

Department of Defense (DoD): Keeping Our Nation Safe and Secure

AFGE is proud to represent 270,000 civilian employees in the Department of Defense (DoD), whose experience and dedication ensures reliable and cost-efficient support of our nation's warfighters. Our members perform a wide range of civilian functions, from maintaining weapons to overseeing contractors to guarding installations. The Pentagon's own data prove that of the department's three workforces—military, civilian, and contractor—the civilian workforce is the least costly and the most efficient, but is nevertheless targeted for the largest cuts. AFGE is honored to represent civilian employees on a wide range of issues, both on Capitol Hill and within the department.

KEY POINTS

To strengthen the Department's critical civilian workforce, prevent waste and inefficiency, and strengthen national defense AFGE urges Congress to:

1. Prevent further wasteful outsourcing of civilian Defense jobs by continuing the moratorium on A-76 public/private competitions until process flaws are corrected
2. Restore military commissaries to their traditional role supplying affordably priced food and staples to military families
3. Improve military health care by backfilling medical vacancies resulting from realignment with civilian medical staff instead of outsourcing health care to an overburdened private sector
4. Support more merit-based competitive hiring, instead of using excepted hiring authorities, through measures such as streamlining the job application process, creating standing registers of qualified applicants, and using panels of subject-matter experts to make selections instead of using rigid qualifications
5. Repeal the authority for alternative performance management systems such as AcqDemo that are bureaucratic, inefficient, and result in favoritism and discrimination
6. Improve acquisition, readiness, and sustainment by narrowing the definition of "commercial items," expanding DoD access to contractors' technical data, and supporting the government's right-to-repair military hardware
7. Enforce existing statutory prohibitions against outsourcing governmental functions by requiring improved contract and budget guidance, withholding appropriated funds from noncompliant service contracts, and re-establishing and expanding contractor inventories that were discontinued during the prior administration
8. Reduce contract waste and inefficiency and improve the availability of contract cost data by reinstating the Army's acclaimed Enterprise Contractor Manpower Reporting Application (ECMRA) instead of OMB's failed System for Acquisition Management (SAM)
9. Withhold authority for any further rounds of Base Realignment and Closure (BRAC) and eliminate a loophole that allows the privatization of functions at bases facing closure
10. Eliminate the remaining arbitrary personnel caps governing certain headquarters activities in favor of comprehensive cost reporting for military, civilian, and contract personnel

11. Ensure that commission reforms to the Department's Planning, Programming, Budgeting, and Execution (PPBE) process protect readiness and lethality, accurately present the costs of contracts, and end misleading claims of future "savings" when cutting the civilian workforce in favor of contractors
12. Prohibit the use of appropriated funds for hiring term or temporary employees to perform enduring work
13. Improve procedures for adjudicating decisions on security clearances (a requirement for many DoD positions) and commission a joint survey to determine if past security clearance decisions show a pattern of discrimination or have overlooked membership in hate groups
14. Reinstate the statutory requirement for the Department to perform an independent estimate of manpower costs prior to deploying major weapons systems, including the appropriate balance of military, civilian, and contractor personnel for operation, training, and sustainment

RETAINING THE MORATORIUM ON PUBLIC-PRIVATE COMPETITIONS PURSUANT TO OMB CIRCULAR A-76

Issue

Despite previous Congressional direction, DoD is not prepared to conduct viable A-76 competitions. In fact, the disruptive impact of A-76 competitions on the care provided to wounded warriors being treated at the former Walter Reed Army Medical Center in February 2007 led to multiple investigations, resignations of senior officials, hearings and legislation by Congress prohibiting the conduct of A-76 competitions, initially at military medical treatment facilities, and the Department of Defense, as currently reflected in Fiscal Year 2010 NDAA section 325, and later extended to the entire federal government through annual appropriations restrictions.

Background/Analysis

Section 325 of the FY 2010 NDAA made congressional findings on the flaws of public-private competitions as devised by OMB Circular A-76 and implemented within DoD. These flaws included:

1. The double counting of in-house overhead costs as documented by the DoD IG in D-20090-034 (Dec. 15, 2008);
2. Failure to develop policies that ensured that in-house workforces that had won A-76 competitions were not required to re-compete under A-76 competitions a second time;
3. The reporting of cost savings were repeatedly found by the GAO and DOD IG to be unreliable and over-stated for a variety of reasons, including:

- a. Cost growth after a competition was completed because the so-called most efficient organization and performance work statements that were competed often understated the real requirement.
 - b. Military buy-back costs documented by GAO (GAO-03-214); A-76 competitions required a military department either to reduce its end strength or reprogram the funds to Operations and Maintenance appropriations in order to complete the competition.
- 4. As a result of these flaws, DoD was required to develop comprehensive contractor inventories, improve its service contract budgets, and to have in place enforcement tools to prevent the contracting of inherently governmental functions; to ensure that personal service contracts were not being inappropriately used; and to reduce reliance on, or improve the management over high risk “closely associated with inherently governmental” contracts.
 - a. The scope of contractor inventories has been limited to “closely associated with inherently governmental functions” and personal services contracts since SASC changes to the 2017 NDAA; the full scope of all services contracts must be included in contractor inventories by including:
 - i. All services contract portfolio groups as were required during the Bush and Obama Administrations;
 - ii. Including all commercial services contracts;
 - iii. Eliminating arbitrary dollar thresholds, as most services contracts are typically awarded through piecemeal task orders with low dollar threshold amounts, particularly due to the pervasiveness of continuing resolutions and incremental funding;
 - iv. Including critical functions as defined in title 10 and any function performed by military or civilian employees in the last ten years.
 - b. During the Trump Administration, the Department ended the Obama Administration’s commitment to implement the robust Enterprise Contractor Manpower Reporting Application (ECMRA) by moving to the System for Award Management. This system, designed by OMB’s Office of Federal Procurement Policy and implemented by the General Services Administration for the rest of the Federal Government, lost key functions that were part of ECMRA:
 - i. Meaningful cost comparison capabilities because of the absence of indirect and other direct cost data from SAM;
 - ii. The ability to track requiring activities;
 - iii. The ability to track the location where the contract was performed;
 - iv. The ability to track funding sources, including appropriations, object class, and program element information; and
 - v. Coverage for most fixed price contracts, which currently comprise the majority of services, as SAM has excessive exclusion thresholds.

The GAO has repeatedly documented these flaws, and broken DoD commitments to Congress, most recently in GAO 21-267R, “SERVICE ACQUISITIONS: DoD’s Report to

Congress Identifies Steps Taken to Improve Management But Does Not Address Some Key Planning Issues” (Feb. 22, 2021).

These flaws have not been addressed and the conditions laid out in Section 325 have not been complied with (based on required GAO reviews and the lack of required DoD certifications of actions taken). In fact, June 28, 2011, is the last time DoD specifically reported to Congress on its plans to address problems specifically arising from section 325 of the FY 2010 NDAA.¹ Nonetheless, the Pentagon has incorrectly told the Congressional Research Service that it has met all the criteria identified in section 325 of the Fiscal Year 2010 NDAA for ending the moratorium on A-76 competitions.

Congressional Action

- Continue the public-private competition moratorium until such time as the flaws in A-76 are corrected and contractor inventories complete.
- Congress should require the department to address the requirements of section 325 of the FY 2010 NDAA in full, followed up by a GAO review.

PRESERVING THE DOD COMMISSARY NON-PAY BENEFIT SAVINGS (WHICH ARE PARTICULARLY IMPORTANT IN REMOTE AND OVERSEAS AREAS) AND ITS WORKFORCE (THAT INCLUDES VETERANS AND MILITARY SPOUSES AND FAMILY MEMBERS) AND A NECESSARY INGREDIENT TO COMBATING FOOD INSECURITY AMONG SOME MILITARY FAMILIES

Issue

DoD’s continuation of the flawed variable pricing program has damaged the Commissary brand, resulting in significant revenue losses that were further exacerbated by the pandemic. This damage has occurred during a period when some military families have been suffering from food insecurity, necessitating a Basic Needs Allowance and consideration during the last NDAA process of providing free produce to some military families. In the past, commissaries offered military members and their families the lowest pricing available anywhere for brand name items.

Background/Analysis

¹ Additionally, the department notified Congress on Nov. 26, 2019 that it would be transitioning from the Enterprise Contractor Manpower Reporting Application to the System for Award Management (SAM), and that it would provide a summary of FY 2020 data by the end of the third quarter of FY 2021. The DoD notification did not explain that SAM excludes most services contracts and does not address the analytical review requirements of section 2330a of Title 10, as the statute requiring SAM across non-DoD agencies had a much narrower scope than the DoD statute.

The commissary benefit is a crucial non-pay benefit for the military and their family members, particularly in remote and overseas locations. As a result of recent variable pricing “reforms” developed by the Boston Consulting Group, sales have dropped by nearly 25% and coupon redemption has been reduced by more than half from 113 million in 2012 to 53 million in 2017. SNAP usage has dropped by 947,000 down to 550,000. There is broad coalition support for preserving the commissary benefit led by the American Logistics Association.

