



September 28, 2020

The Honorable James Inhofe
Chairman
Senate Armed Services Committee

The Honorable Jack Reed
Ranking Member
Senate Armed Services Committee

The Honorable Adam Smith
Chairman
House Armed Services Committee

The Honorable Mac Thornberry
Ranking Member
House Armed Services Committee

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

On behalf of the member companies of the Professional Services Council (PSC),¹ thank you for the opportunity to provide you and your staff with PSC's positions on provisions included in the House and Senate versions of the Fiscal Year 2021 National Defense Authorization Act (H.R. 6395 and S. 4049). PSC commends you and your committees for drafting strong bills that recognize the important roles and contributions that contractors bring to mission success across the Department of Defense.

As you reconcile your versions of the FY21 NDAA, PSC respectfully requests that you consider the concerns and priorities listed in the attached white paper. In that paper, we outline potential impacts the provisions could have on the contractor community.

In particular, I highlight the following provisions or report language that are consistent with longstanding PSC priorities and that significantly improve the benefits the Defense Department can gain from the contractor community:

- Reduce the timeframe for utilizing expedited closeout methodologies and applying those improvements to additional services contracts (House Section 818);
- Reinforce the need for federal agencies to implement prior-year NDAA provisions regarding Procurement Administrative Lead Time metrics and reporting (House report language);
- Repeal the requirement for the Department of Defense to establish a "loser-pay" fee structure for bid protests (Senate Section 846);
- Reduce DoD's use of incremental funding for services contracts (House report language); and

¹ PSC is the voice of the government technology and professional services industry, representing the full range and diversity of the government services sector. As a trusted industry leader on legislative and regulatory issues related to government acquisition, business and technology, PSC helps build consensus between government and industry. Our 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 trade association's members employ hundreds of thousands of Americans in all 50 states.

- Increase oversight of ongoing DoD initiatives on cybersecurity and supply chain risk management (House Section 828 and committee report language).

The attached paper provides additional justification for these and other provisions of interest and concern to PSC and our member companies.

Thank you for your time and consideration of this information as well as for your continued strong leadership in support of our national security. PSC would be happy to answer any questions you or your staff may have or provide further information.

Yours respectfully,

A handwritten signature in dark ink, appearing to read "David J. Berteau". The signature is fluid and cursive, with a large initial 'D' and 'B'.

David J. Berteau
President and CEO, Professional Services Council

White Paper: The Fiscal Year 2021 National Defense Authorization Act (H.R. 6395/ S. 4049) Impact on the Contractor Community

September 28, 2020

Promote an Effective, Streamlined, and Competitive Federal Contracting System

Support House Section 818 (Expedited contract close out methods): Reducing the timeframe for utilizing expedited closeout methodologies to cover additional services contracts from the current 17 years to 7 years would be a win-win for the government and the contractor community. Timely contract closeout has cash flow implications resulting from over or under-billing positions, as well as a significant internal investment in resources necessary to support the closeout process. Similarly, federal agencies require comparable investment in agency and contracted resources to support administering contract closeout actions, impacting funds available to support agencies' missions. As importantly, agencies can identify excess funds available for deobligation and reuse.

Support Senate Section 846 (Repeal of "loser-pay" bid protest pilot program): The fundamental purpose of the bid protest process is to hold agencies accountable for following the law and their procurement procedures in a transparent manner. Establishing a "loser-pay" fee structure for bid protests and penalizing incumbent contractors who file protests does not support that fundamental purpose, and PSC has opposed the provision. Since the enactment of this requirement, the RAND Corporation released a comprehensive study on the impact of bid protests on DoD acquisitions that found no indications of abuse of the process by medium and large defense contractors and noted that protests by the largest firms have held steady and may be declining. In addition to being unnecessary and undercutting agency accountability, it has proved difficult to implement. PSC looks forward to working with the Committees on better approaches to any problems with bid protests.

