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The Honorable Elizabeth Warren
SASC
309 Hart Senate Office Building
Washington, DC 20510-2604

Subject: Lowering Defense Costs and Initiating Acquisition Reforms; Part 2

Dear Sen. Warren:

This is a follow-up to the letter which I sent on May 18, 2021, same subject. I now request that you introduce or co-sponsor legislation to avoid or reduce unjustified award/incentive fees on major weapons systems acquisitions and on software (SW) acquisitions for which agile SW development practices are used.

Yesterday, the HASC released H.R. 4350, NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2022. It omitted an important provision for acquisition reform and oversight that I had recommended. Also, on July 22, the SASC published its executive summary of the SASC markup that was short on details relating to “technical debt.” Consequently, I request that you provide remedies in SASC amendments.

The May letter included your question to then-nominee Deputy Secretary of Defense Hicks: “Do you believe that we can find way to lower the top-line budget number and then spend that money more effectively without sacrificing our security?” I told you that “I have a plan for that!” My previous letter included many acquisition reform issues. Today, I seek your help on just one; reduce or prevent unjustified award/incentive fees.

I have been advocating acquisition reforms regarding award fee criteria to your colleagues and their predecessors including Chair, Committee on Oversight and Government Reform Henry Waxman, SASC Chair John McCain, then-Sen. Kamala Harris, HASC Chair Adam Smith, Sen. Ernst, Sen. Sanders, Rep. Norcross, and Rep. Speier. I had supported Chairmen Skelton and McCain in drafting NDAA provisions which became law and in oversight activities. Some of my recommendations to DoD and GAO were incorporated into acquisition policy and guides.

The following table includes some of my letters and articles that provide in-depth background on unjustified award fees.

Reform Issue/Objective	Sen./Rep./ Exec. Ofc.	Letter(L)/Document(D) Subject	Date
Note: Download PDF letters from www.pb-ev.com , “Acquisition Reform” tab and documents from “Articles and Tutorial” tab			
Unjustified Award Fees	Waxman	(L) Award Fees and Contract Oversight	6/22/07

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Unjustified Award Fees	NA	(D) Article in Defense AT&L Magazine, "Systems Engineering (SE) and EVM Support for Performance-Based Awards"	Jan. 2007
Contractors "manage data" in order to "make the number"	Waxman	(L) Award Fees, Contract Oversight and Lockheed Martin	3/10/08
Fraud, waste, and abuse	McCain	(L) Fraud on the F-35 Program and Need for Acquisition Reform	1/4/18
Unjustified Award Fees and Fraud, waste, and abuse	Harris	(L) Support of Bogus Bonus Ban Act and Related Acquisition Reforms	9/22/19
All of the above	Smith	(L) NDAA for FY 2021 and Unfinished Oversight and Legislation	12/20/20
All of the above	Norcross	(L) Today's F-35 Hearing, Deceptive (or No) Performance Metrics, and Ponzi Schemes	4/22/21
Fraud, waste, and abuse	Norcross	(L) More on Deceptive Performance Metrics and Ponzi Schemes	4/25/21
All the above	Sanders	(L) Your Hearing, "Waste, Fraud, Cost Overruns, and Auditing at the Pentagon"	5/13/21
All the above	Zients	(L) Acquisition Reforms to Reduce Defense Costs	6/1/21
Unjustified Award Fees	Speier	(L) Addendum to Request to Resubmit HR 6395, Sec. 1745	7/2/21
All the above	Sanders	(L) : Legislation to Reduce Acquisition Costs and Related Fraud, Waste, and Abuse	7/11/21
Unjustified Award Fees	Smith	(L) Repeated Request for GAO Assessment of F-35 Block 4 Modernization Incentive/Award Fees	7/14/21
Unjustified Award Fees: Agile methods for software	Kausner	(L) Recommendations to Amend NDAA and DoD Policy: Agile Methods, Technical Debt, and Award/Incentive Fees	8/6/21
Unjustified Award Fees: Agile methods for software	Kausner	(L) Refined Amendment to NDAA to Assess Agile Practices on F-35 Block 4 SW Development	8/10/21
Unjustified Award Fees: Subjective criteria for award fees	Speier	(L) Request to Amend NDAA for FY 2022 or Billion Dollar Boondoggle Act	8/19/21
All of the above	NA	(D) white paper, "DOD Acquisition Reform: EVMS-lite to Program/Project Management (P/PM)," Rev. 26	8/24/21

There are two targets of opportunity to reduce unjustified award fees. In both cases, award or incentive fees may be earned even if the contractor is behind schedule, over cost, and has not met technical performance objectives. The targets follow.

