



March 23, 2022

The Honorable Carolyn Maloney
Chairwoman
House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, DC 20515

The Honorable James Comer
Ranking Member
House Committee on Oversight and Reform
2105 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Maloney and Ranking Member Comer:

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. We applaud your legislative effort to take on federal contracting price gouging, and we provide the following comments on how to ensure federal agencies buy products and services at fair and reasonable prices.

We made our mark in the 1980s by looking into Pentagon waste, fraud, and abuse, spotlighting overspending on \$436 hammers, \$640 toilet seats, and \$7,600 coffee makers. Back then the Truth in Negotiations Act (TINA) required contractors to correct overpricing and provide mandatory refunds.¹

Much has changed in the intervening four decades, mostly for the worse. Pricing disclosure laws and anti-gouging remedies have been riddled with exemptions and loopholes, forcing agencies to frequently buy products and services without competition and without certified data to ensure prices are fair and reasonable.² Remedies for defective pricing, including price adjustments, mostly in the form of refunds, happen infrequently and only when contracts are subject to TINA, which has become increasingly rare.

Your January 19, 2022, committee hearing on “Price Gouging in Military Contracts: New Inspector General Report Exposes Excess Profit Obtained by TransDigm Group” focused on a Department of Defense inspector general report that found taxpayers are paying too much for spare parts.³ According to the report, one contractor alone, TransDigm, received \$20.8 million in

¹ The Truth in Negotiations Act is now called the Truthful Cost or Pricing Data Act but is still better known by its historical name and acronym. 10 U.S.C. § 3701 *et seq.*; 41 U.S.C. 3501 *et seq.*

² Federal Acquisition Regulation, Subpart 15.402(a) (Pricing Policy), https://www.acquisition.gov/far/part-15#FAR_15_402.

³ *Price Gouging in Military Contracts: New Inspector General Report Exposes Excess Profit Obtained by TransDigm Group: Hearing before the House Committee on Oversight and Reform*, 117th Cong. (January 19, 2022), <https://oversight.house.gov/legislation/hearings/price-gouging-in-military-contracts-new-inspector-general-report-exposes-excess>.

excess profits from 2017 to mid-2019.⁴ That case is just one of many, and demonstrates the negative impacts of weakening contracting laws and regulations. Subsequently, the committee released draft legislation, entitled “Fair Pricing with Cost Transparency Act of 2022,” and invited public comments.⁵

POGO supports giving agency contracting officers the tools and data they need to make smart buying decisions and to avoid paying excessive costs or prices. We have reviewed the draft legislation, and unfortunately, although well-intentioned, it continues the “whack-a-mole” approach that Congress has taken to fixing contract pricing for decades. Overpricing problems created by the contractor-inspired “acquisition reform” movement in the mid-1990s⁶ have placed agencies in a terrible buying position and put taxpayer dollars at risk.

Simply stated, the current contracting process treats tough negotiations with companies as a cardinal sin to be avoided in all circumstances, and the draft legislation does little to address that.

For example, the draft codifies practices already contained in defense contracting laws — which governed in the TransDigm case — and in Federal Acquisition Regulation subparts 15.403-1 and 15.403-3, which allow contracting officers to obtain “data other than certified cost or pricing data” to support determinations of fair and reasonable contract pricing.⁷

Additionally, the draft legislation adds a requirement that civilian offerors “shall be required to submit to the contracting officer uncertified cost information to the extent necessary to determine the reasonableness of such price.”⁸ Yet laws on the books already state that contracting officers “shall require” submission of data to determine price reasonableness.⁹

The law governing defense offerors goes even further, stating that a contractor that fails to comply with a reasonable data submission request “is ineligible for award unless the head of the contracting activity, or the designee of the head of contracting activity, determines that it is in the best interest of the Government to make the award to that offeror.”¹⁰

⁴ Department of Defense Inspector General, *Audit of the Business Model for TransDigm Group Inc. and Its Impact on Department of Defense Spare Parts Pricing*, DODIG-2022-043 (December 13, 2021), ii, <https://media.defense.gov/2021/Dec/27/2002914678/-1/-1/1/DODIG-2022-043%20508.PDF>.

⁵ House Committee on Oversight and Reform, “Chairwoman Maloney Announces New Legislation in Response to TransDigm’s Price Gouging on DOD Contracts,” Press Release, January 19, 2022, <https://oversight.house.gov/news/press-releases/chairwoman-maloney-announces-new-legislation-in-response-to-transdigm-s-price/>.

⁶ Project On Government Oversight, *Defense Waste & Fraud Camouflaged as Reinventing Government* (September 1, 1999), <https://www.pogo.org/report/1999/09/defense-waste-fraud-camouflaged-as-reinventing-government/>.

⁷ 10 U.S.C. § 3705 (2022); 41 U.S.C. § 3505 (2022); and Federal Acquisition Regulation, Subpart 15.403 (Obtaining certified cost or pricing data), https://www.acquisition.gov/far/part-15#FAR_15_403.

⁸ Discussion Draft, Fair Pricing with Cost Transparency Act of 2022, 117th Cong., (2022), <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/Fair%20Pricing%20with%20Cost%20Transparency%20Act.pdf>.

⁹ 10 U.S.C. § 3705(a) (2022); 41 U.S.C. § 3505(a) (2022).

