AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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The Honorable Trey Gowdy
Chairman
House Oversight and Government
Reform Committee
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
House Oversight and Government
Reform Committee
Washington, DC 20515

Dear Chairman Gowdy and Ranking Member Cummings:

We ask that "The Contracting Act for Fiscal Year 2018" not be considered for further action by Oversight and Government Reform Committee. "The Freedom from Government Competition Act for Fiscal Year 2018" if implemented would be a tremendous and unnecessary waste of money. In addition to massive waste, it opens the door to mission failure and the corrupting influence of politics and conflicts of interest in the award of government contracts.

Unlike contractors, federal employees perform government services on a not-for-profit basis. They take an oath of loyalty to the Constitution and laws of the United States, and contractors loyalty is, by law, solely to the company's shareholders. In an era where the integrity of government is constantly threatened by politics, the last thing Congress should do is expand the role of unaccountable and politically-connected contractors.

Current law prohibits the outsourcing of inherently governmental functions. Searching to expand their business, some contractors are pressing lawmakers to narrow the scope of what is defined not only as inherently governmental, but also what is considered "closely associated with inherently governmental." Closely associated with inherently governmental work should be performed by federal employees in order that agencies retain control over their core functions and not render themselves vulnerable to a private contractor's financial, legal, ethical, or political failures and the "Freedom from Government Competition" bill would eliminate statutory mandates to reduce reliance on "closely associated with inherently governmental contracts."

Both title 10 and the Government Accountability Office (GAO) have identified risks of outsourcing closely associated with inherently governmental work for many reasons, not the least of which is the danger from insufficient governmental expertise and ability to provide oversight on the contracted efforts. Contractors administering contracts, and contractors providing oversight to contractors would be routine under this bill, as all those functions would be characterized as a commercial function in this legislation. Such irresponsible governance is what led to the fraud, waste and abuse examined and critiqued by the War Time Commission on Contracting, which criticized the existing "inherently governmental" concept as too narrow in scope. The Freedom from Government Competition would further narrow the category.

Other examples of so-called "closely associated with inherently governmental functions include: developing agency budgets, developing agency regulations, access to classified information as was afforded to Edward Snowden, assisting in interrogations, physical security, guarding convoys (by, for

instance, subcontracting with the Taliban, which occurred in Afghanistan), determining fair market value when an agency exercises the taking power under eminent domain. Those functions would all be labeled as commercial functions by this bill because inherently governmental as applied by OMB and the Agencies limits inherently governmental to the exercise of "substantial discretionary" decision making that would bind an agency in a final decision. While the final decision on budgetary priorities would be inherently governmental under this standard, developing the budget would be "closely associated with inherently governmental" and therefore "commercial" and subject to outsourcing according to this bill.

The federal workforce has the same number of employees in 2017 as it did during the Kennedy Administration, during a period when the U.S. population grew by 40 percent. The Congressional Budget Office notes that federal spending for services contracts grew from 11 percent of federal spending in 2000 to 15 percent in 2012.In addition, Defense Business Board recently documented that the Department of Defense spent as much on 777,000 contract services employees ($141.7B or 24 percent of DoD's topline) as it does on military pay and benefits ($136.7B or 23 percent of DoD's topline), double what the DoD spends on its 740,000 civilian workforce ($71.5B or 12 percent of DoD's top line).

They were able to make these comparisons because DoD, unlike the rest of the Federal Government, has started to compile contractor inventories based on work done by the Army. When the Army testified before the Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs on March 29, 2012, their testimony showed that when "apples to apples" comparisons are made with Army contractor inventory data, that contractors charge the government more than twice as much for their "indirect costs" of administration and profit as they do for the direct labor costs for those services. It is therefore no surprise that contracted services are far more expensive than DoD civilians.

The "Freedom from Government Competition Act for Fiscal Year 2018" not only ignores this shocking information, it eliminates the requirement to collect it in the future. Thus, the only "freedom" in the bill is the freedom to rip off the American taxpayer in a way that remains clouded in secrecy. It is suppression of information, a means to cover up the profits and other costs contractors charge the government in order to enrich themselves and their shareholders at taxpayer expense.

The House Armed Services Committee Chairman Thornberry complained after passage of the FY 2018 NDAA that "Unfortunately DoD and Congress have limited insight into how and where [$144 billion of contract services spending in DoD] is spent."