Congressional Action

- Establish pilot programs for providing free produce to military families affected by food insecurity through the Commissaries.
- Require Commissaries to stop profiting like private businesses through variable pricing and return to the low-cost model that provided a clear benefit to military families.

PRESERVING THE PROVISION OF QUALITY HEALTH CARE TO MILITARY MEMBERS, THEIR FAMILIES, AND RETIREES IN MILITARY MEDICAL TREATMENT FACILITIES BY BACKFILLING MILITARY MEDICAL STRUCTURE PLANNED FOR REALIGNMENT TO OPERATIONAL REQUIREMENTS WITH CIVILIAN EMPLOYEE BACKFILLS

Issue

The department is downsizing military medical treatment facilities by shifting beneficiaries to TRICARE for any functions performed by military structure that does not deploy into combat zones to improve readiness.

Background/Analysis

In the 2017 NDAA, Congress directed the department to reorganize the Defense Health Program and provided authority to convert military medical structures to civilian performance. To that end, Congress repealed requirements that military department surgeon generals certify to Congress about the impact on readiness and quality of care before privatizing any military medical structure. The Trump administration further misused this authority with plans to downsize both military and civilian structures in military medical treatment facilities. For any function that did not involve a military occupational specialty that was deployable into combat zones, the administration planned to shift care into already oversaturated local TRICARE markets. The administration claimed these actions were intended to improve readiness.

The effects of these actions have degraded the quality and level of health care provided to military beneficiaries and their families because the local markets, as Congress and the GAO found, lack the capacity to provide this care. These local health care network capacity problems were exacerbated further by the COVID-19 pandemic.

AFGE lobbied Congress during the course of the FY 2021 and FY 2022 NDAA to consider inclusion of H.R. 2581, “Nurse Staffing Standards for Hospital Patient Safety and Quality Care Act of 2019,” sponsored by Rep. Schakowsky (and others), and the corresponding S. 1357

sponsored by Sen. Warren (and others). Section 716 of the FY 2021 NDAA requires the department to develop and report a proposed quality of care standard to Congress, which must be approved by Congress, before further action can be taken to downsize or reorganize military medical treatment facilities. Section 715 bars downsizing military medical structure until the department reports to Congress its rationale for determining what medical structure is related to readiness. Additionally, Section 722 of the FY 2021 NDAA requires the department develop a “COVID-19 global war on pandemics” plan. And finally, Section 757 of the FY 2021 NDAA requires a study on force mix options and service models to enhance readiness of the medical force of the Armed Forces. The Defense portion of the omnibus appropriations bill for FY 2021 includes direction for a GAO review of the military medical treatment reorganization and similarly puts a pause of reorganization efforts until GAO findings are addressed in a report to Congress.

However, the Biden Administration, the Trump Administration, and Congress have all failed to require the Department to backfill planned realignments of military medical structure with civilian employees, which would be an important way to mitigate the damage from past policies.

Congressional Action

- Require the Department to take more pro-active steps to backfill military medical structure planned for realignment to operational requirements with civilian employees.

IMPROVING THE CIVILIAN HIRING PROCESS BY ESTABLISHING A PREFERENCE FOR COMPETITIVE SERVICE HIRING IN LIEU OF NON-COMPETITIVE HIRING THROUGH DIRECT HIRES, EXPANSIONS OF THE EXCEPTED SERVICE, OR TITLE 10 EXCEPTIONS TO TITLE 5 OVERSIGHT BY THE OFFICE OF PERSONNEL MANAGEMENT

Issue

DoD’s hiring problems arise from the piecemeal expansion of non-competitive hiring and “flexibilities” provided to DoD management that are exceptions to title 5 procedures.

Background/Analysis

- Section 1109 of the FY 2020 NDAA consolidates various direct hire authorities established on a piecemeal basis over the course of several NDAA’s into a single provision, which sunsets on September 30, 2025. Section 1109 also requires the Secretary of Defense, in coordination with OPM, to provide for an independent study to identify steps that could be taken to improve the competitive hiring process consistent with ensuring a merit-based civil service and diverse workforce in DoD and the federal government. The study is required to consider the feasibility and desirability of using “cohort hiring” or hiring “talent pools” instead of conducting all hiring on a “position-by-position basis.” The study is to proceed in “consultation with all stakeholders, public sector unions, hiring managers, career agency and Office of Personnel Management personnel specialists, and after a survey of public sector employees and job applicants.”

- The National Security Commission on Artificial Intelligence, the Government Accountability Office, the Congress, and the Department of Defense have all recognized that the Department has significant skills gaps in various Scientific, Technological, Engineering, Mathematical, and Manufacturing (STEMM) fields as well as acquisition, financial management, cyber, artificial intelligence, and foreign language skills. Recruiting in these fields is critical to meeting 21st century threats to our national security as articulated in President Biden’s National Defense Strategy.
- These skills gaps have persisted after numerous “flexibilities” have been provided to the Department of Defense, including:
 - The Secretary of Defense has since 1989 had broad authority to establish hiring levels and compensation for civilian faculty at the National Defense University and Defense Language Center;
 - The Secretary of Defense has since 2011 had authority to deviate from title 5 in a so-called “pay for performance” demonstration project for the acquisition workforce;
 - The Cyber Excepted Service is exempt from OPM oversight and from the Classification Act, does not allow non-veterans to appeal adverse actions to the Merit Systems Protection Board, and has an excessive three-year probationary period;
 - Section 9905 of Title 10 provides the secretary various direct hire authorities for depot maintenance and repair; the acquisition workforce; cyber, science, technology and engineering or math positions, medical or health positions, child care positions, financial management, accounting, auditing, actuarial, cost estimation, operational research, and business administration;
- The perspective of the Department of Defense leadership has consistently been one of seeking and obtaining exemptions from the government-wide processes administered by the Office of Personnel Management that are intended to ensure an apolitical civil service. The Department of Defense has sought these authorities purportedly in the quest for greater management flexibility, often to the detriment of the long-term job security of employees being hired into the Department.
- In fact, the misuse of these authorities arguably has been one of the primary factors leading to persistent skills gaps in the workforce. There is an inherent contradiction between unfettered management “flexibility” to set the terms and conditions of employment and the very idea of human capital planning that views employees as possessing both existing skills and potential talent that can only be developed through a long-term commitment. There is a flawed perception that an employee has only a single skill that cannot be adapted and developed as the Department’s missions change. Personnel caps have been used to discard employees and their skills through the egregious misuse of term and temporary appointments.
- Another contributing factor to these management problems in the Department has been lax oversight by the Office of Personnel Management of the delegated examining authority provided to the Department, a delegation that has persisted over a couple of decades. As a result of this lax oversight, there has been a proliferation of separate career programs within each military department for the same kinds of skills.

- For anyone concerned with civilian control of the military, the likely genesis of this proliferation of separate civilian career programs within each military department for the same sets of skills in the Department resides in the preference of military supervisors for managing a civilian workforce in the kind of framework they are accustomed to for the military. Sometimes this cultural propensity manifests itself in lack of recognition that the Americans with Disabilities Act or other Civil Rights laws applicable to the federal government workforce must be applied to the civilian workforce in DoD.
- Sometimes this results in each Military Department creating separate developmental paths and certification requirements for similar sets of skills, a practice that creates significant barriers for promotion of internal candidates or lateral entry for external candidates.
- Moreover, management practices and culture often erect barriers to hiring more than any lack of authorities. For example the National Security Commission on Artificial Intelligence reported that the Department failed to recognize experience as a substitute for educational credentials when determining appropriate compensation for Cyber workers, something that title 5 already allows without any legislative action.
- Congressional “reforms” – frequently the result of Department or study commission recommendations - often emulate the highly expensive accession methods used by the military, such as recent recommendations by the National Security Commission on Artificial Intelligence for a Digital Academy—based on the military academy model.
 - There are less expensive alternatives to fill skills gaps, if only the Department, with the assistance of a reinvigorated Office of Personnel Management, were to revive the objective assessment tools that had been successfully used before to generate larger lists of qualified and diverse candidates.
 - Larger numbers of diverse candidates (at less cost than the Digital Academy) could be generated by expanding the existing three-year Cyber Scholarship programs for federal government employees to make them as generous as ROTC commissioning programs which pay for four years of college and even for graduate and professional school, with a comparable service commitment.
 - Additionally, a larger population of qualified and diverse candidates could be generated by expanding the use of cohort hiring or standing registers, a method that can only practically be used through objective assessment tools for screening candidates, in lieu of the burdensome practice of requiring job applicants to separately apply for similar jobs on the website USAJOBS. The paucity of qualified and diverse candidates on referral lists is in large part due to the failure to generate standing registers of qualified candidates from objective assessment tools that require applicants to apply only once rather than separately to each job opening.
- AFGE’s position, in general, has been to oppose direct hiring because exceptions to full and fair open competition for jobs have been used to circumvent consideration of internal candidates for jobs, weaken diversity, and exclude otherwise qualified candidates from consideration. Sometimes in the past AFGE has supported, purely on an exception basis, direct hire for depots but has seen these authorities later illegitimately expanded to cover areas such as installation support services in public works offices.

