



May 6, 2020

The Honorable James Inhofe  
Chairman  
Senate Armed Services Committee  
Washington, DC 20510

The Honorable Adam Smith  
Chairman  
House Armed Services Committee  
Washington, DC 20515

The Honorable Jack Reed  
Ranking Member  
Senate House Armed Services Committee  
Washington, DC 20510

The Honorable Mac Thornberry  
Ranking Member  
House Armed Services Committee  
Washington, DC 20515

Dear Chairmen Inhofe and Smith, and Ranking Members Reed and Thornberry:

On behalf of the Acquisition Reform Working Group (ARWG), we appreciate your leadership and continued efforts to produce the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021.

The ARWG signatories to this letter include the American Council of Engineering Companies (ACEC), Computing Technology Industry Association (CompTIA), Information Technology Industry Council (ITI), and National Defense Industrial Association (NDIA). Together, we represent thousands of small, mid-sized, and large companies in addition to hundreds of thousands of employees that provide goods, services, and personnel to the Department of Defense (DoD) and have extensive experience in partnering with the federal government to meet many of our country's most critical needs and objectives.

Recently, DoD transmitted various legislative proposals to your committees for inclusion in the FY21 NDAA. Several of these legislative proposals could have significant consequences for the defense industrial base. We are writing to share our member companies' views on these legislative proposals. We appreciate your consideration of industry's concerns as you and your committees mark up the FY21 NDAA.

ARWG strongly opposes the following DoD Legislative Proposals:

### **Preference for Performance-Based Contract Payments**

This DoD legislative proposal would reverse the statutory reforms made by Congress in Section 831 of the FY17 NDAA. The DoD legislative proposal would recouple total performance-based payments (PBPs) to total cost incurred. In Section 831, Congress explicitly **decoupled** PBPs from incurred costs by amending the contract financing statute to read “[p]erformance-based payments shall not be conditioned upon costs incurred in contract performance but on the achievement of performance outcomes.” See 10 USC § 2307 (b)(2).

Moreover, this DoD legislative proposal ignores previous policy guidance from Congress to focus on performance outcomes rather than costs. In its report accompanying the FY17 NDAA, the Senate Armed Services Committee admonished DoD in saying that “the Department has become even more focused on measuring cost as an output rather than focusing on measuring outcomes for the taxpayer and rewarding contractors for meeting those performance objectives.” See Senate Report 114-255, p. 214. DoD has explicitly rejected that advice in submitting this legislative proposal and remains stubbornly fixated on the desire to avoid providing contract financing payments exceeding “actual costs incurred at any point in time.” Rather than focusing on incurred cost, DoD would better advance the interests of both the warfighters and taxpayers by negotiating meaningful performance milestones and ensuring that contractors meet those milestones prior to receiving payments.

Finally, this DoD legislative proposal is contrary to the practices of the other Executive Branch agencies in using PBPs. The Federal Acquisition Regulation (FAR) clause on PBPs does not include a limitation to total cost incurred. See FAR 52.232-32. None of the other Executive Branch agencies routinely require limiting PBPs to total costs incurred. In fact, DoD recently published the final Defense Federal Acquisition Regulation Supplement (DFARS) rule implementing the changes made by Section 831, including decoupling PBPs from costs incurred, ultimately realigning itself with the rest of the Executive Branch. This change does not require any increased funding. DoD has not provided a compelling reason to readopt defense-unique limitations on the use of PBPs.

### **Use of Detailed Manufacturing and Process Data**

This proposal would authorize DoD to release or disclose any detailed manufacturing or process data (DMPD) pertaining to privately funded commercial or noncommercial items outside of the government as necessary for “operation, maintenance (including depot-level maintenance, repair, and overhaul), installation, training, airworthiness determinations, testing and evaluation, or accident or incident investigations.” Such data could be disclosed—at DoD’s discretion—to third parties seeking to compete against the original equipment manufacturer (OEM).

