

October 19, 2017

The Honorable John McCain
Chairman
Senate Armed Services Committee

The Honorable Jack Reed
Ranking Member
Senate Armed Services Committee

The Honorable Mac Thornberry
Chairman
House Armed Services Committee

The Honorable Adam Smith
Ranking Member
House Armed Services Committee

Dear Chairmen McCain and Thornberry and Ranking Members Reed and Smith:

On behalf of the members of the Professional Services Council, I write today to convey PSC's position on several provisions contained in the House and Senate versions of the Fiscal Year 2018 National Defense Authorization Act (H.R. 2810). PSC commends both Committees for creating strong bills that support the men and women in uniform, provide funding for national security, and recognize the important roles and contributions contractors bring to mission success in the Department of Defense.

As you reconcile the differences between your chambers' versions of the NDAA, I respectfully request that you take our below concerns into account and ensure the NDAA that is signed into law will:

Enhance Competition and Flexibility to Increase Efficiency and Savings

PSC strongly believes that the government can reduce costs, better access innovation, and improve outcomes when the best ideas from inside and outside government are considered on merit and the Department has the flexibility to utilize the total workforce—military personnel, DoD civilians, and contractors—to meet mission needs. Fair, balanced policies and clear, understandable execution and measurement of public-private competition, are necessary to ensure that the best decisions are made for allocating taxpayer dollars.

Senate Section 801 and 829:

One important step to enhancing competition is the repeal of Sec. 325 of the FY 2010 National Defense Authorization Act (P.L. 111-84), as Sec. 801 of the Senate bill would do. This provision, which imposed a “temporary” prohibition on the Department’s authority to consider using public-private competitions for other than inherently governmental functions, has operated as a *de facto* permanent prohibition on the Department’s ability even to consider the merits of such a technique. The Department has previously requested the repeal of the limitation, and PSC supports that request. In conjunction with our support for Sec. 801, PSC opposes Sec. 829 of the

Senate bill, which would constrain DoD's use of competition in service contracting even when it is in the Department's best interest. This provision directly contradicts the goals of Sec. 801.

House Section 340A:

Implementing fair competition policies, however, has been a contentious issue for many years, as the current methodologies for determining cost comparisons between the public and private sectors do not accurately reflect the full cost of the government workforce. Assessing contractor costs is relatively straightforward because contracts themselves require clear documentation of all costs, and those costs are audited. However, no equivalent process or documentation exists for determining and verifying the government's in-house costs. To date, all previous efforts to determine a true "apples-to-apples" comparison of the cost associated with agency sourcing decisions have failed to produce a clear and accurate picture.

Sec. 340A of the House bill, if properly adjusted, could begin to address problems with the methodologies used to determine government costs and compare them to contractor costs. This provision would require GAO to report on the extent to which the Department's workforce decisions have incorporated feedback and lessons learned from cost comparisons of the performance of functions by members of the Armed Forces, DoD employees, and contractor personnel. The report would further detail the extent to which the Department has used such feedback and lessons learned to improve guidance, including DODI 7041.04, and the full cost of manpower tool.

PSC respectfully requests that, should Sec. 340A be included in the final NDAA, the Committee delineate the details of the "feedback and lessons learned" that the review will include. While it is our understanding that this report is intended to focus on previous GAO work, we believe that any comparison must include industry stakeholder feedback while concurrently determining if cost should be the only factor considered to determine who is best suited to perform certain functions.

That said, PSC believes a better approach—and one we continue to work with the government to achieve—is to direct DoD to correct deficiencies in DODI 7041.04 while also ensuring that an appropriate balance is struck that allows the government to operate in the most effective and efficient manner, achieving both innovation in the acquisition process and the best value for the taxpayer.

House Section 870:

PSC opposes Sec. 870 of the House bill, which would eliminate DoD's authority and flexibility to allocate resources based on need, and instead impose arbitrary caps for service contracts. Under the provision, DoD would be prohibited from spending more on total services contracting than was requested in the President's 2010 budget request. Changes in the services market since the 2010 budget was released would make implementation of such caps simply unworkable and create unintended, negative consequences.

PSC strongly opposes arbitrary caps on services contracting spending because they hamstring the Department's ability to appropriately manage its total workforce in support of mission needs. On a practical level, this cap would be impossible to implement with existing data. The services

market has transformed significantly over the past decade to include greater reliance on “as-a-service” delivery capabilities. As such, some contracts which are categorized today as a “service” could have been categorized as a “product” in the 2010 base year. Finally, in the intervening years, many DoD requirements have changed—such as the need for strong cybersecurity capabilities—leading to growth in DoD services spending that would not be part of the arbitrary baseline caps on services contract spending. This provision would therefore inappropriately place excessive pressure for reductions in other DoD mission areas that rely heavily on services.