- Direct hire authorities work “well” for a hiring manager when one knows specifically whom one wants to hire for a job by cutting off competition and shortening the length of the hiring process. But they completely undermine recruiting the best qualified candidates from a diverse pool and largely perpetuate a “closed system” of hiring in the federal government, where getting hired means “knowing someone on the inside.”
- The Merit Systems Protection Board recently suggested in November 2019 that agencies can hire better, not just faster and cheaper, by bringing subject matters experts into the hiring process and “ensuring that the advertised qualifications of a job posting more accurately line up to the competencies needed to be successful.” Direct hire authorities are typically justified as a means of streamlining the lengthy hiring process to fill positions that would otherwise be filled with other labor sources (contractors or military). However, direct hire is a band-aid that fails to deal with the root causes of hiring delays and largely circumvents other Congressional objectives such as veterans’ preference, hiring military spouses, allowing for internal competition for jobs, and promoting diversity of the workforce.
- There are four root causes to hiring delays, none of which is addressed by direct hire authorities:
 1. Budgetary uncertainty arising from continuing resolutions, hiring freezes, sequestration, furloughs, and arbitrary caps on the size of the civilian workforce reflected in Full-Time Equivalent projections in the budget or the number of authorized positions on an organization’s manning documents. Virtually every management layer of the DoD can create impediments to hiring by requiring organizations to seek their approval prior to initiating a hiring action with the human resources departments.
 2. Restrictions on the use of “over hires” for civilian positions even when a workload requirement exists and funding is available to a local manager to initiate hiring for that position. These restrictions create incentives for managers to use available funding for civilian employment to hire contractors instead, even for inherently governmental functions that by law, cannot be contracted out. The GAO recently found that the depots in the organic industrial base sometimes commence hiring at 80% of their authorizations on a position by position level waiting for vacancies to occur, rather than a more proactive approach of hiring at some percentage above 100% of authorizations to account for hiring lags.
 3. Downsizing and centralization of human resources offices, in the name of “efficiency,” which severs the relationship between hiring managers and the human resource “recruiters” who have been asked to do more with less.
 4. The processing of security clearances is an entirely separate function within the hiring process. Security clearance processing and adjudication is by far the most time consuming part of the hiring process, and it has an enormous impact on the time it takes to fill many positions, regardless of whether direct hire authority is used.

Congressional Action

- Oppose adding additional direct hire authorities or expansions of the excepted service.
- Support preferences for competitive hiring.
- Require the Department to respond to recent Senate Armed Services Committee report language, which identified deficiencies in the hiring, development, and retention of STEMM, Cyber, and other critical personnel and directed the Department to develop a coherent plan for greater use of competitive hiring, subject matter expert hiring panels, and use of standing registers of qualified candidates, among other measures. Follow up on Department of Defense response to Senate Armed Services Committee markup directive report language: “Department of Defense civilian workforce career developmental programs,” at page 168: “The committee notes that skill gaps in hiring, development, and retention of personnel in Science, Technology, Engineering, Mathematics, and Manufacturing (STEMM), Cyber, Artificial Intelligence, acquisition workforce, financial management, and critical functional areas required by the National Defense Strategy (NDS) persist, even after numerous legislative initiatives that provided greater flexibility in setting the terms and conditions of employment. Each military department has created its own separate career program brands for the same kinds of skills, often with their own separate developmental paths and certification and training requirements that create a cumbersome application process and may at times impede consideration of otherwise qualified candidates for civilian jobs. The committee believes that this fragmented approach does not meet the needs of the Department. Accordingly, the committee directs the Secretary of Defense to provide a report to the Committees on Armed Services of the Senate and the House of Representatives not later than January 1, 2022, on its plan to streamline civilian personnel management across the Department of Defense (DoD) with the goal of further developing the skills the Department needs to meet the priorities of the NDS while maintaining an apolitical civilian workforce. The plan should at least address the following elements:
 - (1) Emphasis on competitive hiring using objective assessments of qualifications in lieu of rigid tools for classification;
 - (2) Promoting innovative management of the Federal workforce;
 - (3) Using data analytics to establish a systematic process to ensure the current and future DoD workforce is aligned with the current and future mission of the Department;
 - (4) Use of subject matter expert hiring panels to limit rigid assessments of qualifications;
 - (5) Recognition of alternative developmental paths to establish qualifications required for positions;
 - (6) Emphasis on diversity and inclusion;
 - (7) Increasing use of standing registers of qualified applicants to fill open positions;
 - (8) Emphasis on active recruitment methods through visits to high schools, trade schools, colleges, universities, job fairs, and community groups rather than passive recruitment through job postings;
 - (9) Utilizing standardized and uniform Government-wide job classification;

- (10) Reducing cumbersome application processes, including the requirement to use Federal resumes;
- (11) Legislative proposals required to achieve these outcomes.”

REPEAL AUTHORITY FOR ACQDEMO AND OPPOSE OTHER SO-CALLED PERFORMANCE MANAGEMENT SYSTEMS SIMILAR TO THE FORMER NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)

Issue

The AcqDemo is plagued with the same problems that occurred under the NSPS, described below. Recommendations from the section 809 Panel to make its authority permanent and expand it to the entire acquisition workforce are flawed and should be opposed.

Background/Analysis

A recent RAND review of the AcqDemo identified the following problems:

1. It is not clear whether the AcqDemo flexibility has been used appropriately, as starting salaries for AcqDemo participants were about \$13,000 higher than starting salaries for “comparable” GS employees in DoD.
2. As occurred in NSPS and similar pay-banding structures, “female and non-white employees in AcqDemo experienced fewer promotions and less rapid salary growth than their counterparts in the GS system.”
3. Only about 40% of respondents to the RAND survey perceived a link between their contribution and compensation, a figure that “is lower than comparable survey statistics from other demonstration projects.”
4. Subject matter expert interviews and survey write-in responses opined that AcqDemo was overly bureaucratic and administratively burdensome – taking time away from actual mission performance: appraisal writing, feedback sessions, and pay pool administration, in particular, were perceived to be time-consuming and inefficient.

Additionally, the claim by AcqDemo proponents that it “links employees pay and awards to their contribution to mission outcomes rather than longevity” is unsupported. In fact, some employees at APG support AcqDemo precisely because it provided greater salary increases overall than the GS system for every employee and had good grievance outcomes, largely because of the failure of management to do all the bookkeeping required on a timely basis with respect to setting objectives and counseling, which would seem to run counter to the argument of its proponents in management and the 809 Panel that describe it as rewarding and recognizing excellent performers.

Congressional Action

- Oppose expansion of AcqDemo and consider repealing authority for AcqDemo.

EXPANSION OF “COMMERCIAL ITEM” DEFINITIONS HAVE ENCOURAGED SOLE SOURCE PROCUREMENTS THAT WEAKEN TECHNICAL DATA RIGHTS ACCESS, ORGANIC INDUSTRIAL BASE SUPPORT, AND GOVERNMENT COMMAND AND CONTROL OF WEAPON SYSTEMS

Issue

In the FY 2018 and 2019 NDAs, the definitions of “commercial items” were expanded very broadly in ways that could easily mischaracterize many weapon systems and components as commercial and thereby inappropriately shift the sustainment workload from the organic industrial base to the private sector. Military leaders could lose command and control, and depots could lose the ability to perform maintenance efficiently and effectively on new weapon systems. Government access to technical data rights and cost or pricing data could be diminished and the ability of the government to insource contract logistics support could also be affected.

Background/Analysis

The following definitional changes are of concern:

- Changing the standard for designating the level of modifications to an item that would be required to deem an item as military unique. Many weapons and components that are only suited for military purposes could be modified to no longer be compatible with their civilian origins and yet would no longer be considered military unique.
- Changing the standard from multiple state “and” local governments to multiple state “or” local governments “or” foreign governments. This greatly expands the list of military unique items that could be considered commercial even though they have never been sold in the commercial marketplace.
- A single determination made by any contracting officer anywhere in the world designating an item as commercial stands as the final determination for that item for all purposes throughout the lifetime of that item for all acquisition actions unless the Secretary of Defense determines otherwise in writing.

