already provide for the ability to promptly close protests that do not merit further development. Additionally, this provision will undercut the fundamental purpose of the bid protest process—to hold *agencies* accountable for following the law and their procurement procedures in a transparent manner—and we support removing it from the underlying bill.

Amendment #530, Senators McCaskill and Tester: To impose addition requirements on DoD prior to the transfer of the background and security investigations from the National Background Investigations Bureau (NBIB) to the Defense Security Services (DSS), as required by Section 938. While PSC has concerns regarding the workforce analysis provision contained in this amendment, we strongly oppose the underlying provision and believes that this transfer is at best premature. The FY17 NDAA required two reports to Congress on how DoD and OPM would implement such a transfer. It is our understanding that, as of September 6, 2017, only one report has been received by the Congress. Accordingly, we urge the Congress to review the forthcoming plans and the ongoing actions of the NBIB prior to determining whether to proceed with segmenting this important government-wide responsibility.

Amendment #715, Senators Moran and Udall: To include the text of the Modernizing Government Technology Act (the MGT Act/ S. 990). The MGT Act would establish a critical

source of dependable funding for federal agencies to invest in IT system modernization, incentivize agencies to utilize the funds for agency priorities, and accelerate the transition to the cloud. PSC supports enactment of the proposed provisions to help make government more effective and its networks more secure, while reducing overall costs.

PSC *opposes* the following amendments:

Amendment #367, Senator Duckworth: To strike Sec 822(d). Section 822(d) would establish the current expedited process timeline of 65 days as the primary target for GAO to decide bid protests, while ensuring GAO retains the authority to extend the deadline to 100 days for large complex protests. PSC opposes this amendment and supports retaining the underlying provision. Amending these timelines will maintain the integrity of the protest process while reducing the costs and delays associated with a protest.

Amendment #484, Senator Cardin: To strike Title VIII Subtitle E - Provisions related to commercial items. 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, as the provisions in the underlying bill are designed to do, will allow DoD to take advantage of innovation in the commercial marketplace that will lead to reduced acquisition costs. While PSC has concerns regarding the changes proposed in Section 851 of the bill, we oppose striking Subtitle E in its entirety. We urge the Congress to continue efforts to encourage DoD to use commercial items where appropriate and possible.

Amendment #651, Senator Wyden: To require the Department to manage litigation on behalf of an indemnified contractor if the case exceeds a period of two years without final judgement or settlement. PSC opposes this amendment, which would represent an unwarranted intervention by the Congress into ongoing government litigation. PSC believes that indemnification is an important tool for contractors, particularly those supporting and working alongside our military personnel deployed overseas and we are concerned with the unknown and potentially wide-ranging impact and scope of this amendment. Should the Senate seek to address indemnification litigation, these efforts should, at a minimum, be targeted and directed only at future contracts and any litigation that arises from these future contracts.

Amendments #625 and #597, Senator Sanders: To require contractors to report annually on the location of their workforce and prohibit contracts to any entity that has a greater percentage of layoffs among U.S. based employees. This amendment will impose new and burdensome requirements on contractors and contracting officers with limited foreseeable value to the government. Without applying these requirements prospectively, this amendment could significantly impact and disrupt current government operations, as existing contracts would be subjected to changes that could delay needed—and already contracted for—goods and services. Further, this amendment fails to account for U.S. based contractors with significant overseas presence on behalf of the U.S. government, including companies operating in Iraq and Afghanistan.

Amendment #564, Senator Cardin: To require the Secretary of Defense and the Administrator of the Small Business Administration to submit a plan for a process to expedite the approval of

security clearances for employees of small business concerns participating in the SBIR or STTR programs. PSC appreciates efforts to address the security clearance backlog and its impact on the government and the contractor community for these worthwhile small business programs. Yet, we must oppose this amendment. Prioritizing clearances for a subset of contractors will only exacerbate the backlog for others, including military and federal employees. PSC urges the Senate to instead take a holistic approach that reduces the backlog and wait times for all individuals seeking clearance, while ensuring transparency and proper reporting, fully funding the agencies and services that oversee investigations and adjudications, and implementing real reciprocity among departments and agencies.

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,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with the first name being more prominent.

Alan Chvotkin
Executive Vice President and Counsel