



AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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February 2, 2022

Honorable Carolyn Maloney
Chairwoman
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, D.C. 20515

Honorable. James Comer
Ranking Member
House Committee on Oversight and
2157 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Maloney and Ranking Member Comer:

On behalf of the American Federation of Government Employees, AFL-CIO, which represents over 700,000 federal and D.C. government employees who serve the American people in over 70 different agencies across the nation and around the world including approximately 300,000 in the Department of Defense (DoD), we appreciate your support of a strong national defense and your recognition of the importance of a professional, apolitical civil service supporting our uniformed warfighters. We also appreciate the Committee's interest in and jurisdiction over civilian agency procurement issues.

The January 19, 2022 Hearing on "Price Gouging in Military Contracts: New Inspector General Report Exposes Excess Profit Obtained by TransDigm Group," was a reprise of a prior hearing on this same problem. Unfortunately, the underlying issue that TransDigm's behavior was not unlawful, and in fact encouraged by the existing contract pricing statutory and regulatory framework, was not addressed in any kind of meaningful detail. Starting with the Federal Acquisition Streamlining Act (FASA) and culminating in continuous additional statutory amendments, including implementation of Section 809 Panel recommendations for "streamlining acquisition regulations," the Oversight and Reform Committee acquiesced in radical expansions of what is considered to be a "commercial item or service" to embrace sole source procurements for spare parts for military weapon systems, even though those spare parts were not goods or services sold in substantial quantities to the general public. In addition, the Committee is well aware that various statutory changes over the years have directly weakened application of the Truth in Negotiations Act (TINA) (now "called the Truthful Cost or Pricing Data statute) to the point where its application is often easily evaded.

The legal consequences of this expanded definition of "commercial items and services," as well as the growth of TINA exemptions and increased dollar thresholds is that contracts end up being exempted from TINA, and contractors are effectively given a "free pass" from providing contracting officers with current, complete and accurate information to negotiate contract prices even in sole source situations.¹ In

¹ Indeed, most recently in the Fiscal Year 2022 National Defense Authorization Act, the Armed Services Committees continue to promote expanding upon these faux-"commercial" procurements, requesting DoD identify and address through further legislative proposals any further "impediments" to further expansions of "commercial" acquisitions of "innovative technologies." The policy rationale for these radical changes has been that private sector research and development spending has outpaced military research and development spending, and that companies developing innovative technologies will not want to do business with DoD but instead sell their technologies to military competitors. We think these assumptions are misleading as both the Department of Defense and State Department must approve technology transfers to foreign governments. Additionally, much of what is characterized


the case of TransDigm, once the Inspector General reports were released and TransDigm was characterized as charging “excess profits,” TransDigm voluntarily provided uncertified cost and pricing data to the government’s contracting officers. The problem remains that uncertified “cost and pricing data” provides little insight and no remedy to contracting officers during the course of negotiations, unlike “certified cost and pricing” data that application of TINA requires.

Accordingly, legislative “solutions” to this problem that would merely ratify voluntary practices already authorized in the Federal Acquisition Regulation to provide uncertified cost or pricing data to contracting officers provide far less useful remedies to the government than would the application of TINA, a course of action that would simply require returning to the pre-FASA definition of what constitutes a “commercial item,” the lowering of TINA dollar applicability thresholds, and the elimination of one-proposal TINA exemptions. We recommend that the “Fair Pricing With Cost Transparency Act of 2022,” include additional language that would return to the robust definitions and remedies previously provided by TINA, and would be happy to provide the suggested language to the Committee.

At a minimum, AFGE urges the Committee to endorse language regarding the so-called “commercial items” definition by adopting language proposed by Congressmen Tim Ryan and Tom Cole, on a bipartisan basis, in the House version of the FY 2020 National Defense Authorization Act. This language would require actual sales in “significant quantities” [to the general public] before an item or service could be deemed to be “commercial.” While this change would not address all the TINA exemptions identified by the Inspector General in the TransDigm report, it would when combined with recalibrating the TINA dollar applicability threshold to a more modest \$500,000 (from the recent near trebling of the threshold to \$2 million) serve to illustrate that Congress is serious about reigning in overpricing of government contracts.

We appreciate your consideration of our views. Any question on the details of this letter may be directed to Dr. John Anderson, at 703-943-9438, john.anderson@afge.org or our policy counsel, Richard C. Loeb, at 202-639-6466, richard.loeb@afge.org.

Sincerely,


Everett B. Kelley
National President

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Senate Homeland Security and Government Affairs Committee
Senate Armed Services Committee
House Armed Services Committee
Senate Committee on Appropriation – Defense Subcommittee
House Committee on Appropriations – Defense Subcommittee

as private sector research and development has a significant federal government component to it, so the data comparing private sector and governmental research and development spending trends needs to be analyzed in detail to make proper comparisons, and when the data is normalized, the federal component of research and development spending is far more robust.