A joint hearing between the House Armed Services Committee (HASC) Readiness and Tactical Land and Air Forces Subcommittees on Nov. 11, 2019, focused on sustainment problems with the F-35 fighter jet, which is DoD’s costliest weapons system with acquisition costs expected to exceed \$406 billion and sustainment costs estimated at more than \$1 trillion over its 60-year life cycle. According to an April 2019 GAO-19-321 audit, “F-35 Aircraft Sustainment: DoD Needs to Address Substantial Supply Chain Challenges,” the F-35 aircraft performance is “falling short of warfighter requirements - that is, aircraft cannot perform as many missions or fly as often as

required ... due largely to F-35 spare parts shortages and difficulty in managing and moving parts around the world.” For example, F-35 aircraft were unable to fly nearly 30% of the May-November 2018 time period due to spare parts shortages and a repair backlog of about 4,300 F-35 parts. Certain sets of F-35 parts are acquired years ahead of time to support aircraft on deployments, but the parts do not fully match the military services’ needs because the F-35 aircraft have been modified over time. For example, 44% of purchased parts were incompatible with aircraft the Marine Corps took on a recent deployment. The GAO, the DOD IG and some in Congress during this hearing acknowledged that these problems are rooted in the government’s lack of access to intellectual property.

However, these same members of Congress do not seem to recognize that the goal post has been moved even further with additional impediments to the government obtaining access to intellectual property in response to the Section 809 and Section 813 panels’ recommendations that were recently enacted by Congress. For instance, a change made in Section 865 of the FY 2019 NDAA is currently being implemented in departmental rulemaking to remove an exception for major weapon systems to the presumption, for purposes of validating restrictions on technical data, that commercial items were developed exclusively at private expense. Currently, the general presumption of private expense at DFARS 227.7103-13(c)(2)(i) is subject to an exception in subparagraph (c)(2)(ii) for certain major weapon systems and certain subsystems and components. The rulemaking deleted the exception, making the presumption apply to all so-called “commercial items” (in reality faux commercial items). Under the rulemaking, “Contracting officers shall presume that a commercial item was developed exclusive at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice.” See 84 FR 48513 (Sept. 13, 2019).

The industry members of the Section 813 Panel, who comprise a majority, are recommending that Congress rewrite federal acquisition law to allow for greater negotiation between government and industry on intellectual property developed with **governmental funding**. According to the minority members of that panel (from the government) this will “further remove any risk from the contractor and to transfer that risk to the government” by allowing “a contractor, through negotiation, to transfer all R&D risk to the government, accept billions of dollars in government funding, and retain all intellectual property rights without providing any intellectual property rights to the government.”

The GAO itself, depending on who is leading the audit and when they did the audit, have sometimes supported industry’s position on intellectual property (IP) and sometimes supported the notion that the government needs greater access to IP. See, e.g., GAO-06-839, *Weapon Acquisition: DoD Should Strengthen Policies for Assessing Technical Data Needs to Support Weapon Systems* (July 2006); versus GAO-17-664, *Military Acquisitions: DoD? Is Taking Steps to Address Challenges Faced by Certain Companies* (July 2017).

Some of the members of Congress who expressed great concern with these issues during the November 2019 hearing seem to have backed away in response to industry assurances that they are negotiating in good faith with the government to give the government access to all technical data “consistent with contractual arrangements,” which were established when the government

decided to shift all sustainment responsibility to the contractor in a performance based logistics contract.

Section 807 of the Fiscal Year 2022 National Defense Authorization Act requires an “Assessment of Impediments and Incentives to Improving the Acquisition of Commercial Products and Commercial Services” by the Under Secretary of Defense (Acquisition and Sustainment) and the Chairman of the Joint Requirements Oversight Council (JROC), with a briefing to Armed Services Committees within 120 days of enactment covering the following topics:

- Relevant policies, regulations and oversight processes with respect to the issue of preferences for commercial products and commercial services;
- Relevant acquisition workforce training and education;
- Role of requirements in the adaptive acquisition framework as described in DODI 5000.2;
- Role of competitive procedures and source selection procedures;
- Role of planning, programming, and budgeting structures and processes, including appropriations categories;
- Systemic biases in favor of custom solutions;
- Allocation of technical data rights;
- Strategies to control modernization and sustainment costs;
- Risks to contracting officers and other members of acquisition workforce of acquiring commercial products and services, and incentives and disincentives for taking such risks;
- Potential reforms that do not impose additional burdensome and time-consuming constraints on the acquisition process.

Congressional Action

- Our members should in particular work through their uniformed leadership through the JROC to ensure the issues of cybersecurity risks, access to technical data rights, interoperability concerns and Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel and Facilities (DOTMLEPF) issues are properly considered; as well as work through the DUSD(A&S) community which should be particularly concerned about the effects of the preference for commercial products and services has on escalating sustainment costs.
- Ask for additional GAO, DoD IG and FFRDC studies of the impact of recent acquisition reforms on sustainment and readiness costs, focusing on access to IP and “right to repair” issues in depot and operational environments for the military departments.
- Scale back the commercial items application in the case of foreign military sales.

- Repeal section 865 of the FY2019 NDAA that changes the presumptions for weapon systems against governmental access to IP.
- Raise jurisdictional concerns when the Armed Services Committees deal with further expansion of commercial products and services with the following Committees:
 - Judiciary Committee; Antitrust and Competition Subcommittees;
 - Banking and Commerce with respect to Defense Production Act;
 - Oversight and Reform and Homeland Security and Governmental Affairs, the presumptive committees with jurisdiction that have routinely waived jurisdiction in favor of the Armed Services Committees.

PROVIDE EXAMPLES TO CONGRESS OF PRIVATIZATIONS THAT ARE INCONSISTENTLY WITH STATUTORY REQUIREMENTS AND ENSURE APPROPRIATE IMPLEMENTATION OF SECTION 815 OF THE FISCAL YEAR 2022 NATIONAL DEFENSE AUTHORIZATION ACT

Issue

The Department currently does not prioritize and validate services contract requirements in its programming and budgeting process over the course of the Future Year Defense Program (FYDP), subjecting the civilian workforce instead to programmatic offset drills. Loopholes to the public-private competition moratorium are used to directly convert civilian jobs to contract, usually by not backfilling positions and then contracting the function; or reorganizing and claiming a new technology or business process has changed the work previously performed by civilian employees. Statutory insourcing requirements that give “special consideration” to federal government employee performance of new requirements “closely associated with inherently governmental functions” or “critical functions” as defined in section 2463 of title 10 are ignored. Additionally, statutorily required contractor inventory reviews to reduce contractor performance of “closely associated with inherently governmental functions” to the “maximum extent practicable” through insourcing or to mitigate risks of performing “personal services contracts” with insufficient statutory authority by insourcing are likewise ignored. These examples are not exhaustive but illustrate the statutory compliance problems within the Department. Section 815 of the Fiscal Year 2022 National Defense Authorization Act establishes a statutory framework for improving Departmental compliance with statutory limitations against privatization and to ensure contract services requirements are eventually included in Departmental programming and budgeting prioritization, giving due consideration to insourcing government jobs rather than cutting them, with full compliance to be reflected in the Fiscal Year 2023 budget submission to Congress for services contracts. During this implementation period for section 815 it is important to provide examples to Congress of compliance problems and to ensure full implementation with section 815.

Background/Analysis

- DoD ignored FY 2015 NDAA conference report language that directed DoD to adopt a checklist used by the Army to improve consistent compliance with sourcing statutes for all contracted services, including: the statutory definitions of “inherently governmental” and “closely associated with inherently governmental”; the statutory and regulatory definition of “personal services” and the various statutory exceptions; the statutory restrictions on contracting firefighters and security guards; the statutory restrictions on contracting for publicity; the statutory definitions and requirements for the contracting of critical functions; and the statutory prohibitions against contracting functions except through public-private competitions and the existence of the moratorium against public-private competitions.
- The GAO (GAO-16-46) found that the Army’s use of this checklist resulted in considerably more consistent and accurate identification of “closely associated with inherently governmental” functions than other Defense components, reporting nearly 80% of the \$9.7 billion it obligated for the kinds of contracting activities where such contracts would likely be found. By contrast, because they did not use the checklist, Navy, Air Force, and other Defense components identified only a small fraction of what should have been identified. The checklist requires senior leader certification of all service contract requirements as part of the procurement package processed by contracting officers and is further reviewed after a contract is awarded as part of the post-award administration and service requirements validation.
- The Fiscal Year 2018 National Defense Authorization Act established a framework involving Service Requirements Review Boards (SRRBs) under the Under Secretary of Defense (Acquisition and Sustainment) to purportedly improve the rigor and transparency of service contract requirements in the budgeting and programming process. This included an uncodified note for total force management standard guidelines to assist the SRRBs, with directive report language that the SRRBs become more strategic and less transactional in their reviews. Initially, the Defense Acquisition University (DAU) updated its services contract handbook with the Army checklist in response to this uncodified note. Unfortunately, the SRRB’s primary focus remained transactional and was focused mainly on “better buying practices” as part of year end acquisition planning to support contracting officers, rather than a more strategic programmatic prioritization and validation of contract services requirements. The SRRB’s performed their work in a silo completely disconnected from the Department’s programming processes under the purview of CAPE, resulting in continued delays in fulfilling the purposes of the statute. The statute was subsequently clarified in the 2020 NDAA to fix responsibility for program requirements on CAPE and budget requirements on the Comptroller. However, implementation in the SRRBs continued to flounder and the DAU eventually de-emphasized the Army checklist in its guidebook and incorrectly limited statutory restrictions solely to inherently governmental functions, ignoring “closely associated with inherently governmental” and “critical functions” and the existence of a moratorium on public-private competitions.