Support House Section 804 and Senate Section 845 (Amend auditing definitions): PSC appreciates the Committee's focus on better aligning government requirements with private sector practices. As the Section 809 Panel recommended, reviewing and approving contractor business systems with generally accepted commercial and government auditing standards will provide consistency and clear up the confusion regarding the identification, severity, meaning, and resolution of business systems deficiencies.

Strengthen the Short- and Long- Term Health of the Industrial Base

Support Senate Section 801 (Implementing EO 13806 recommendations): PSC understands the work that went into producing the report required by the Executive Order 13806—Assessing and

Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency—and believes that the Congress tasking DoD with providing more in depth actions to implement the recommendations would provide valuable information for future decision making. In addition, PSC looks forward to working with the Committees on additional assessments on services contracts in logistics, sustainment, and support that can lead to contractor roles that improve readiness at less cost in less time.

Support Senate Section 5841 (DoD progress payments changes): PSC applauded the Department of Defense for its swift action to mitigate the impacts from COVID-19 on the Defense Industrial Base and to provide accelerated cashflow during the early days of the pandemic. The increase in progress payment rates provided a vital lifeline that PSC believes contributed significantly to maintaining the health of the industrial base during the pandemic.

Increase Transparency and Stability in the Federal Market Through Better Planning

Support House Section 357 (Establishment of material readiness metrics): PSC and other stakeholders and experts, including the “Section 809 Panel,” continue to raise concerns regarding the state of materiel readiness in the Department of Defense. We believe it is essential that there is unity of effort by all stakeholders in the sustainment system, consistent performance objectives, and transparency and accountability in resourcing of activities related to materiel readiness. This provision will help the Department reach those goals.

Similarly, PSC urges the conferees to review holistically the many provisions relating to the Department's readiness and sustainment efforts—including House Sections 351, 355, 811, and 913 and Senate Sections 171 and 862—to avoid what we see as overlap, duplication and unnecessary requirements. Each of these sections is intended to improve the way DoD approaches sustainment of its weapon systems, but more must be done with these provisions to harmonize the efforts to produce better outcomes. We look forward to working with the Committees on those efforts.

Support House Section 846 and Senate Section 831 (Requirements assessment): PSC supports the Committee's objective to ensure that the Department's requirements processes produce timely, realistic, and achievable requirements that are aligned with the acquisition system and the budget process. Better requirements will lead to better outcomes. We believe this assessment would provide valuable information for the Congress and agree that it should be tied to the Adaptive Acquisition Framework as both Committees direct.

Support House Section 220 (Improve digital data management): PSC supports the direction to DoD to improve and modernize data management across the enterprise. We believe that a data driven approach will lead to better integration of the Department's acquisition processes, improved decision making, and better outcomes.

Support Senate Section 5891 (List OTA consortia members): PSC continues to believe that “other transaction authority” (OTA) has a place in the acquisition toolbox when used appropriately. We also believe that there should be increased transparency around OTA use; a Beta.SAM.gov list of the consortia used would assist in these goals.

Support and Amend House Section 837 (Category management training): PSC understands that this amendment is targeted toward small business and believes that better training on category management for federal agencies would be productive and beneficial. However, the Small Business Administration (SBA) may not be the appropriate agency to develop the curriculum and best practices for other federal agencies. Instead, since the President’s Management Agenda’s Category Management CAP Goal is owned by OMB, we would urge the Congress to direct OMB to oversee efforts to address training needs.

Provisions on Domestic Sourcing: Both bills impose numerous requirements for domestic sourcing of certain products, and PSC agrees with the Committees’ overall intent of improving the security and stability of domestic sourcing while reducing dependency on foreign suppliers where vulnerabilities exist. PSC does not intend to comment on each provision in the respective NDAA’s that add new or further restrictions on certain products, materials or systems, but we do urge the conferees to ensure that proper consideration is given to the time and effort both the federal government and the contractor community will need to comply with the new restrictions.