This DoD legislative proposal would eviscerate longstanding trade secret protections for DMPD, including the “crown jewels” that contractors, especially manufacturers, highly value and take great measures to protect. In last year’s NDAA, Congress repealed Section 866 of the FY19 NDAA, which would have established a statutory right for DoD to release or disclose limited rights data such as DMPD outside of the government during a data rights challenge. Section 866 presented significant due process and trade secret protection issues. This legislative proposal is significantly more damaging to a contractor’s ability to protect its most important trade secrets. It impacts not only data to which DoD may have reasonable validation concerns related to source of development funding but also commercial and other privately funded items for which DoD does not have a validation concern.

The proposal eliminates the need for DoD to comply with the longstanding requirements of 10 USC 2321 to initiate data rights challenge proceedings if it has reasonable validation concerns. Instead, DoD would only be required to determine that the disclosure of the data is “necessary” for the identified purposes such as maintenance—a nebulous and low standard that at least one DoD customer has previously likened to requiring no more than a showing of “convenience.” The disclosure would be made without any requirement for the authority for decision-making to be made at an appropriately high level or outside the purview of programs seeking to release or disclose data to create competition where it would not have otherwise existed. Notably, existing law already enables DoD to release or disclose DMPD that is “limited rights data” outside of the government to third parties as necessary for “emergency repair or overhaul.” See 10 USC 2320(a)(2)(D)(i)(I).

The DoD proposal would also significantly undermine recent congressional efforts to require DoD to develop an IP Strategy early in the acquisition lifecycle, plan appropriately, and enter into specially negotiated licenses with appropriate valuation and pricing as a preference to address the DoD’s data delivery and data rights needs. In fact, the conference report accompanying the FY18 NDAA stated that, in establishing a statutory preference for specially negotiated licenses via Section 835 (c), Congress sought to “encourage program managers to negotiate with industry to obtain the custom set of technical data necessary to support each major defense acquisition program rather than, as a default approach, seeking greater rights to more extensive, detailed technical data than is necessary.” Because this legislative proposal would grant an automatic default authority for DoD to disclose DMPD if it deems it necessary to do so, the proposal would accomplish exactly what Congress sought to avoid by requiring DoD to undertake appropriate planning and negotiate special licenses. In fact, DoD’s proposal would eliminate the possibility of a negotiated solution.

Industry recognizes and supports the Department’s desire to boost competition in the sustainment tail of the lifecycle of a weapon system, particularly in the area of maintenance and repair of legacy platforms.

Such competition must accommodate appropriate protections for contractor intellectual property. However, due to the significant trade secret and financial risk associated with this legislative proposal, contractors' primary recourse for mitigating the risk would be to withhold DMPD from delivery, which may create issues for organic maintenance and further exacerbate DoD's readiness concerns.

### **Submission of Uncertified Cost Information**

This proposal would require an offeror or contractor to submit uncertified cost information for commercial item proposals or contracts below the \$2 million Truth in Negotiations Act (TINA) threshold when a contracting officer determines that the pricing information provided is not adequate to permit the establishment of a fair and reasonable price. DoD seeks additional authority to ensure that contracting officers have insight into the costs of sole-source items and are in a more favorable position to negotiate with sole-source companies, especially in light of the DoD Inspector General's recent investigation into the TransDigm Group's excessive pricing practices.

However, the DoD proposal relies on a dubious assumption, namely that a sole-source supplier with a history of excessive pricing would be willing to reduce the offered price if the government obtained uncertified data on the contractor's costs. When the government knows the price is excessive, gathering supplementary information does nothing to change DoD's negotiating position when only one contractor can provide the part.

At the same time, the proposal would needlessly add bureaucracy, increase cost, and remove incentives for DoD contracting officers to perform due diligence. This proposed change would limit a contracting officer's responsibility to perform market research and review pricing information. The default practice among contracting officers would be to require additional uncertified cost data, which would add a significant barrier to commercial item acquisition, further burden the system, and slow the delivery of capabilities to the warfighter with no added protection for the government or the taxpayer. Moreover, unlike price, uncertified cost data for a commercial item does not reflect a contractor's investment to develop and bring the item to market.