- Section 815 of the Fiscal Year 2022 National Defense Authorization Act, amending section 2329 of Title 10, requires senior officials to complete and certify a checklist ensuring that statements of work and task orders submitted to contracting officers comply with longstanding statutes that prevent replacing DoD civilian employees with contractors, subject to annual DoD Inspector General reviews, and require that service contract budgets comply with these requirements.
 - The Joint Explanatory Statement accompanying this provision requires that the Secretary of Defense submit a plan for implementation to Congress not later than June 1, 2022. The plan must address:
 - Responsibilities assigned to the offices of the Under Secretary of Defense (Comptroller), the Under Secretary of Defense (Acquisition and Sustainment), and the Under Secretary of Defense (Personnel and Readiness), as well as the Office of Cost Assessment and Program Evaluation.
 - Identify changes needed to Military Department and Defense Agency programming guidance
 - Establish milestones to track progress and ensure that projected spending on services contracts is integrated into and clearly identified in the Department of Defense's Future Year Defense Program (FYDP).
 - Issue standard guidelines for the evaluation of service contract requirements based on the May 2018 Handbook of Contract Function Checklists for Services Acquisition, which is modeled on the Department of the Army's Request for Services Contract Approval form.
 - The Committees also required a Government Accountability Office review of the Department's Service Requirements Review Board process established by the Under Secretary of Defense (Acquisition and Sustainment).
 - The FY 2022 NDAA also requires standard guidelines be developed to reflect statutory total force management policies and procedures related to the use of Department of Defense civilian employees to perform new functions and functions that are performed by contractors.
 - The statute requires the services contract budget submitted in February 2023 include FYDP level of detail and be informed by the contractor inventory review required by section 2330a(e) using the standard total force management guidelines.
 - The statute requires acquisition decision authorities to certify for each service contract that:
 - A task order or statement of work being submitted to a contracting officer is in compliance with the standard total force management guidelines;
 - That all appropriate statutory risk mitigations have been made (such as insourcing new work or previously contracted work);
 - That each task order or statement of work does not include requirements formerly performed by Department of Defense civilian employees.
 - The statute requires annual Inspector General reviews to ensure compliance.

Congressional Action

- Ensure CAPE and the Comptroller issue programming guidance for services contracts.
- Defense appropriators should withhold funds for defective budget exhibits and restrict the use of appropriated funds for services contracts that have not complied with the statutory requirements codified in Section 2329 of Title 10.
- Ensure USD (P&R) re-establishes the contractor inventory review process formerly performed during the Obama Administration in conjunction with the USD (A&S).
- Ensure USD (P&R) participates in CAPE program reviews with military departments to ensure compliance with total force management policies and consideration of contractors as offsets in lieu of civilian workforce.
- Ensure USD (P&R) issues Army Checklist standard guidelines in an updated DODI 1100.22, the instruction governing total force management.
- Follow up with Department when AFGE reports examples of non-compliance or inadequate or delayed compliance with section 815.

FIXING THE DAMAGE DONE TO THE SCOPE OF THE CONTRACTOR INVENTORY STATUTE IN THE FISCAL YEAR 2017 NDAA

Issue

DoD incurs waste and promotes inefficiency because Section 812 of the FY 2017 NDAA reduced the scope of the contractor inventory by excluding 56% of service contracts. This occurred because the law: (1) limited the contractor inventory to four “service acquisition portfolio groups;” (2) excluded service contracts below \$3 million (the majority of contract actions for services task orders fall below \$3 million); and (3) limited the inventory to “staff augmentation contracts” (defined as “personal services contracts”). Section 819 of the FY 2019 NDAA would have repaired all these problems based on the House Chairman’s mark, but in conference the SASC majority only agreed to expanding the contractor inventory to cover “closely associated with inherently governmental” contracts, a move that could potentially increase the inventory by 25%. (However, the GAO documented that all but the Army have underreported “closely associated with inherently governmental” contracts, so an increase by 25% is optimistic.) Finally, the Department notified Congress in 2019 that it would be transitioning from the Enterprise Contractor Manpower Reporting Application to the System for Award Management (SAM), and that it would provide a summary of FY 2020 data by the end of the third quarter of FY 2021. The DoD notification did not explain that SAM excludes most service contracts and does not address the analytical review requirements of Section 2330a of Title 10, as the statute requiring SAM across non-DoD agencies has a much narrower scope than the DoD statute.

Background/Analysis

The USD (Acquisition and Sustainment) conceded in a February 2018 contractor inventory report to Congress that the FY 2017 changes had reduced the inventory to approximately 25% or just under \$42 billion of the department's more than \$160 billion in contracted services spending. An October 2019 information paper prepared by the Office of the USD (Acquisition and Sustainment) misleadingly claimed that the department's purported "implementation" of the Enterprise Contractor Manpower Reporting Application (ECMRA), modeled on a prior successful Army initiative, was unsuccessful. The Department claimed that ECMRA only had a 20% reporting compliance rate and the Department would fully meet the requirements of Section 2330a of Title 10 through the OMB-developed SAM used by the rest of the government under statutory authority requiring far less coverage and analysis than currently required for DoD.

An October 2016 GAO report (GAO 17-17) amply documents the vacillations, delays and deficient implementation by USD A&S and USD P&R of ECMRA. The 20% compliance figure cited in the 2019 paper was foreordained by the Trump Administration's prolonged efforts to reverse Obama-era decisions. Additionally, the 2012 Army testimony before the Senate HSGAC contracting subcommittee documents the successful Army ECMRA contractor inventory initiative, which was never implemented by OSD. The lack of a viable contractor inventory is one of the conditions underlying the continuation of the public-private competition moratorium.

Prior Army and departmental testimony, as well as several GAO and DoD IG reviews, had established the importance of the contractor inventory in determining the direct labor hours and associated costs (direct and overhead) for service contracts and for improved total force management planning. SAM does not address this nor does the underlying statutory requirement for SAM, which is far narrower in scope than the section 2330a requirement in Title 10.

The testimony and audits also established that the contractor inventory was important not just for identifying the size of the contractor labor component of the total force of military, civilian and contractors, but also posed the question: "Who was 'the customer.'" The financial accounting systems and Federal Procurement Data System-Next Generation were not designed to identify who was the ultimate governmental customer for service contracts, but instead identified the funding source (in the case of the accounting system) and the contracting activity (in the case of FPDS-NG).

The lack of a comprehensive and viable contractor inventory may very well hinder efforts to improve contract services planning and budgeting. Indeed, it will be difficult to validate projections of contract spending without a credible baseline for comparison of past expenditures by requiring activities and funding sources. For instance, it is only through contractor inventories that the Army was able to ascertain that over 90% of the funding sources for headquarters contracts resided in mission areas that were budgeted outside of headquarters accounts, making any future directed congressional efforts to cut contract costs an easily evaded shell game. SAM does not address this problem.

When implemented in the manner of the Army, industry reporting burdens were reduced and accuracy increased through accommodation of industry reporting with a bulk loader for spreadsheets and use of a centralized help desk and data management capability. None of these features exists when implemented through a standard clause, resulting in less comprehensive and

accurate inventories and even complaints from industry on reporting burdens. Again, SAM does use a standard clause for reporting because very little is actually reported in comparison to what was collected by the Army in response to the broader requirements in section 2330a of Title 10.

Under the government-wide SAM, “non-labor costs” are not collected, a major defect earlier noted by CBO, and the scope is limited to exclude fixed price contracts in excess of \$2.5 million. This makes SAM, according to the CBO, virtually useless.

Congressional Action

- Repeal the \$3M title 10 reporting threshold limitation for service contracts.
- Repeal the limitation of the contractor inventory to just four service portfolio groups.
- Amend the scope of the inventory to include all contract services, or alternatively expand the “staff augmentation” (personal services) and “closely associated with inherently governmental” categories to include critical functions and any function performed by military or civilian force structure in the past 10 years.
- Consider expanding the prior DoD statutory framework, which led to ECMRA, to be a government-wide requirement in lieu of the current OMB-developed SAM to improve data accuracy and completeness and reduce reporting burdens.
- Reject any DoD efforts to rescope or repeal Section 2330a of Title 10, which provided the authority for developing ECMRA.
- Ensure that services characterized as “commercial” that correspond to the scope of reporting are included.