Eliminate Onerous Compliance Requirements that Increase Costs Without Improving Performance or Essential Accountability

Support and Amend House Section 828 (Section 889 Sense of Congress): PSC welcomes the inclusion of this section highlighting serious concerns regarding the implementation of Section 889(a)(1)(B) of the FY19 NDAA. Under Secretary of Defense Ellen Lord testified before the HASC on June 10 about the challenges the Department faces in implementation. The August 12 Office of Director of National Intelligence waivers for DoD, the State Department and USAID further demonstrate the wide-spread challenges regarding the government’s (and contractors’) ability to meaningfully implement these new requirements, regardless of the intent and the good faith efforts made by the impacted communities. This Sense of the Congress states that regulators should ensure sufficient time for public comment and review. Even though the publication of the interim FAR final rule one month prior to the effective date did not provide that time, the provision remains useful as an operating principle for rulemaking.

PSC and others have asked the Congress to delay implementation of Section 889(a)(1)(B)² and require better coordination of this provision with other statutory and regulatory changes. Once such change

² See Joint PSC NDIA March 21, 2020 letter to Congress on required changes to Section 889(a)(1)(B): https://www.pscouncil.org/a/News_Releases/2020/PSC_and_NDIA_Seek_Extension_to_NDAA_Section_889_Deadline.aspx

mentioned in the provision is the Federal Acquisition Security Council, which did not exist at the time Section 889 was enacted. At a minimum, we urge the conferences to adopt a statutory delay in implementation, but we believe that more should also be done to narrow the scope and clarify the definitions of Section 889(a)(1)(B) and reconcile it with other related statutory provisions. Doing so will improve national security as Section 889 is implemented.

Similarly, the inclusion of the State Department authorization in the House bill, and its Section 14503 specifically, only further highlights the challenges posed by this lack of coordination. This provision imposes a new requirement on the Secretary of State to produce a list of telecommunications providers whose involvement in certain activities would prohibit the State Department from contracting with those companies. We oppose this provision. This provision appears to target some of the same companies covered by the Section 889 prohibition, but would appear to require the creation of a separate list, a new provision unique to the State Department, and a different process for companies seeking to do business with the Department of State. This provision unnecessarily duplicates in part the work already required of the Federal Communications Commission and the already-produced “Entities List” published by the Department of Commerce. It will create confusion and reduce competition without any concomitant security benefits. We are also separately writing to the House Foreign Affairs Committee and the Senate Foreign Relations Committee raising these concerns.

Support House Section 820 and House Section 820C (Commercial items provisions): PSC supports the Congress’ continued focus on removing obstacles for government access to commercial items and reducing duplicative practices for contracting officers. We believe both of these goals will be moved forward by adding commercial item determinations to the DoD Commercial Item Group and allowing a prior commercial item determination to serve as a determination for subsequent procurements.

Oppose House Sections 1632, 1634 and 1710A and Senate 1612, 1631 and 1632: PSC appreciates the extensive work of the Cyberspace Solarium Commission and believe that the report and many of its recommendations will significantly improve cybersecurity and cyber hygiene. That said, the inclusion of these specific provisions would require significant contractor community investments while providing few if any benefits to cybersecurity.

Allow Government Contractors to Build Workforces to Meet Future Government Missions

Support Senate Sections 374, 1052, and 9403 (Security clearance and secure facilities-related provisions): PSC has been grateful to have been able to work with the Congress to craft reforms to the government-wide security clearance process, and we continue to appreciate the focus on recruiting and retaining the trusted workforce that would result from these provisions. This year’s NDAA addresses additional needed reforms, especially the promotion of better information sharing between the government and contractor community. We urge the conferees to include these provisions in the final bill but also to continue to exercise oversight of the implementation of and results from previous reforms and ongoing executive branch initiatives.

Support House Section 834 and Senate Section 871 (Accelerated payments for small businesses): PSC has been an active and strong supporter of accelerated payments to small business prime and subcontractors. Accelerated payments are a critical lifeline for small businesses who work in the federal marketplace and help provide access to capital while enhancing growth opportunities. We support the Committees' continued focus on oversight of existing government-wide requirements and efforts to strengthen the requirements by addressing unique Defense Logistics Agency practices.

