

April 17, 2015

The Honorable Mac Thornberry
Chairman

The Honorable Adam Smith
Ranking Member

Armed Services Committee
2126 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Thornberry and Ranking Member Smith:

On behalf of the nearly 400 members of the Professional Services Council,¹ I am writing to you in response to your call for input regarding the “Agile Acquisition to Retain Technological Edge Act” (H.R. 1597), which you introduced as a discussion draft on March 25.

PSC shares your conviction that we have a unique and important opportunity to make wide-ranging and needed reforms to the Department of Defense’s (DoD) acquisition ecosystem and we deeply appreciate that you have adopted such an open, transparent, and collaborative approach to tackling the difficult challenge of acquisition reform. The introduction of a discussion draft bill is another example of your inclusive approach to meaningful improvement.

Overall, we believe that H.R. 1597 is a step in the right direction and we support many elements of the draft bill. However, we do need to highlight several areas of the bill and the accompanying draft committee report language that are of concern to our membership. In response to your request, we are also pleased to offer some recommendations for improving the bill text and report language.

Services Contracting

First, regarding the DoD’s acquisition of services, Section 301 of H.R. 1597 requires the Under Secretary of Defense (AT&L) to complete an examination of the decision authority related to the acquisition of services. It also tasks AT&L to develop guidance to improve capabilities and processes related to requirements development and source selection for, and oversight and management of, services contracts. PSC supports this provision, particularly its focus on

¹For over 40 years, PSC has been the leading national trade association of the government technology and professional services industry. PSC’s nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association’s members employ hundreds of thousands of Americans in all 50 states. See www.pscouncil.org.

improving requirements development for the acquisition of services. Requirements development for services, and specifically for complex services, has been a longstanding challenge for the department. As a result, Statements of Work (SoW) in the department's requests for proposals often leave industry confused about what capabilities the department is actually seeking to procure or drive bidders to propose to a set of assumptions that may or may not represent the best path forward for the department. Rather than using detailed Statements of Work, we have long advocated that the department would be far more likely to receive compelling and innovative proposals if it were to use Statements of Objectives (SOOs). And the first critical step toward achieving that goal is re-thinking and re-focusing on the capabilities the department has and that it needs in this vital area. For example, the department could do a better job of training the acquisition workforce, including specifically the technical and requirements communities, on how to align the use of SOOs with mission objectives. In addition, senior leaders and program offices should state a preference for the use of SOOs wherever possible.

Next, despite our support for the legislative text of Section 301, we have several concerns with the accompanying report language regarding services contracting, which primarily focuses on the department's inventory of services contracts and the statutory caps imposed on services contracts. PSC fully supports the committee's desire to have more details about what types of services the department is contracting for. And, as the committee report points out, the department has done a much better job in recent years of collecting services contracting data by establishing services portfolio groups and reporting on obligations and competition rates within each of these groups. In comparison, the inventories require similar expenditure amounts for services in total, in addition to requiring that the department capture contractor full time equivalents (FTE) and bucket the services provided as either being "inherently governmental functions," "closely associated with inherently governmental functions," or "critical functions."

The statutory language also provides some flexibility for the department to calculate contractor FTE when actual "head count" data is difficult to determine. While we agree that inventories may not yet be as complete and accurate as the congress would like, the department has been submitting the required inventories for several years and continues to build on the accuracy of the data within them.² But we have long argued that too much focus on a contractor head count has limited value, particularly with regard to evaluating the quality of mission performance. Such head count information may have some limited utility to a buying activity when seeking data about long-term contracted staff augmentation services, but has little utility when assessing contractor performance of complex services such as systems engineering or for performance-based logistics contracts. Additionally, under a fixed price contract, the number of FTEs a contractor commits to meeting the objectives of the contract adds little, if any, value to

² However, we are aware of the November 2014 criticism of the department's manpower reporting system. See "Additional Actions Needed to Facilitate the Use of DOD's Inventory of Contracted Services," (GAO 15-88; 11/19/14), available at <http://www.gao.gov/assets/670/667059.pdf>.

the department's evaluation of the type of work acquired and whether the objectives of the contract were achieved.

While better information on services contracting is needed, we recommend that the committee revisit the utility of the current statutorily-mandated services contracts inventory requirement and engage with the department and industry about whether other departmental data reporting and analysis could serve as a better mechanism for providing greater transparency into the department's annual spending on services.