RATIONALE FOR OPPOSING ANOTHER ROUND OF BASE REALIGNMENT AND CLOSURES (BRAC) AND FOR CLARIFYING THE RECENTLY ENACTED LIMITED AUTHORITY FOR BRAC WHEN SELF-NOMINATED BY A STATE GOVERNOR

Issue

Another BRAC round would undermine DoD’s efforts to rebuild its readiness and result in excessive unprogrammed investment costs in a politically divisive process with adverse economic impact and community dislocations.

Background/Analysis

- Section 2702 of the FY 2021 NDAA prohibits another round of BRAC.
- DoD has undergone five BRAC rounds from 1988 to 2005.

- The Cost of Base Realignment Actions (COBRA) model used by DoD has typically underestimated upfront investment costs and overstated savings (see GAO 13-149). This occurred because:
 - There was an 86% increase in military construction costs in the last BRAC round caused by requirements “that were added or identified after implementation began.”
 - DoD failed to fully identify the information technology requirements for many recommendations.
 - There was no methodology for accurately tracking recommendations associated with requirements for military personnel.
- GAO found that stated objectives of consolidating training so that the military services could train jointly failed to occur in two thirds of the realignments for this purpose (see GAO-16-45).
- Section 2702 of the FY 2019 NDAA provided authority for DoD to realign or close certain military installations when self-nominated by a state governor, subject to the Secretary of Defense, and reporting that savings will exceed the costs of implementation by the end of the fifth fiscal year after completion of the realignment. However, this provision contains a loophole that could allow privatizing activities on a base being closed, defeating the ostensible purpose of becoming more efficient. Additionally, section 2702 did not include a process ensuring meaningful input from affected employees and the labor unions representing them.

Congressional Action

- Do not authorize another BRAC round or alternative to BRAC. Carry forward section 2703 of the FY 2020 NDAA.
- Eliminate loophole in section 2702 permitting privatization and clarify process for employee and union input.

ALTHOUGH CONGRESS SIGNIFICANTLY IMPROVED STATUTORY LANGUAGE CLEARLY PROHIBITING PERSONNEL CAPS IN MOST OF THE DEPARTMENT OF DEFENSE, ARBITRARY PERSONNEL CAPS STILL REMAIN IN USE IN SOME HEADQUARTERS ACTIVITIES THAT EXTEND AS FAR AS ORGANIZATIONS COMMANDED BY ONE STAR LEVEL GENERAL OFFICERS OR CIVILIAN EQUIVALENTS

Issue

Although Congress prohibited arbitrary personnel caps for most of the civilian workforce in the Department of Defense in the Fiscal Year 2021 National Defense Authorization Act (and are expected to follow course in section 8012 of the Defense Appropriation once there is an appropriation for Fiscal Year 2022), inappropriate and wasteful arbitrary personnel caps remain in place for various kinds of headquarters activities throughout the Department of Defense. These headquarters activities exist throughout the entire Department, sometimes down to one star level organizations.

BACKGROUND/ANALYSIS

The Fiscal Year 2022 National Defense Authorization Act section 1102 (and presumably section 8012 of the Defense appropriation) specifically provides that:

- The DoD civilian workforce is to be “solely” managed based on the total force management principles of section 129a of title 10, that specifically prohibit arbitrary reductions of Full Time Equivalent projections of the civilian workforce over the Future Year Defense Program Years absent an appropriate analysis of the impact of those reductions on military force structure, operational effectiveness, stress on the force, lethality, readiness, workload, and the fully burdened costs of the total force (of military, both active and reserve components, civilian employees and contractor support); and the workload and funds made available by Congress; and
- The DoD civilian workforce may not be arbitrarily constrained with personnel caps in any form, whether as numerical limits or maximum number of employees; Full Time Equivalent (FTE) projections; or an end strength. (NOTE: the dual status military technicians are a legitimate recognized exception, as they are managed based on an end strength and corresponding military force structure.)

However, the Goldwater-Nichols era personnel caps established in 1986 in sections 143, 194, 7014, 8014 and 9014 of title 10 currently remain in place and:

- Do not serve their intended purpose of controlling overhead costs for headquarters activities;
- Are not at all related to the workload requirements needed for appropriate civilian oversight of the command, control, communications, and intelligence capabilities needed to meet 21st century threats;
- Are implemented with draconian business rules that require arbitrary cuts unrelated to funding or workload to the civilian workforce to offset growth in any functional area;
- Have the following two effects of shifting headquarters oversight functions to: (1) field operating agencies established to evade the limits; and (2) temporary, less transparent forms of labor, such as contractors or military detailees²;

² The Fiscal Year 2022 National Defense Authorization Act Readiness Subcommittee markup had directive report language requesting a report on the effect of personnel caps on inappropriate contracting in the USD (Policy) office; See also, GAO 21-295, “DEFENSE INTELLIGENCE AND SECURITY: DoD Needs to Establish Oversight Expectations and to Develop Tools That Enhance Accountability (May 2021) (As missions grew, only 22 percent of the USD (Intelligence and Security) were civilian employees, with the remainder comprised of 78 percent “non-permanent personnel – consisting of

- The actual funds expended to operate headquarters functions often do not include contract expenditures which are identified in non-headquarters accounts.

In summary, the personnel caps result in diminished civilian control of the military, distort the true costs of overhead functions, and should be repealed and replaced with a reporting requirement that fully captures the costs of management headquarters functions, including all forms of labor and field operating agencies. Reporting requirements should account for inflation, as well as how changed missions and business processes changed spending levels. Congress can and should cut funding if changes in spending are not justified. The timing of repeal should be conditioned on a full accounting for all spending actually executed in headquarters organizations (as validated by GAO).

CONGRESSIONAL ACTION

PROPOSED LANGUAGE: Strike sections 143, 194, 7014, 8014 and 9014 of title 10 and replace with a new section entitled “Department of Defense Management Headquarters Reporting.”

“Not later than February 1 each fiscal year, effective within two years of the date of enactment, the Department of Defense (DoD) shall report with the budget submission the total costs of performing Major DOD Headquarters Activities:

- (a) as defined in Department of Defense Instruction 5100.73,
- (b) including all Field Operating Agencies and Staff Support Activities; and
- (c) including military, DoD civilian employees and contract services supporting the headquarters by appropriation

The nature of the function being performed, and not the location where it is performed, is the determining factor on whether it should be reported as supporting the headquarters.”

IDENTIFY IMPEDIMENTS TO TOTAL FORCE MANAGEMENT BEST PRACTICES IN THE PLANNING, PROGRAMMING, BUDGETING AND EXECUTION SYSTEM (PPBES) AND ENSURE THE PPBES COMMISSION ADDRESSES CURRENT DEFECTS IN THE PPBES THAT CUT CIVILIAN EMPLOYEE STRUCTURE AND REALIGN THESE REQUIREMENTS TO MORE EXPENSIVE CONTRACTORS OR MILITARY IRRESPECTIVE OF COST AND IMPACT ON READINESS, LETHALITY OR STRESS ON THE FORCE

Issue

Programmatic “savings wedges” that arbitrarily cut civilian employee Full Time Equivalent (FTE) projections and associated funding over the course of the Future Year Defense Program (FYDP) have become standard bad business practices during Defense Wide Reviews and during

contractors, joint duty assignees, military/reservists, and liaison officers or detailees” resulting in a loss of accountability).

the Program Objective Memorandum process. When a civilian position is not filled or is cut, and the requirement remains, the work shifts to more expensive contractors or military, creating the very conditions of a hollow force and phantom “savings” that never materialize. This is a classic example from behavioral economics of “externalities” or the shifting of costs or risk to meet parochial needs to the detriment of the enterprise over the long term. **(See graphics on page 32)**

Background/Analysis

- Current Deputy Secretary of Defense Hicks has accurately summarized countless GAO audit findings that document the bad business practice of cutting civilian structure in the quest for phantom “savings” that merely shift the work to military or contractors: “Predictably, for example, even though Congress directed the Defense Department to cut \$10 billion through administrative efficiencies between 2015 and 2019, the Pentagon failed to substantiate that it had achieved those savings. The reason these efforts rarely succeed is that they merely shift the work being done by civilians to others, such as military personnel or defense contractors.” DepSecDef Kathleen Hicks, “Getting to Less: The Truth About Defense Spending,” Foreign Affairs (March 2020), p. 56.
- These bad business practices result in excessive levels of civilian under-execution documented by the Government Accountability Office over Fiscal Years 2015-2019, when civilian pay under-execution averaged \$1.8 billion overall.
- Both Section 8012 of Defense Appropriations and Section 129a of title 10 pertaining to “total force management” prohibit the use of appropriated funds to arbitrarily cut projected civilian FTEs over the Future Year Defense Program (FYDP) years without analyzing the impact on workload, the fully burdened costs of the total force (of military, civilian employees and contract support), operational effectiveness, lethality, readiness, stress on the force, and military force structure.
- Directive report language from H.R. 2500, The National Defense Authorization Act for Fiscal Year 2020, “Optimizing Total Force Management,” at pp. 254-5 of the House Report requested a Federally Funded Research and Development Center study “to review the Department’s force structure decision-making processes in the Office of the Secretary of Defense, Joint Staff, and in each of the Military Departments to verify the Department is planning, programming and budgeting for a force structure that optimizes lethality by using military for warfighting functions and ensures that planned operational capabilities are fully executable and sustainable.” The study was to include:
 - *an identification of best practices as well as impediments to the optimum sizing of each component of the Total Force of active military, reserve component military, civilian workforce, host nation support, and contract support;*
 - *recommendations on how to leverage the Military Department’s modeling efforts in order to achieve a more balanced Total Force mix;*
 - *“the effects of Full Time Equivalent (FTE) caps and associated business processes resulting either from legislation or departmental policy or practice*