The FY2018 NDAA gave DoD until October 2022 to begin to address this problem in the budget exhibits mandated by this "acquisition reform." We commend the leadership and intellectual honesty shown by the Armed Services leadership in recognizing and dealing with this problem of inadequate contract services budgets. We ask the Oversight and Government Reform Committee to use its time to solve these problems, not worsen them with legislation such as the Freedom from Government Competition Act. Opening the spigot further on unaccountable and costly outsourcing is the opposite of what the Committee should be doing.

The bill ignores the lessons learned in the late 1990s under President William J. Clinton's "Reinventing Government" and the early 2000s when President George W. Bush required agencies to consider contracting out all government work deemed "commercial." The Government Accountability Office and Department of Defense Inspector General found that hoped for "savings" from public-private competitions almost never materialized after the costs of competitions, the disruptions in agency performance, the technical failures of contractors, and the vast differences between what contractors said they'd charge and what they actually charged were calculated. In any case, the vast majority of competitions were won by public-sector employees, even in the face of biased double-counting of

overhead under the OMB rules for public-private competitions. Given this documentation of the excessive costs of contracting, the bill would enshrine the highly subjective and easily rigged concept of "best value" by repealing the current statutory standard that bases the outcomes of public-private competitions on the workforce providing the services at the lowest cost.

Both the GAO and DoD IG documented numerous cases of cost growth after contracts were awarded in public-private competitions, growth that occurred because the public-private competition performance work statements did not accurately capture the full requirement.

Rather than addressing the problems documented by the Armed Services Committees that led to the public-private competition moratorium in the first place (See FY 2010 National Defense Authorization bill section 325), the bill would simply bury those Congressional findings by repealing them. The bill ignores the bi-partisan vote extending the moratorium against public-private competitions last year by a vote of 253-172 when the Cartwright amendment was passed as part of the DoD, Military Construction, Department of Veterans Affairs, Energy and Water and Legislative Branch Appropriations Bills.

The bill repeals the requirement to account for the investment costs associated with public-private competitions, costs that could be substantial and ignores prior Agency experience that public-private competitions required significant preliminary planning needed to determine the scope of the competition, determine the availability of workload data, quantifiable outputs of functions, agency and industry performance standards, and research to determine the appropriate grouping of functions for competition. Pretending that there is no need for preliminary planning activities does nothing but bias the cost comparisons and weaken the legitimate analytical underpinnings for any decision. Similarly, the bill by statutory fiat ignores the historical experience that public-private competitions typically took two years, and simply mandates either one year or a 90-day "streamlined competitions" for 65 or fewer employees or for any circumstance where contractors perform "substantially" similar functions to the public sector, a very vague and broad requirement. It raises the question of whether the "Freedom from Government Competition" contemplates use of any rationale for outsourcing beyond a political preference that government work be performed on a for-profit basis by politically well-connected contractors.

In its preference for outsourcing, the bill would eliminate a Bush Administration insourcing initiative that arose out of an Army lean six sigma study that diagnosed the OMB Circular A-76 public-private competition process as the central impediment to insourcing efficiencies. These efficiencies, which Army Posture statements claimed generated $48K average savings per each position insourced through 2008. Accordingly, the Armed Services Committees took OMB and the A-76 process out of the insourcing framework, giving authority to DoD to write their own rules in order to realize these efficiencies. This generated further savings according to Army testimony in March 29, 2012, a $15B reduction in contract services spending from a peak of $51B in FY2008 to $36B, an inconvenient fact for the advocates of mass privatization of government work.

Finally, the bill would repeal protections in existing law against allowing contractors to claim a competitive advantage in a public-private competition by failing to provide health care or retirement benefits to their employees. This is a shameful and regressive step. The government strives to be a model employer and sourcing decisions should never be made on the basis of a "race to the bottom" where the worse employer wins. The policy of excluding benefit costs from competition upholds the principle that the government should not participate in the effort to immiserate the middle class, that government should promote and support middle class living standards, not contribute to their deterioration. The Nobel economist Joseph Stiglitz has documented that a major impediment to economic growth results from structural inequalities which have been growing in America as more and more of our citizens lose their

access to health care or the prospect of economic security in retirement. That effect of the Freedom from Government Competition Act's mindless repeal of title 10 protections shows, perhaps more than any other, that the bill is a direct attack on middle class families and should be opposed.

For all the above reasons, we ask that the Oversight and Government Reform Committee bury this bill to the oblivion it deserves, and that the parts of it amending title 10 get roundly rejected by the Armed Services Committees.

Sincerely,

J. David Cox, Sr.
National President