¹⁰ 10 U.S.C. § 3705(b) (2022). *See also* Section 803 of the National Defense Authorization Act for Fiscal Year 2020, Public Law 116–92, 133 Stat. 1198, 1483 (2019), <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf> and Section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261, 112 Stat. 1920, 2085 (1998), <https://www.congress.gov/105/plaws/publ261/PLAW-105publ261.pdf>.

Despite those provisions, the Defense Department continues to enter into bad deals because it is still at the mercy of price-gouging companies. TINA's mandatory refund provision is not triggered in the majority of procurements, and there is no mechanism to suspend a contractor from future government business or to classify the company as ineligible to receive contract awards when it fails to submit requested cost information. Without such mechanisms, companies will continue refusing to cooperate and rake in excess profits.

TINA used to provide such mechanisms, but after 25 years of "acquisition reform," including outrageous increases in the dollar thresholds that would require submission of certified cost or pricing data, the government has jettisoned the meaningful application and enforcement of that law.

One major area of concern with the draft legislation is that it mandates the submission of uncertified, rather than certified, cost or pricing data. Unfortunately, uncertified data is part of the current problem, even in a sole source environment, and a problem that companies exploit to their advantage.

Uncertified data are data that need not be current, complete, or accurate. There is no remedy available to the government when a contractor submits defective uncertified data, yet it must rely on that data for contract pricing. Only when certified data are submitted does the government obtain a remedy. Allowing uncertified data is the equivalent of requiring the government to accept an unsigned tax return and prohibiting it from trying to obtain any taxes owed. It is small wonder that contractors resist submitting certified cost or pricing data. That data holds them accountable.

The government's ability to shield taxpayers from overcharging by contractors has been further eroded by changes to the definitions of "commercial item" and "commercial service" that are specifically designed to allow contractors to avoid cost or pricing disclosure and to stymie aggressive negotiations by agencies, even in sole source buying situations. The contorted definition of "commercial items and services," which under close scrutiny is revealed to be little more than a ruse to permit unfettered price gouging, was designed by contractors to benefit contractors.¹¹ This has led to hundreds of millions of dollars in wasteful contract spending because contractors are free to demand whatever prices they want and negate any effective pricing insight and meaningful negotiation by contracting officers.¹²

As some members of the Committee correctly pointed out during the hearing, TransDigm's practices violated no laws or regulations. That is the scandal. The problem is not TransDigm's practices *per se*, which follow the same pricing practices all major contractors use (albeit perhaps

¹¹ Mandy Smithberger and Scott Amey, "Thornberry Buying Industry Commercial-Item Policies," Project On Government Oversight, April 28, 2015, <https://www.pogo.org/analysis/2015/04/thornberry-buying-industry-commercial-item-policies/>.

¹² Department of Defense Inspector General, *Summary of DoD Office of Inspector General Spare-Parts Pricing Audits: Additional Guidance is Needed*, DODIG-2015-103 (March 31, 2015), 4, <https://media.defense.gov/2018/Sep/07/2001962916/-1/-1/1/DODIG-2015-103.PDF>.

a bit more brazenly); the problem is that it's all legal and Congress has made it nearly impossible for contracting officials to negotiate with companies receiving noncompetitive contracts.

While the draft legislation attempts to fix pricing gaps, more is needed.

POGO recommends a wholesale reversal of the Federal Acquisition Streamlining Act and subsequent statutory expansions of these contractor corporate welfare policies to correct the ruinous contract pricing policies of the "acquisition reform" era.

Additionally, without a wholesale revision of the definition of "commercial" to include only goods or services actually sold in substantial quantities to the general public, which was proposed by the Defense Department 10 years ago,¹³ contracting officers will have little choice, particularly in sole source situations, but to accept contractor price gouging.¹⁴

The first Defense Department inspector general report on TransDigm contains a thoughtful response from the former Defense Department director of pricing and contracting that outlines steps to ensure contracting officers have access to data to make fair and reasonable price determinations.¹⁵ In reviewing that memorandum, it should become clear to the committee that the proposed legislation will do very little to change the current contracting rules.

In summary, the January hearing directed at TransDigm once again revealed just the tip of the iceberg of government contract pricing outrages. These outrages have been written by companies and sanctioned and legalized by Congress for well over 20 years. The proposed "Fair Pricing with Cost Transparency Act of 2022," while well-intentioned, will likely ensure that the *status quo* prevails.

I thank the committee for reaching out to interested parties. If you have any questions, please contact me at danielle@pogo.org, or Scott Amey at Scott.Amey@pogo.org.

Sincerely,



Danielle Brian
Executive Director

¹³ Letter from Scott Amey to the Senate Armed Services Committee Supporting Defense Efforts to Redefine Commercial Items, May 15, 2012, <https://www.pogo.org/letter/2012/05/pogo-supports-dod-effort-to-redefine-commercial-items/>.

¹⁴ "Price Gouging in Military Contracts: New Inspector General Report Exposes Excess Profit Obtained by TransDigm Group": Hearing before the House Committee on Oversight and Reform, 117th Cong. (January 19, 2022), (testimony of Mandy Smithberger, Director, Center for Defense Information at POGO), <https://www.pogo.org/testimony/2022/01/testimony-watchdog-report-makes-case-for-pentagon-reforms/>.

¹⁵ Department of Defense Inspector General, *Review of Parts Purchased From TransDigm Group*, DODIG-2019-060 (February 25, 2019), 88-90, <https://media.defense.gov/2019/Feb/27/2002093922/-1/-1/1/DODIG-2019-060.PDF>.