*that would impede the use of more holistic analytical tools for linking the enabling civilian to supported force structure.*³

- Section 1004 of the Fiscal Year 2022 National Defense Authorization Act establishes a “Commission on Planning, Programming, Budgeting, and Execution Reform,” not later than 30 days after enactment, comprised of 14 civilians not employed by the Federal Government who are recognized experts with relevant professional experience related to PPBES processes; iterative design and acquisition process; innovative budgeting and resource allocation methods of the private sector; budget or program execution data analysis. Appointments to the Commission will come from the Chair and Ranking Members of the Armed Services Committees and Appropriation Committees, Speaker of the House and Minority Leader of the House, the Majority and Minority Leader of the Senate, and the Secretary of Defense. The purpose of the Commission is to:
 - *Examine the effectiveness of the planning, programming, budgeting, and execution process and adjacent practices of the Department of Defense, particularly with respect to facilitating defense modernization;*
 - *Consider potential alternatives to such process and practices to maximize the ability of the Department of Defense to respond in a timely manner to current and future threats;*
 - *Make legislative and policy recommendations to improve such process and practices in order to field the operational capabilities necessary to outpace near-peer competitors, provide data and analytical insight, and support an integrated budget that is aligned with strategic objectives.*
 - *Additionally, the Commission will review the financial management systems of the Department with respect to effective internal controls and “the ability to achieve auditable financial statements.*
- The issue of the Department obtaining “auditable financial statements” is a red herring because the audits solely relate to the development of a balance sheet of assets and liabilities for a sovereign entity funded with Congressional appropriations on an annual cash basis rather than on an accrual basis. There is no bona fide private market for most

³ In addition to force structure modeling done by the Military Departments, the Congressional Budget Office has a force costing utility, “The U.S. Military’s Force Structure, a Primer (FY2021 Update); see, <https://www.cbo.gov/publication/57088>; GAO 16-327, “ARMY PLANNING: Comprehensive Risk Assessment Needed for Planned Changes to Army Force Structure (Apr. 2016) (“the Army performed considerable analysis of its force structure requirements, but did not assess mission risk for its enabler units”); GAO 17-413, NAVY FORCE STRUCTURE: Actions Needed to Ensure Proper Size and Composition of Ship Crews (May 2017) (“The Navy’s process to determine manpower requirements -the number and skill mix of sailors needed for its ships – does not fully account for all ship workload.”); GAO 19-385, “DEFENSE STRATEGY: Revised Analytic Approach Needed to Support Force-Structure Decision-Making (Mar. 2019) (“Analysis does not significantly deviate from services’ programmed force structures or test key assumptions.”)

of the services and assets being assigned a “value” on a consolidated balance sheet for governmental sovereign entities, making the entire enterprise lacking in economic substance. The Department could conceivably still receive an unqualified audit opinion and be wasting billions of dollars or have mission failures.⁴

Congressional Action

- Ensure PPBE reform recommendations are not skewed to favor force modernization to the detriment of readiness, stress on the force, lethality, workload, and fully burdened costs of the total force (active and reserve component military, civilian employees and contract support);
- Ensure PPBE reform recommendations include the full direct and indirect costs of contract support and establish transparency for contractors in PPBE requirements validation;
- Ensure PPBE reform recommendations address the longstanding problem of cutting civilian employee structure mischaracterized as “savings” and then realigning the requirements to more costly contractors or military to the detriment of readiness, lethality and stress on the force.
- Ensure financial auditing is not used to deflect attention from current defects in the PPBE process in providing balanced total force management within the Department’s budget submissions.

PROHIBITING USE OF APPROPRIATED FUNDS FOR TERM OR TEMPORARY HIRING FOR ENDURING WORK

Issue

The department sometimes misuses term or temporary hiring authorities, most often to avoid personnel caps and to circumvent Budget Control Act caps, to the detriment of retaining and developing high-performing employees. Some of the Department’s actions have been ideologically motivated, seeking a less secure “at will” workforce rather than a professional, apolitical civil service.

Background/Analysis

- According to Government Accountability Office analysis of Department of Defense (DoD) data, during Fiscal Years 2016 through 2019, “approximately 35 percent of DoD term and temporary personnel were converted to permanent civilian positions within the federal government [after DoD had] increased term personnel by 40 percent.” See GAO 20-532: “DEFENSE WORKFORCE: DoD Needs to Assess Its Use of Term and Temporary Appointments” (Aug. 2020).
- The Defense Language Institute – Foreign Language Center (DLI-FLC) at Monterey, California, operates under a draconian personnel cap regime where any increase in a

⁴ In FY 2020, Independent Public Accounting (IPA) firms conducted 24 standalone audits of DoD reporting entities, of which eight received unqualified opinions, one received a modified (or qualified) opinion and the remaining 15 reporting entities, as well as the overall DoD consolidated audit, received a disclaimer of opinion. The FY 2022 DoD budget estimated it would spend about \$1.281 billion on the financial audit.

foreign language requirement in one area (e.g., Russian or Chinese instructors) results in an arbitrary reduction in other areas (such as Farsi, Arabic, Hebrew, Turkish, or other Middle Eastern languages).

- Highly trained foreign language faculty are arbitrarily terminated, ignoring long-term human capital planning that would emphasize retaining faculty with such specialized skills.
- To implement this draconian policy of treating faculty as “at will” employees, the Commandant of DLI-FLC hires faculty using annual renewable term appointments, which are extended or not on a completely arbitrary basis, year after year, and sometimes improperly replaced with private contractors.
- This mistreatment of faculty at DLI-FLC as expendable “at will” employees is occurring at the same time that the Senate Appropriations Committee drafted directive report language to "encourage the Department of Defense to continue placing a high priority on the Language Training Centers and the Language Flagship strategic language training program” and designated the funding for these programs as a “congressional special interest.”

Congressional Action

- Prohibit use of appropriated funds for hiring term or temporary employees to perform enduring work.

ESTABLISH FACTUAL BASIS FOR DUE PROCESS APPEALS FOR SECURITY CLEARANCE DETERMINATIONS

Issue

Most federal employees in DoD must obtain and retain a security clearance as a condition of employment, and those not requiring a security clearance may still be subject to the same clearance procedures if they have access to sensitive, unclassified information. These procedures are established pursuant to a Clinton-era executive order and afford insufficient due process protections for federal employees.

Background/Analysis

- AFGE lost a case in federal court involving a Defense Finance and Accounting Service (DFAS) employee whose job did not require access to classified information (only sensitive information) and who was fired from their job after incurring credit problems arising from health issues while this person had inadequate insurance coverage. The dismissal was based on the application of the procedures for determining access to classified material. See, e.g. *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (en banc), cert. denied sub nom. *Northover v. Archuleta*, 134 S. Ct. 1759 (2014).
- The Senate version of the FY 2022 NDAA bill included language (“Exclusivity, Consistency and Transparency in Security Clearance Procedures, and Right to Appeal”)

sponsored by Sen. Warner (D-VA) purporting to establish transparent appeal procedures for adverse security clearance determinations. The language was accepted for inclusion in a managers' package; additionally, similar language was included in section 9401 of the Senate version of the FY2021 NDAA.

- The Senate language had several defects, including:
 - Lack of clarity on whether the appeal procedures could be applied to positions not requiring security clearances but merely requiring access to sensitive information;
 - No clear provision for judicial review of appeals;
 - A provision allowing an agency head to waive the procedures;
 - Summaries of testimony were permissible in lieu of verbatim transcripts.
- The Senate language was struck in conference in FY 2021 and not included in the final conferee agreement in the FY 2022 NDAA. There was little significant change between both versions.
- AFGE attempted to request a GAO review on whether DoD and other agencies had applied the executive order procedures in a discriminatory or retaliatory manner against classes protected under equal employment opportunity laws, or in retaliation for whistleblowing activity. Unfortunately, AFGE learned just prior to the August HASC markup that the GAO was not equipped to do a review where no established system of records for adjudications and appeals existed for them to audit. An attempt was made to develop an alternative framework of review based on a Federally Funded Research and Development Center demographic survey and a review of the effectiveness and fairness of the security clearance procedures by the Administrative Conference of the United States, an independent government agency specifically set up to perform legal analysis of administrative processes. However, it was too late in the process to work this as an amendment during markup, but HASC Readiness staff indicated a willingness to work on this issue in next year's NDAA.