Leverage Industry Capabilities and Expertise to Reduce the DCAA Backlog

The backlog of incurred cost audits under the Defense Contract Audit Agency (DCAA) has wide-ranging, consequential, and negative impacts for the government and the contractor community—both of whom have an interest in moving rapidly to close out contracts. For the contractor, the government commonly withholds significant funds that should be reconciled and paid in a more timely manner. The government should be able to collect any money that might be determined to be due from the contractor, while there is still time and funds available to be collected. Unfortunately, DCAA’s backlog—and improper accounting of the backlog—prevents either from meeting these goals. GAO’s September 2017 major report confirms the current unacceptable backlog still remains.

Senate Section 894 and House Section 802:

Sec. 894 of the Senate bill amends the requirements for DCAA’s annual report to require “the total number and dollar value of audits that are pending for a period longer than 18 months as of the end of the fiscal year covered by the report, including a breakdown by type of audit.” PSC appreciates the Committee’s acknowledgment that DCAA is not properly accounting for all outstanding contract audits. We urge you to include the reporting provisions and take further actions to reduce the backlog of incurred cost audits by including targeted reforms that allow for the use of independent, third-party auditors—similar to Sec. 802 of the House bill.

Including and strengthening this provision would begin to address the unacceptable backlog and would be a step in the right direction to implementing efficient audit management for the Department. Allowing independent accounting firms to support DoD during the incurred cost audit process will increase competition, expand the use of commercial audit technology, generate faster audit turnaround times, and reduce the backlog and auditing costs.

House Section 874:

PSC is similarly concerned with Sec. 874 of the House bill, which would repeal provisions of the FY 2017 NDAA that allowed for commercial auditor findings for certain DoD contracts to be submitted and accepted by DCAA if the audit adheres to generally accepted accounting principles. This provision contradicts Sec. 802 of the House bill, the goal of which is to expand the use of supplemental audits performed by public accounting firms, and should be excluded from the final conference report.

Promote Effective and Efficient Policies that Improve Acquisition Outcomes

PSC believe that enactment of the annual NDAA is critical to ensuring the Department adopts commonsense policies for how it solicits, acquires, and manages services and technology from contractors in the most effective and efficient manner. This year's bills include a number of PSC-supported proposals that will reduce the timeframes associated with DoD's procurement awarding process.

Senate Section 822:

PSC strongly encourages the retention of Sec. 822 of the Senate bill, which will enhance post award debriefing rights and amend the timelines for GAO consideration of bid protests. Enhanced debriefings will provide contractors with additional information after a source selection and create a more meaningful dialogue between the government and offerors to reduce 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.

Senate Section 821:

Conversely, PSC strongly objects to Sec. 821 of the Senate bill, which would require a losing bid protester to pay the processing costs incurred by DoD 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 has been vocal in our opposition to establishing a "loser-pay" fee structure for GAO bid protests and penalizing incumbent contractors who file protests. PSC understands that there 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. This provision will also 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.

Additionally, Sec. 885 of the FY 2017 NDAA required the Secretary to contract with a third party to "carry out a comprehensive study on the prevalence and impact of bid protests on Department of Defense acquisitions, including protests filed with contracting agencies, the Government Accountability Office, and the Court of Federal Claims." This comprehensive, congressionally mandated report includes 14 areas of review and has not yet been completed and provided to the Committees. Thus, including dramatic reforms to the bid protest process, as Sec. 821 of the Senate bill would do, is premature. Instead, PSC urges you to strike Sec 821 and review the forthcoming report prior to determining whether these changes are warranted, practical and fair.

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 reducing the timeline associated with protests than any “loser-pay” provision.

House Section 814:

PSC objects to Sec. 814 of the House bill, under which the Secretary shall ensure that a requirements owner shall plan for the need for a service to avoid the use of a bridge contract and impose additional reporting requirements on the use of bridge contracts "due to inadequate planning." PSC does not concur that bridge contracts are necessarily a reflection of the failure to plan for follow-on work. Circumstances outside the control of the buying activity may dictate the need for a bridge contract, such as 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, the provision should provide for exemptions (not requiring waivers) when funding or unknowable procurement-related problems create the need for a bridge contract.

House Section 871:

PSC supports Sec. 871 of the House bill directing the Secretary to develop a definition and a way to measure Procurement Administrative Lead Time (PALT). PALT has an immense impact on both government efficiency and effectiveness, as well as contractor costs. While some agencies in the Department are tracking PALT, many use their own unique definitions, and few agencies publicly release this information. Anecdotal information is that lead times seems to be increasing, despite the government’s expressed desire to create more efficiency within the federal acquisition system. By standardizing the definition of PALT across DoD and collecting information based on uniform metrics, agencies, contractors, think tanks and others will be able to more easily analyze this important statistic and use it as a tool to ensure needed services are available and contracted for in a timely manner. Enactment of this provision would directly support one of Undersecretary for Acquisition, Technology and Logistics Ellen Lord's top priorities: reducing the time from when the Pentagon makes a request to when it is delivered.