Support House Section 212 (STEM programs as allowable costs): PSC believes that making a contractor's cost for participation in certain science, technology, engineering and math development programs an allowable cost will help ensure that companies can improve their ability to recruit and retain high-skilled staff to meet future government mission needs.

Support House Section 836 (Small business past performance): PSC supports allowing small businesses and contracting officers to consider the relevant past performance experience of first-tier subcontractors and joint venture members when making contract award decisions.

Ensure Fairness and Due Process for the Contractor Community

Oppose Senate Section 1635 (Cyber attacks on contractors): PSC does not support this provision, which was considered and rejected by the Committees last year. It would authorize the Department to obtain access to equipment and information to conduct a forensic analysis of contractor networks, whether or not the contractor requested such assistance and without sufficient safeguards in place to ensure due process.

Oppose House Section 820B (DoD lobbying reports): Since much of the information required to be reported by this provision is duplicative of existing lobbying disclosure requirements, PSC believes that these new reports and the needed time and effort to compile this information will be extensive, invasive, and provide no value added to the government or the public.

Oppose House Section 848 (Fair Labor Standards Act changes): The Federal Acquisition Regulation (FAR) already requires consideration of the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors taken, including, but not limited to, whether the contractor had effective standards of conduct and internal control systems in place at the time the cause for debarment occurred and the degree to which the contractor cooperated with the government agency during the investigation. This provision ignores these existing procedures, duplicates their effort and results, would cause confusion for contracting officers, and provides no additional benefits. It has been repeatedly rejected by the Congress in recent years. We urge you to do so again.

Oppose House Section 849 (Commission on Wartime Contracting) and House Section 851 (Security contractors): These provisions would require an unreasonable and duplicative effort that would

produce no added value to the Department's current or future missions. PSC believes it would be far more beneficial to look proactively at the Department's needs for future overseas contingencies—especially now, given recently announced and anticipated changes to US military deployments overseas—rather than retroactively collect and analyze almost two decades worth of data that are unconstrained by geography or scope. The on-going work of the Special Inspector General for Afghanistan Reconstruction already provides useful “lessons learned” that could have been covered in recent congressional hearings and in the Department's on-going contingency operations planning. We look forward to working with the Committees on such a forward-looking approach that would benefit the Department.

Oppose House Section 850 (Publish border wall contract data): The federal government is already required to make public significant amounts of information related to contract awards, including the information required by this provision. Requiring a new and separate list of contracts specifically relating to the construction or maintenance of any particular subset of such data, including but not limited to a barrier along the United States and Mexico border if above a certain dollar threshold, is unnecessary and duplicative, and doing so would unfairly single out contractors performing work under properly-awarded existing contracts.

Promote Technology and Innovation to Achieve Agency Mission Results

Support House Section 249 (Artificial intelligence and talent exchanges): Since its inception, PSC has been a strong supporter of the Department's public-private talent exchange programs. We appreciate the work that Congress, DoD, and industry have done to make these exchanges work. The direction to specifically include artificial intelligence applications will enhance the department and industry's ability to effectively and efficiently work together to maximize the benefits of this technology for the federal government.

Support House Section 1769, and Senate Section 5239 (Private sector participation): PSC supports these and similar efforts made by the Congress to direct federal agencies to provide private sector partners with a seat at the table when developing strategies and plans that impact both. The Department benefits from such participation. This is particularly relevant for the development and integration of emerging technologies.

Support House Section 1769 (FedRAMP Reauthorization): These provisions will provide much-needed improvements to the FedRAMP program by addressing issues surrounding reciprocity and streamlining and accelerating the “Authority to Operate” (ATO) review and approval process.

Oppose Senate Section 841: (Permanently authorize CSOs) PSC does not oppose the use of Commercial Solutions Openings, which are intended to allow federal agencies to acquire innovative

commercial products and services, yet we believe a permanent authorization is premature. Instead, we urge the conferees to support the assembly and analysis of results from ongoing use of CSOs.

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