AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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March 15, 2018

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:

On behalf of the American Federation of Government Employees, AFL-CIO (AFGE), which represents over 700,000 federal employees, including 300,000 Department of Defense federal employees in every state and territory, we are writing to oppose H.R. 1339, "The Freedom from Government Competition Act of 2018."

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 and would instead repeal the moratorium. 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.

For similar reasons we oppose any amendment that would purport to carve out depot maintenance and repair. Depot maintenance is statutorily defined in title 10 United States Code section 2460 and only covers a portion of crucial activities performed by facilities we consider depots. There are other crucial activities that are performed under the rubric of core logistics and sustainment activities such as planning, design, engineering, research, systems integration, management, operational support, human resources, etc. Although all those activities are required for the maintenance function to be performed successfully, none are technically considered depot maintenance or fall within its definition. Additionally, the organic industrial base is much larger than the 17 so-called "hard iron" depots and represents a large portion of the civilian workforce of DoD, and includes supply of parts, manufacturing activities, research and test facilities, labs, etc.

The bill's underlying premise is fundamentally flawed when it mischaracterizes as "commercial" any function that is not "inherently governmental." The concept of "inherently governmental" as interpreted by OMB and Executive Agencies, has been limited to

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"discretionary decision making" that would bind an Executive Agency (as defined at the Cabinet level) in a "final" agency decision. That is a very narrow concept and the idea that Executive

Agencies should mischaracterize everything else as commercial would weaken the ability of Agencies to properly oversee their missions, generate conflicts of interest for contractors, and otherwise undermine the principles of an apolitical civil service and military. Federal government employees and members of the military swear an oath of allegiance to the Constitution and laws of the United States and are subject to statutory and ethical standards that do not apply to contractors who take no such oath. Based on extensive prior experience with OMB and Agency reporting under the FAIR Act, there is solid documentation of the following:

- Much military force structure, primarily in the Reserve Components, but also in the Active Components has been mischaracterized as "commercial" using the framework of "inherently governmental." The Defense Business Board and Congressional Budget Office, using FAIR Act inventory data have mischaracterized approximately 200,000 military as "commercial."
- Arresting a citizen has been deemed "inherently governmental" whereas "temporarily detaining" a citizen was "commercial."
- At one time, only the "command and control" of combat, combat support, and combat service support force structure was considered inherently governmental, and later only "offensive combat operations" were considered inherently governmental, whereas shooting anyone in self-defense was "commercial," providing the rationale for Private Security Contractors guarding convoys (and sometimes subcontracting with the Taliban to perform this function).
- Taking private property for a public use was "inherently governmental" whereas making "recommendations" on its "fair market values" was "commercial."
- Making final Agency decisions on budgetary priorities was "inherently governmental" whereas "developing budgets" and making recommendations on those priorities was commercial.
- Issuing final agency regulations was "inherently governmental" whereas developing and making recommendations on the content of those regulations was "commercial."
- Awarding contracts was "inherently governmental" whereas serving on a source selection panel or devising an acquisition strategy or drafting statements of work or overseeing another contractor's performance were considered to be "commercial" functions.

Rather than addressing and fixing the problems with the OMB Circular A-76 process documented by the Government Accountability Office, Department of Defense Inspector General, War Time Commission on Contracting, Congressional Hearings and findings, it would simply ignore these lessons learned and open the door for OMB Office of Federal Procurement Policy to worsen the public private competition framework by:

- Repealing the current statutory standard that bases the outcomes of public-private competitions on the workforce providing the services at the lowest cost and replacing that standard with the highly subjective and more easily rigged concept of "best value."