1. Any cost-based contract for Major Capability Acquisitions entered into by DoD that includes an award or incentive fee
2. Award/incentive fees when using Agile methods for SW development

Background is provided in the table above. For background and recommended legislation on the first target, please read the letters to Reps. Waxman and Speier that are highlighted in green. For background and recommended legislation on the second target, please read the letters to USD Kausner that are highlighted in yellow.

Billion Dollar Boondoggle Act

In the most recent letter to Rep. Speier, I had recommended that she mark up the NDAA to include a provision that was in Waxman's Clean Contracting Act of 2007 (Clean) but was omitted from her Billion Dollar Boondoggle Act.

Excerpt:

However, an important section of Clean, concerning unjustified award fees, was omitted from Boondoggle. Please consider amending the Boondoggle Act to restore the omission, as follows.

TITLE V—PREVENTING UNJUSTIFIED AWARD FEES

SEC. 501. ENCOURAGING EXCELLENT CONTRACT PERFORMANCE.

(a) LIMITATION.—For any cost-based contract entered into by the Federal Government that includes an award or incentive fee—

(2) at a minimum, the following factors shall be considered in making a determination regarding whether, and in what amount, the fee shall be paid to the contractor:

(A) Whether the contractor met cost goals.

(B) Whether the contractor met schedule goals.

(C) Whether the contractor met performance goals and delivered the goods or services required to be provided under the contract.

Please amend the SASC version of the NDAA for FY 2022 to include the Boondoggle Act's omission above. Just substitute "DoD" for Federal Government. Also, consider asking Sen. Ernst to be a bi-partisan co-sponsor because of her sponsorship of a preceding Boondoggle Act that was based on Waxman's Clean.

Agile Methods

The SASC executive summary of its NDAA requires the Secretary of Defense to enter into an agreement with a federally funded research and development center to perform a study on technical debt in software-intensive systems. GAO reported a lack of decline in the technical debt of the F-35 SW Modernization program which uses Agile Methods. Consequently, I recommend that the NDAA include direction to GAO to report on the use

of Agile methods on the F-35 program including the metrics used for tracking cost, schedule, and technical performance and the relationship of those metrics, if any, to award/incentive fees. So, please amend the SASC NDAA provisions to cover pertinent F-35 oversight issues. The proposal follows:

Please consider submitting an amendment to the SASC NDAA which addresses the product backlog in addition to the technical debt, as follows.

1. Specify the SW Engineering Institute (SEI) as the preferred FFRDC.
2. Request SEI to assess the following when Agile practices are used on the F-35 program and other programs to acquire SW that is embedded in weapon systems and other military-unique hardware systems:
 - Does the contractor maintain traceability in requirements decomposition from the source requirement (e.g., feature) to lower-level requirements (e.g., user story) as well as from the road map to the prioritized backlog?
 - Are metrics identified and tracked that are used to impact decision making? Do the metrics allow traceability from the road map through releases and items in the product backlog?
 - The extent to which award/incentive fee criteria are used that are dependent on:
 - a. Achieving the goals and features of each SW iteration and increment in the Product Roadmap (or backlog) on a timely basis and
 - b. Reducing the total open deficiencies in the technical debt, especially Type I or critical deficiencies.
3. Based on GAO findings, please add the following questions to the scope of SEI's assessment.
 - Are all capabilities included in increment 1 of each SW drop?
 - Does the schedule provide adequate time to complete regression testing to identify and address defects before the final increment of the SW is complete?
 - Is the final increment a production ready version of the SW drop with mature capabilities and without substantial fixes needed before finalizing the SW for release to the F-35 fleet?
 - Is the remaining schedule achievable and based on assumptions about the amount of work that can be completed that is rooted in reality?

I would be glad to furnish more background, clarification, and justification. This letter is also posted to www.pb-ev.com .



Paul J. Solomon

CC:

Sen. Joni Ernst

Sen. Bernie Sanders

HASC Chairman Adam Smith

Rep. Norcross

Rep. Speier

Deputy Secretary of Defense Kathleen Hicks

USD(A&S) Gregory Kausner

Anthony Capaccio, Bloomberg News

Michael LaForgia, NYT