



Eric Bunn Sr.
National Secretary-Treasurer

Dr. Everett B. Kelley
National President

Jeremy A. Lannan
NVP for Women & Fair Practices

May 28, 2020

Honorable Adam Smith
Chairman
House Armed Services Committee
2120 Rayburn House Office Building
Washington, DC 20515

Honorable Jim Inhofe
Chairman
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, D.C. 20510

Honorable Mac Thornberry
Ranking Member
House Armed Services Committee
2126 Rayburn House Office Building
Washington, DC 20515

Honorable Jack Reed
Ranking Member
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, DC 20510

Dear Chairmen and Ranking Members:

On behalf of the American Federation of Government Employees, AFL-CIO, (AFGE) which represents more than 700,000 federal employees who serve the American people in 70 different agencies, including approximately 300,000 in the Department of Defense (DoD), we appreciate your support of a strong national defense and your recognition of the importance of a professional, apolitical civil service supporting our uniformed warfighters. As you work on the National Defense Authorization Act (NDAA) for Fiscal Year 2021, we write to urge your support for Department of Defense legislative proposals that would correct the imbalance created by recent overly-broad extensions of so-called “commercial” treatment for acquisitions. As the Department notes in its justification and analysis, these “commercial item” definitions and treatment have generated excessive cost growth and readiness problems.

On February 25, 2019, the Department of Defense Inspector General found that a DoD contractor, TransDigm, earned excessive profits ranging from 15 percent to over 4,400 percent in an audit of 46 of 47 spare part contracts for aircraft and airframes because of the characterization of these procurements as “commercial.” The DoD IG determined, and testified before the House Committee on Oversight and Reform on May 15, 2019, that these outcomes were not isolated instances but pervasive results of statutory changes that broadened the definition for “commercial items” and discouraged contracting officers from obtaining certified cost and pricing data needed to determine the reasonableness of contract price. As the IG stated:

First, it is important to note that the issues raised in our TransDigm audit are not limited to just this company and its contracts with DoD. However, TransDigm’s unwillingness to share cost data, and DoD contracting officers’ limited success in negotiating fair and reasonable prices for sole-source parts, are representative of findings that the DoD OIG has highlighted in our audit reports going back many years.

Often, our reports have identified the lack of cost data available to DoD contracting officers as the root cause for contractors' obtaining excessive profits on sole-sourced parts. DoD contracting officers' use of certified or uncertified cost data to perform cost analysis is often the most reliable way to determine whether a price is fair and reasonable. (Emphasis added.)¹

Additionally, the Government Accountability Office (GAO) found the F-35 fighter jet sustainment costs had ballooned “to more than \$1 trillion over a 60-year life cycle,” and that “the F-35 aircraft were unable to fly nearly 30 percent of the May-November 2018 timeframe [of the audit] due to spare parts shortages.” These bad outcomes were attributable in large part due to the prime contractor’s management and control over the F-35 spare parts which were not owned by the Military Departments, and which lacked sufficient access to technical data required for effective sustainment. These problems were highlighted by the GAO and DoD witnesses during a November 13, 2019 House Armed Services Subcommittees on Readiness and Tactical Air and Land Forces Joint Hearing on the F-35 Program:

In addition, DOD's options for improving sustainment are **constrained** by the overall structure of the program. For example, **contractors largely own the technical data, provide the spare parts, and manage the global logistics system.**²

One of the critical components of this is understanding intellectual property ... And what we are fundamentally saying is before we put together an acquisition strategy you have to think about **what information is critical to a program, particularly in terms of sustainability so you're not always held hostage to the prime [contractor] on that through the life of the contract** and that you can find better cost solutions through a variety of different providers.³

The Department has proposed three significant clarifications AFGE supports that would go a long way to addressing these problems:

1. The Department proposes repealing unduly restrictive language that currently mandates the mechanical presumption that once a product or service is determined to be “commercial” in a particular procurement in the past, the contracting officer must seek a written determination from the head of the contracting activity before they can use procedures that provide for greater cost insight and that do not force the government negotiator to “fly blind,” which results in excessive prices being paid. This problem is endemic to many so-called commercial item and service purchases made by DoD, particularly when the goods or services are not actually sold in substantial quantities to the general public.

¹ Testimony of Glenn A. Fine and Theresa S. Hull before the House Committee on Oversight and Reform, “DoD Inspector General Report on Excess Profits by TransDigm, Inc.” (May 15, 2019).

² Testimony of Diana Maurer, Director of GAO’s Defense Management and Capabilities Team; November 13, 2019 House Armed Services Subcommittees on Readiness and Tactical Air and Land Forces Joint Hearing on the F-35 Program

³ Testimony of Ellen M. Lord, Under Secretary of Defense, Acquisition and Sustainment; November 13, 2019 House Armed Services Subcommittees on Readiness and Tactical Air and Land Forces Joint Hearing on the F-35 Program

2. The Department proposes giving contracting officers the authority to require uncertified cost information from contractors or offerors to the extent necessary to determine the reasonableness of price. While this is a significant improvement, we agree with the testimony from the DoD IG that access to certified cost or pricing data should be required as well, particularly for purposes of improved pricing and accountability.
3. The Department proposes clarifications that would enable the release, disclosure, or use of operation, maintenance, installation, or training data needed for maintaining its inventory of aircraft. This proposal puts reasonable limitations on further disclosure coupled with a notice requirement to the owner of the data.

Excess profits of up to 4,400 percent attributable to restrictions on governmental access to certified cost and pricing data are not fiscally sustainable. Reduced flying hours for major weapons systems due to spare parts shortages and lack of access to technical data affect the readiness and lethality of our nation's military capabilities and could ultimately place the lives of our volunteer Soldiers, Sailors, Airmen and Marines at risk in future conflicts. Moreover, continuation of the status quo with respect to the aforementioned concerns will substantially weaken the long-term viability of the organic industrial base. AFGE urges you to include the three aforementioned clarifications proposed by the Department in the FY 2021 NDAA.

For additional information or questions, please contact John Anderson, telework number (703) 943-9438, john.anderson@afge.org or Richard Loeb, richard.loeb@afge.org, (202) 639-6466.

Sincerely,

A handwritten signature in black ink that reads "Alethea Predeoux". The signature is written in a cursive, flowing style.

Alethea Predeoux
Director, Legislative Department