- Repealing the requirement to account for the investment costs associated with public-private competitions. These costs could be substantial, and within the Department of Defense posed the choice of either reducing military end strength and force structure deemed as "commercial" by OMB or salami slicing Operations and Maintenance funds in other programs to allow reprograming the Military Pay Appropriation into Operations and Maintenance funds to pay the contractor or civilian workforce taking over the function.
- Repealing the current title 10 statutory requirement for 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.
- 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.
- 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 bill would repeal statutory mandates to reduce reliance on "closely associated with inherently governmental functions" and also mischaracterizes in a simplistic and misleading way any function that was not narrowly defined as "inherently governmental" as "commercial."
- The bill would weaken Senate-confirmed, Cabinet level flexibility to manage their workforces by misdirecting their attention from mission requirements to complying with arbitrary mandates to outsource most of the personnel performing the work assigned to their agency. The idea that a so-called "exemption" process between the Agency head and OMB for national security and exemptions for critical functions is the best use of their time and Agency resources is flawed and wasteful.
- The bill would repeal the requirement for contractor inventories across the Civilian Agencies and weaken the framework for improved contract services budgets, which were key criteria in the Fiscal Year 2010 National Defense Authorization section 325 for establishing and continuing the public-private competition moratorium within DoD.
- The bill would take away authority from DoD to save money and appropriately balance the mix of Active, Guard, Reserve Component Military, its civilian

workforce, and contractors by repealing DoD authority to make those decisions when insourcing and returning the authority to OMB to establish the process and approval authorities for such decisions. An Army lean six sigma study during the Bush Administration documented OMB as the major impediment to insourcing and when the Armed Services Committees removed that impediment, Army Posture Statements and DoD documented substantial savings from insourcing.

In addition to opening the door to worsening matters from the prior public-private competition framework, the bill completely fails to address problems with those private-public competitions which led to the bi-partisan enactment and continuation of the public-private competition moratorium in the first place.

- Congress initially enacted the public-private competition moratorium in Fiscal Year 2008 for both the Department of Defense and civilian agencies in response to disruptions in the care of Wounded Warriors at the former Walter Reed Army Medical Center in February 2007. Public-private competitions also placed at risk the readiness and missions performed by the organic industrial base and across DoD, as well as mission in the Civilian Agencies that had been subjected to the disruption of the A-76 process as mismanaged by OMB.
- 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 work deemed "commercial." The GAO and DoD 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 would charge and what they actually charged were calculated. 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. The bill's arbitrary shortening of the time to conduct public-private competitions will only serve to exacerbate this particular problem.
- 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.
- Even the former President of the Professional Services Council has indicated that many in industry no longer desire to see A-76 studies reinstated because of its high transaction costs and contentious nature.

Finally, the bill's findings that the commercial sector is always more efficient and effective than the public sector is not grounded in any empirical data and reflects an a priori prejudice. 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). The Defense Business Board was 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 House Armed Services Committee Chairman Thornberry acknowledged 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" and it remains unclear whether these reforms will actually improve matters because as of this date, the DoD has only submitted an Advisory and Assistance Services budget and not the comprehensive contract services budget that it had submitted in former years (as required by 10 United States Code section 235). So it appears that DoD currently has less transparency over the $144 billion of annual expenditures on contract services than it did last year, a major opportunity cost to spending DoD funds on more platforms and force structure (both military and civilian).

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

AFGE supports H.R.3303, the "First Responder Fair RETIRE Act," introduced by Representative Gerry Connolly. This bill would allow certain federal employees in law enforcement, investigative and related fields who have become ill or injured while in the performance of their duties to continue to accrue retirement benefits at the law enforcement officer pension accrual rate. AFGE represents many law enforcement professionals such as Law Enforcement Officers, Border Protection Officers, Firefighters, and Immigration and Customs Enforcement (ICE) Officers who all have physically vigorous positions that put them at risk of becoming seriously injured. Too often our ICE Officers, Federal Firefighters and Law Enforcement Officers are injured in the line of duty and become permanently unable to perform their law enforcement duties. Despite their dedication to public service, they are forced to end their federal law enforcement careers after years of experience and dedication to public service. When this happens, these officers also lose their enhanced law enforcement pension accrual benefits.

H.R. 3303, would allow federal agencies to retain the knowledge and subject matter expertise of disabled Law Enforcement Officers, as well as give the officers the option to

continue working within the same agency in a different position. This legislation would also allow the officers to continue receiving retirement benefits as if they had not been disabled. Law Enforcement Officers put their lives at risk every day while securing our nation's borders; protecting federal buildings, federal employees, and officials; and the American public. They deserve the option to continue to their public service when injured and disabled in the line of duty and the retirement benefits they were promised when they took an oath to protect the American public.

Please contact Alethea Predeoux with any questions or concerns at 202-639-6953, or at alethea.predeoux@afge.org.

Sincerely,

Thomas S. Kahn
Director, Legislative Affairs