Increase Access to Technology and Innovation to Achieve Agency Mission Results

PSC supports a number of provisions in the NDAA that will accelerate information technology acquisition and address the national imperative for improved cybersecurity, including the Modernizing Government Technology (MGT) Act and the Cyber Scholarship Opportunities Act.

Senate Subtitle H, the Modernizing Government Technology Act:

The federal government currently spends more than \$80 billion each year on major information technology (IT) systems. Most of that spending is on maintaining existing IT rather than investing in development, modernization, and enhancement activities. Enactment of the MGT Act will make a critical investment in modernizing the government’s IT infrastructure to help limit cybersecurity vulnerabilities inherent in current computer systems and to increase the effectiveness of government services and missions.

Subtitle F, the Cyber Scholarship Opportunities Act:

Similarly, the Cyber Scholarship Opportunities Act will provide an increased focus on training the next generation of cybersecurity experts to mitigate the growing skills gap. Addressing cyber

vulnerabilities is a concern for both the government and the contractor community, and this provision will help fill a critical and increasing workforce need.

Prepare the Total Workforce to Meet Future Government Missions

One of the paramount issues facing the government and contractor community is the backlog of cases in the federal security clearance process. Reports indicate that the number of individuals awaiting clearances exceeds 700,000. Since February of this year, the backlog has grown by as much as 40%. As a result, critical positions—for the military, government civilians, and contractors—are unfilled, and government missions are at risk. We need action now to bring down the backlog, to expand reciprocity, and to ensure the government and the contractor community have access to top tier talent to fill national security positions.

Senate Section 938:

Sec. 938 would transition the background and security investigations for DoD personnel from the National Background Investigations Bureau in the Office of Personnel Management to the Department of Defense. PSC appreciates the Committee's attempt to address the unacceptable backlog and lengthy wait times. However, PSC believes that the process should not be split. Doing so will waste resources, cause further delays, hinder process improvements, and undermine efforts to move the government toward true reciprocity.

Provide Due Process and Fairness for Government Contractors

PSC recognizes the role of Congressional oversight in the federal contracting process and believes all contractors must follow the applicable laws and regulations when entrusted with taxpayer dollars. Two provisions in the Senate bill, however, raise serious concerns regarding fairness and due process for federal contractors and we urge you to exclude them from the final bill.

Senate Section 830:

Sec. 830 will require contracting officers to include workplace safety and health violations in contracting decisions. PSC strongly opposes this provision, which is unnecessary and unworkable. Earlier this year, Congress passed and the President signed into law a Congressional Review Act resolution overturning the "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 that are substantially similar to this provision.

Specifically, Sec. 830 requires contracting officers to consider violations of OSHA or "equivalent State laws by the offeror, and by any covered subcontractors." There is no definition of or central location for data on violations of "equivalent state laws," placing an unworkable burden on contracting officers to find and report this information for both prime and subcontractors and risking further, unnecessary delay to the acquisition process for needed goods and services.

The Department of Labor currently has oversight capabilities and accountability mechanisms to ensure that contractors abide by federal labor laws and regulations. If there are problems with the DOL process, the government should devote the necessary resources to fix them, rather than

establish a parallel and duplicative process that places an unnecessary burden on contracting officers.

Senate Section 10803:

Sec. 10803 would require the Secretary to report to the congressional defense committees on defense contracting fraud. While PSC does not oppose Sec. 10803 in its entirety, PSC has strong concerns regarding the inclusion of companies who have not been convicted of wrongdoing in a report on contractor fraud. The System for Award Management (SAM) includes the electronic roster of companies excluded from federal programs throughout the government and the Federal Acquisition Regulation already requires contractors to certify whether they have been convicted of a felony criminal violation within the prior 24 months. The FAR states that, in such cases, no awards can be made to that contractor, unless an agency “has considered suspension or debarment of the corporation and made a determination” that it isn’t necessary to protect the government’s interests.

To go beyond current regulations and include reporting requirements for indictments and settlements, regardless of the resolution of the case or any admission of wrongdoing, will eliminate the presumption of innocence enshrined in our system and potentially penalize and slander companies without any fraud-related convictions on their record.

Thank you for your time and consideration of this request, as well as your continued strong leadership in support of our military. I look forward to continuing to work with you as the NDAA moves forward. As always, PSC is available at your convenience to respond to any questions the Committees may have.

Respectfully,



Alan Chvotkin
Executive Vice President & Counsel