PSC also remains opposed to the arbitrary cap imposed on services contract spending by Section 808 of the fiscal year 2012 NDAA. While the committee has expressed concern that DoD exceeded the cap in 2012, it is important to note that the aggregate amount of money spent on services contracts tells very little. Especially in this budget constrained environment, DoD is making extensive efforts to reduce its spend in all possible areas. Thus, the amount spent on contracting would seem far less important than the efficiency and quality of DoD's mission execution; such efforts actually result in an increase in spending on services contracts while spending on other types of contracts is falling faster. This is especially true given that much of the spending on services is driven by mission areas that require the department to rely on emerging, cutting edge services and technologies that are principally available through the private sector. Cybersecurity is a prime example. In addition, the continued expansion of the "as a service" model of mission delivery within the department will further impact the services contracting spend. For example, a growing portion of what was once procured as IT infrastructure is now procured "as a service," a trend which is widely expected to grow.

Finally, specifically with regard to the concern that the department exceeded the services contracting cap in 2012, it is important to note that the final guidance on Section 808 was not issued until July 2012, thus making it nearly impossible for DoD to comply with the cap in that fiscal year. The following year, DoD spending on services was below the cap.

Once again, however, we would strongly urge you and the committee to focus more holistically on mission and budget performance rather than on individual data points which may say very little about actual outcomes.

Procurement of Commercial Items

PSC is strongly opposed to Section 706 of the bill in its current form. Section 706 would require DoD to designate a single individual within the department to be responsible for making determinations about whether a product or service qualifies as a "commercial item" under the current definitions. Centralizing all commercial item determinations within one entity within the department offers some benefits but, in our view, presents a number of more significant problems. First, there is the practicality of doing so.³ There are thousands of commercial items

³ The February 4, 2015 DoD memo regarding "Commercial Item Determinations" sets a goal for the contracting officer to make the necessary determination "promptly," with a goal of making that determination within ten business days after assembling the support data.

determinations made each year and requiring that they all be conducted by one office, disconnected from the customer base and the acquisition offices, will almost certainly result in procurement delays. Second, we question whether it is a necessary or helpful step. DoD, largely as a result of congressional direction, is taking steps to enhance its workforce training and development. Since commercial items determinations are among the core responsibilities of a contracting officer, rather than negate that training and removing that authority from contracting officers, we would recommend that the training continue and Congress direct an assessment of such efforts to see if the training has been effective and where additional focus may be necessary.

Our concern on this issue is amplified by the fact that, in recent years, the department has submitted multiple legislative proposals to significantly narrow the definition of commercial items—an action we strongly oppose and that we believe would have an adverse impact on commercial industry’s ability to enter into or remain in the defense marketplace. As you may be aware, in DoD’s April 9, 2015 implementation memo of Better Buying Power 3.0 (at page 22), the Under Secretary of Defense (AT&L) directs DoD to develop a legislative proposal to narrow the current definition of a commercial item. PSC will again oppose this provision and we believe the Congress should again reject it, as well. In fact, we surveyed a number of well-known commercial technology firms that have entered the government marketplace over the last 10-15 years, largely as a result of the emphasis on the commercial items provisions enacted in the 1990s. To a company, they indicated that had DoD’s proposal to restrict the definition of a commercial item been adopted, they would have, either in large part or completely, withdrawn from the government market. Fortunately, Congress recognized the negative impact of such proposals and has consistently rejected them.

In contrast, Congress has encouraged the department to rely more, not less, on commercial items to meet departmental missions. And ironically, several provisions in DoD’s April 9, 2015 implementation memo on Better Buying Power 3.0 take a similar approach to encouraging departmental access to commercial items. We believe that the creation of a central office within DoD to make commercial item determinations has too much potential to create a back door opportunity for the department to broadly find items as being non-commercial without having to go through Congress to change the definition of the term. Hence, the proposal would likely result in actions contrary to Congress’ desire to foster greater reliance on commercial items and, at the same time, reduce competition.

Furthermore, today DoD’s contracting officers correctly make thousands of commercial items determinations on a contract-by-contract basis each year. This structure generally works well, despite occasional disagreements about whether particular contracting officers’ determinations are accurate. Those few cases of debate should not be allowed to overshadow the far more prominent importance and success of the commercial items statutes.

For the above reasons, PSC recommends that Section 706 not be included in future versions of the legislation or the fiscal year 2016 NDAA.