Current law (10 USC 2379(d) and 10 USC 2306a) and existing FAR and DFARS coverage provide DoD all the authorities needed to determine fair and reasonable pricing. The better policy formulation to determine price reasonableness is reflected in the current TINA statute. If necessary, a contracting officer can already require the submission of other information that is relevant to the determination of a fair and reasonable price when information on the prices for which the same or similar items have previously been sold is inadequate.

Finally, the proposal does not adequately account for the most recent congressional action taken to address pricing for sole-source contracts. Congress addressed the pricing issue in a more comprehensive fashion in section 803 of the FY20 NDAA enacted last December. Section 803 amends the TINA statute (10 USC 2306a(d)) to require that an offeror is ineligible for award if the contracting officer is unable to determine proposed prices are fair and reasonable by any other means when an offeror fails to make a good faith effort to comply with a reasonable request to submit data—unless the Head of Contracting Activity determines that it is in the best interest of the government to make the award to that offeror. Paragraph (d)(2) added by section 803 also includes a mechanism for reporting offerors who have refused to provide sufficient information for adequate price determinations for past performance and other purposes. A new DFARS Case (DFARS Case 2020-D008) has been opened to implement section 803, but no proposed rule has yet been published. This provision should be fully implemented in regulations and evaluated before any additional requirements are considered.

### **Commercial Product or Commercial Service Determinations**

This proposal would remove the language of 10 USC 2306a(b)(4), enacted in the FY16 NDAA, to require reliance on prior commercial item determinations. The proposal also revises 10 USC 2380(b), enacted in the FY18 NDAA, which limits the ability of DoD to procure a product or service under FAR Part 15 if the

product or service was previously procured under FAR Part 12. This proposal would require contracting officers to conduct a commercial item determination for every procurement, repeating the determination even if a determination has previously been made.

DoD claims that contracting officers need additional authority and flexibility to make appropriate commercial product and commercial service determinations based on the unique circumstances of each individual procurement. Contracting officers also need to obtain the necessary cost or pricing information to negotiate fair and reasonable prices and prevent excessive pricing, as illustrated by the recent DoD Inspector General report on the TransDigm Group's pricing practices.

The proposal is based on an incorrect assertion that TransDigm's pricing issues were due to "improper commercial item determinations" or conversions to commercial products. In fact, less than 10 percent of the TransDigm cases reviewed were for commercial items. Furthermore, the underlying cause of TransDigm's excessive pricing is not one of commerciality or a lack of governmental authority to obtain information to determine price reasonableness. The simple fact is that, in recent cases, TransDigm was the sole-source provider of the parts in question and the limit to the price they could charge was whatever the government would be willing to pay for what was deemed an operationally critical part.

Assertions that TransDigm's actions were facilitated by an inappropriate reliance on a prior commercial item determination, or insufficient access to pricing data, are misdirected. If this proposal were to be enacted, it would not prevent the pricing practices demonstrated by a single company that was a sole-source provider of critical parts. Instead, this provision would add a significant barrier to commercial item acquisition, reduce information sharing, further burden the system, and impede—rather than enable—the delivery of capabilities to the warfighter at the "speed of relevance"—all with little to no added protection for the government or the taxpayer.

Moreover, the DoD proposal is based on the flawed assumption that "commerciality" changes depending on the circumstances of individual procurements. The wording in the definition of "commercial product" in 41 USC 103 is clear that, once a product is commercial, it remains a commercial product irrespective of other issues. The DoD proposal conflates commercial item determinations with price reasonableness determinations. If DoD is concerned about price reasonableness determinations, relying on a prior commercial item determination in no way limits a contracting officer's ability and responsibility to obtain the necessary pricing information to negotiate fair and reasonable prices.

We strongly oppose the foregoing DoD proposals and welcome the opportunity to answer any questions you have on these issues. Thank you for your continued support of the defense industry as it supports the nation's warfighters.

Sincerely,

American Council of Engineering Companies (ACEC)  
Computing Technology Industry Association (CompTIA)  
Information Technology Industry Council (ITI)  
National Defense Industrial Association (NDIA)