Congressional Action

- Request following directive report language in either House or Senate version of NDAA as follows: Administrative Conference of United States and Federally Funded Research and Development Center Survey of Security Classification Procedures. Not later than 60 days from enactment, the Under Secretary of Defense, Personnel and Readiness, and the Under Secretary of Defense, Intelligence and Security, shall contract with the Administrative Conference of the United States and Federally Funded Research and Development Center to jointly survey employees, supervisors, job applicants, public sector unions, Civil Rights organizations, Whistleblower public interest organizations,

and lawyers representing employees who incurred adverse actions as a result of a revocation of their security clearance or as a result of the applications of these procedures to positions that did not require access to bona fide classified information. The survey will be oriented on whether respondents believe or have examples of where the Department of Defense and other Executive Agencies have misapplied Executive Order Number 12968, "Access to Classified Information," as amended, as a condition of employment to federal government employee jobs where the requirements of the job did not require access to classified information. The surveyors shall review and summarize the extent to which any such misapplication reported by respondents in the survey negatively affected a protected class under Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Americans with Disabilities Act of 1990. The surveyors shall further assess the availability of data systems in each Department, and review, summarize, and analyze any such data, on the demographics of revocations, and the adjudications of those revocations, with respect to each class protected under Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, and The Americans with Disabilities Act of 1990, including veterans with post-traumatic stress symptoms and employees with indebtedness problems attributable to health care emergencies and the lack of adequate insurance. The surveyors shall make recommendations on the best processes for developing systems to track demographic information on these issues with estimates of the costs. Additionally, the surveyors shall make recommendations on the degree to which any such misapplications could have been mitigated with telework arrangements, where workspace location rather than actual access and use of classified information were the basis of requiring a security clearance as a condition of employment. Finally, the surveyors shall analyze and summarize the degree to which individuals associated with neo-Nazi or white supremacist hate groups or ideologies were granted or retained clearances under these procedures. Not later than one year from enactment, the surveyors shall report their findings to the U.S. Senate Select Committee on Intelligence, the House Permanent Select Committee on Intelligence, the Senate Committee on Homeland Security and Governmental Affairs the House Committee on Oversight and Reform, the House Armed Services Committee, and the Senate Armed Services Committee.

IMPROVE STRATEGIC WORKFORCE PLANNING FOR MAJOR WEAPON SYSTEM ACQUISITIONS

Issue

The Fiscal Year 2017 NDAA repealed the requirement in 10 USC Section 2434 for cost estimate reports on the military, civilian, and contract support employee mix needed to operate, train, and sustain major weapon systems prior to milestone B and C decisions.

Background/Analysis

- Improve strategic workforce planning requirements on the mix of active and reserve military, civilian workforce, host nation support and contractors needed to operate, train and sustain major weapon system acquisitions.
- Deferring this planning until after deployment of a system may adversely affect sustainment costs, readiness, and create incentives for over-reliance on contractor sustainment of major weapon systems.
- This flawed repeal effort had been opposed by the MANPRINT, the Force Management communities within the Pentagon, and the HASC, but was successfully promoted by the the acquisition community and the SASC
- This action reflected a further erosion of USD P&R total force management responsibilities for strategic manpower planning that accelerated during the Trump Administration.
- The long-range strategic effects of this statutory change cause the deferral of manpower decisions until after a system is deployed and operational risks and sustainment costs have escalated.
 - This encourages more performance-based logistics arrangements at the root of the F-35 sustainment cost problem where the government has had problems in accessing technical data from the contractor in a timely way resulting in escalating sustainment costs and reduced flying hours and readiness of approximately 30 percent reduction in flying hours.
 - Another example concerns the Army STRYKER infantry carrier vehicle which initially could not deploy without contractor logistics support, prompting the Vice Chief of Staff of the Army to have to belatedly establish processes to in-source the capability to military and civilian performance.

Congressional Action

- Reinstate the manpower estimate reporting requirement for major weapon system acquisitions that formerly was in section 2434 of title 10. Language follows:

§2434. Independent cost estimates; operational manpower requirements

(a) Requirement for Approval.—(1) The Secretary of Defense may not approve the system development and demonstration, or the production and deployment, of a major defense acquisition program unless an independent estimate of the full life-cycle cost of the program and a manpower estimate for the program have been considered by the Secretary.

(2) The provisions of this section shall apply to any major subprogram of a major defense acquisition program (as designated under section 2430a(a)(1) of this title) in the same manner as those provisions apply to a major defense acquisition program, and any reference in this section to a program shall be treated as including such a subprogram.

(b) Regulations.—The Secretary of Defense shall prescribe regulations governing the content and submission of the estimates required by subsection (a). The regulations shall require—

(1) that the independent estimate of the full life-cycle cost of a program—

(A) be prepared or approved by the Director of Cost Assessment and Program Evaluation; and

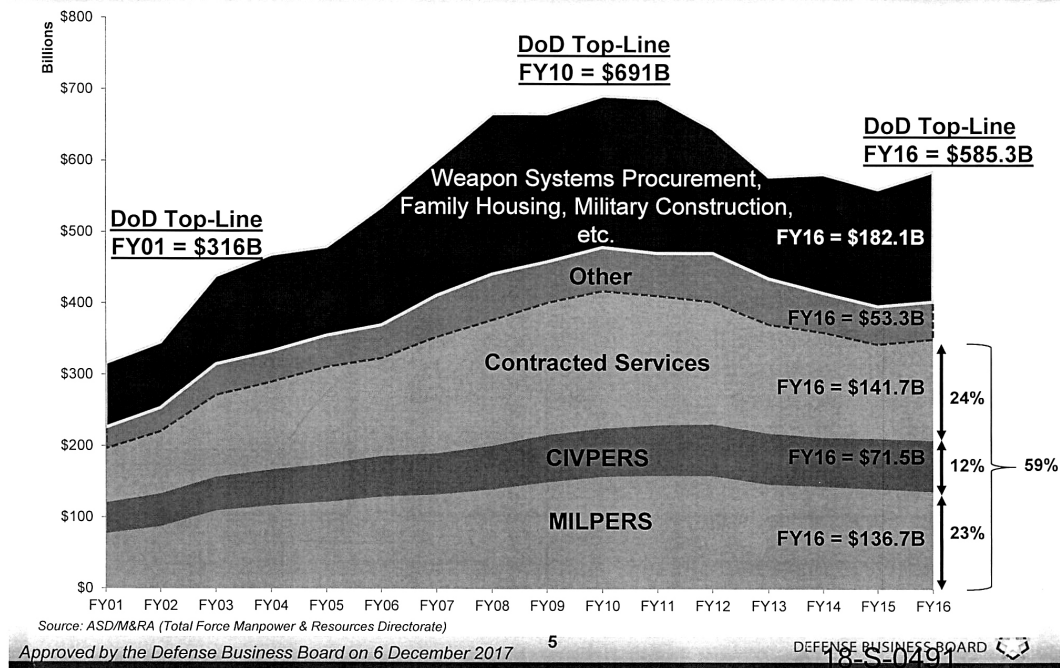
(B) include all costs of development, procurement, military construction, and operations and support, without regard to funding source or management control; and

(2) that the manpower estimate include an estimate of the total number of personnel required—

(A) to operate, maintain, and support the program upon full operational deployment; and

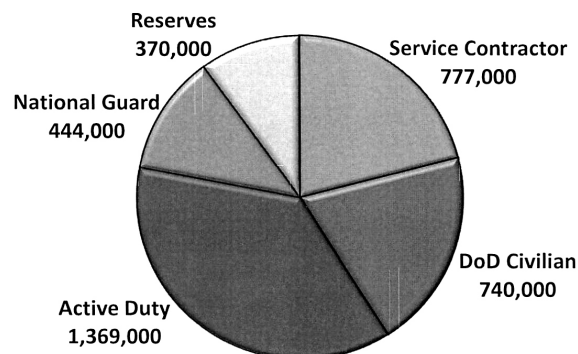
(B) to train personnel to carry out the activities referred to in subparagraph (A).

DoD Budget Breakout



Problem #1: Optimizing the DoD Labor Mix

- June 2017 IDA DoD labor study:
 - Majority of DoD's \$585.3B FY16 budget spent on the 3.7M workforce personnel



Source: Institute for Defense Analysis (IDA) Study, Total Force/Labor Mix, Opportunities for Efficiencies, June 6, 2017 (pgs 1-2)

Approved by the Defense Business Board on 6 December 2017

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DEFENSE BUSINESS BOARD

18-S-0491