If, however, the committee believes that a central commercial items office is necessary, we recommend that Congress reinforce the current guidance that the objective of the office should be in favor of expanding the department's access to commercial items and services through the current statutory framework and that the primary function of this centralized office be to resolve any differences in the commercial item determination by contracting officers. It should also serve as a repository of all commercial item determinations. By limiting the office's role to arbitrating disputes between government and industry, between program offices and contracting offices, or between contracting offices and the department's oversight community, the workload will be manageable and focused where it is most needed. Finally, it is important that the provision be explicit that such an office is entirely separate from DoD's existing cost and pricing offices because the determination of commerciality is not about pricing but what the nature of the item or service being procured. As the statute makes clear, how an offeror prices a commercial item for a specific business opportunity, while important, is actually not relevant to the determination of whether an item or service qualifies as a "commercial item."

Lastly, we encourage the committee to clarify Section 706 so that once an item or services has been determined to be a commercial item the department may not rescind the determination absent a change in circumstance.

Bid Protests

PSC supports a closer review by the committee of bid protests and the forums available, the reasons they are filed, and what impacts bid protests have on the acquisition system. Section 705 of the bill starts down the path of a comprehensive study of bid protests. However, we believe the current items listed in Section 705 that are to be addressed in the bid protest report will not result in a meaningful report that will aid the committee with future policy decisions. For example, an assessment of whether a contractor filed a protest simply for purposes of extending a contract's period of performance will be subjective, as contractors rarely, if ever, use as a reason for filing a bid protest their desire to "extend the current contract." Hence, the committee must be more prescriptive regarding the elements that should be included in the review. Such elements must include an analysis of bid protest sustainment determination rates, the frequency of agency corrective action in advance of protest decisions, the benefits of bid protests to the federal government, and the speed and efficiency by which bid protests are addressed by the government. In addition, PSC questions whether an FFRDC is the appropriate entity to conduct the study and accompanying report required by this section in a completely objective manner. GAO may be in a better position to report on these matters.

Additional Provisions of Support

As stated above, PSC supports many provisions included in the discussion draft. While this letter does not highlight all of the provisions we support, we do wish to specifically highlight our support for Section 501, which would make permanent the DoD Mentor-Protégé Program. PSC also supports DoD's recent legislative proposal to extend the Mentor-Protégé program through 2023, although our preference is for the program to become permanent.

PSC also supports for other provisions included in the various DoD legislative packets the department has recently submitted to the Armed Services Committees. PSC strongly supports Section 831 in DoD's first packet of fiscal year 2016 NDAA proposals. Section 831 would provide flexibility to federal agencies, including DoD, by allowing for an exception to the existing statutory requirement to include cost or price to the federal government as an evaluation factor that must be considered in the evaluation of proposals for multiple award task and delivery order contracts (IDIQ contract). As the department explains in the section-by-section analysis accompanying the legislative proposal, in practice, the evaluation of price as a source selection factor in determining which offerors will receive initial multiple award task and delivery order contract awards for service contracts is problematic at best and is, in many cases, meaningless. PSC further agrees that price competition is best addressed during the competition for task orders under the master IDIQ contract.

PSC also supports Section 803 contained in the third fiscal year 2016 NDAA legislative packet DoD submitted to the committees. Section 803 would remove the retroactive application requirements of Section 803 of the fiscal year 2012 NDAA that expanded the existing executive compensation cap requirements for DoD, NASA, and Coast Guard contracts, to all contractor employees. Again, PSC agrees with DoD's assessment that there is a high probability that the retroactive implementation of the requirements of section 803 would be found to violate the terms of FAR clause 52.216-7, Allowable Cost and Payment, in contracts existing prior to the date of the enactment of the Act, thereby creating a government breach of contract. Based on the legal precedence established during the implementation of similar requirements under section 808 of the fiscal year 1998 NDAA, the Department of Justice has cautioned DoD that the government may be liable for affected costs, plus associated interest penalties and costs associated with contractor claims.

PSC strongly recommends that Section 501 of the discussion draft and Sections 803 and 813 of the DoD legislative proposals be included in any future versions of H.R. 1597.

Again, PSC thanks you and your staff for the thoughtful, collaborative, and hard work to create the discussion draft. We look forward to continuing to work with you as the legislation evolves. As always, please do not hesitate to contact me or Roger Jordan of the PSC staff if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Stan Soloway". The signature is stylized and cursive.

Stan Soloway
President & CEO