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September 22, 2019

The Honorable Kamala Harris
Homeland Security and Governmental Affairs Committee
112 Hart Senate Office Building
Washington, D.C. 20510

Subject: Support of Bogus Bonus Ban Act and Related Acquisition Reforms

Dear Sen. Harris:

I request that you support and improve S. 2145, the Bogus Bonus Ban Act of 2019. The Act was introduced by Sen. Ernst and was referred to the HSGAC. I also recommend that you initiate oversight actions, either by the Federal Spending Oversight subcommittee or by the GAO, to investigate systemic and specific issues regarding award fees (profit) on capital acquisition contracts. The results of the investigation will provide insight of award fee policies and practices that, in my opinion, are beneficial to contractors and detrimental to government program managers and taxpayers. The knowledge obtained will lead to additional acquisition reforms and better program/project management. The evidence obtained may be material to the recovery of \$100 M of bogus bonuses that were paid on the F-35 program.

Per Sen. Ernst's press release, the Act would prohibit the payment of award fees to government contractors for unsatisfactory performances and outcomes, including projects that are over budget or behind schedule...While federal regulations state that an award fee "shall not be earned if the contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory," federal agencies continue to award bonuses to contractors for unsatisfactory performance. The Act requires new government contracts using award fees to link the awarding of bonuses to outcomes, defined in terms of program cost, schedule, and performance.

OMB policy and federal regulations regarding capital acquisitions require that contractors use a program management technique called Earned Value Management (EVM) and that their EVM processes be compliant with thirty-two guidelines in a national EVM standard called EIA-748, EVM System (EVMS). Contractors submit monthly contract performance reports (CPR). The agency performs compliance reviews of the contractor's EVM process, data, and CPRs. The reporting process and oversight controls are analogous to certified corporate financial reports based on GAAP. However, an audit that finds a contractor is compliant with EIA-748 provides false assurance that the information in the CPRs is accurate and truthful. Loopholes and ambiguities in EIA-748 enable contractors to understate the true cost overruns and the Estimate (of costs) at Completion (EAC). There are perverse incentives for a contractor to cook the EVM books in order defer discovery of the contract's real cost and schedule performance, to increase profits, and to maintain funding. (See email dated 8/25/29, below).

So, federal acquisition regulations (FAR) and agency audits fail to deter wasteful, fraudulent or abusive actions by contractors. I believe that poor corporate behavior is sometimes facilitated by complicit government program managers and contract administrators who look the other way.

I have been advocating acquisition reforms regarding EVM, award fees, and program management for 20 years in publications and at conferences. Recently, I have been corresponding with Sen Ernst's staffer,

Roland Foster. I worked with HASC Chairman Ike Skelton, who included my recommendation in a markup to the FY 2011 NDAA. I also communicated with Rep. Waxman on award fees and with Sen. McCain on acquisition reform and cost overruns on the F-35 Joint Strike Fighter program. My letter to Rep. Waxman, subject: Award Fees, Contract Oversight and Lockheed Martin, dated March 10, 2008, is attached. A letter of appreciation from Sen. McCain, dated March 5, 2015, is also attached. My bio and credentials are at <https://www.pb-ev.com/about.html>.

As your constituent and a concerned taxpayer, I seek your help to complete unfinished business that was initiated with the cited legislators. You have an opportunity to improve transparency and accountability on government contracts that will save billions of future taxpayer dollars and possibly lead to reparations for past abuses.

Regarding past award fees for bogus “excellent” cost performance, I have evidence, supplied in a whistleblower lawsuit, of award fees that should never have been approved on the F-35 contract. A federal appeals court concluded that “the Defense Contract Management Agency (DCMA) and GAO reports allege facts that make a potentially fraudulent scheme readily identifiable: Lockheed Martin Corporation and its subcontractors were violating contracting regulations by using their management reserve budgets to compensate for over-budget expenditures that would have otherwise raised their cost performance indexes and EAC reported to the government.”

The undeserved fees, which I estimate to be \$100 M, should be clawed back to make the taxpayers whole and to deter future corporate misbehavior. (See email dated 8/24/2019 below).

Emails

Excerpts of emails to Mr. Foster, follow. I will forward the pertinent emails, with attached evidence, to you when requested.

9/6/2019:

I am curious to know if any of my information and opinions are useful, either to support or augment the Bogus Bonus Act or to be a catalyst for broader acquisition reforms regarding program/project management. Do you plan to corroborate any of my allegations with experts that I recommended?

Regarding the confessions of the Council of Defense and Space Industry Associations (CODSIA) and the National Defense Industrial Association (NDIA), I believe that they want to ***retain the status quo in order to preserve the charade of subjective award fees***. I also believe that the ***“poor behavior,” that they threaten will occur if award fees were based on objective cost, schedule, and technical performance measures, occurs systemically. The motives are to keep profit and funds flowing and to avoid or deter Nunn-McCurdy investigations.***

8/27/09:

On Aug. 7, I sent a letter to you entitled “Unfinished business with Sen. McCain.” This morning, I was delighted to find old correspondence and documents that pertain to ***unfinished business with Rep. Waxman and that directly link to the Bogus Bonus Ban Act.***

The periodic ***award fee criteria were often subjective and those relating to cost and schedule performance were based on, as NDIA warned, the “management of data and reports.”***

8/25/19:

The *DoD Earned Value Management Implementation Guide* (EVMIG) is the central EVM guidance document for DoD personnel. It echoes the warnings by CODSIA (discussed in my letter to Chairman Waxman, below) and NDIA about contractors' "poor behavior," "sacrificing objective program status reporting in favor of making the number," and reporting "unreliable information on contract status and constrained estimates of the final cost." It also echoes the DoD Report to Congress that was required by WSARA that:

1. The "utility of EVM has declined to a level where it does not serve its *intended purpose*"
2. Contractors "keep EVM metrics favorable and problems hidden."
3. If good technical performance measures are not used, programs could report 100 percent of EV even though behind schedule in validating requirements, completing the preliminary design, meeting the weight targets, or delivering software.

Per EVMIG:

"While it may seem obvious that EVM metrics, such as variances or indices, provide incentives to the contractor in an award fee environment, experience shows otherwise. Using metrics such as cost or schedule variances, cost or schedule performance indices, or Variances at Completion to measure performance for award fee purposes should be avoided. ***Use of such metrics may result in overstating of performance or other improper actions that could undermine the EVMS. Metrics may lead to frequent baseline changes for short-term profit gain and generally have not resulted in better cost control.***"

The unanimous indictment of contractors' poor behavior calls for needed changes to the rules, the standard, and oversight practices. Unfortunately, ***if a DCMA compliance review concludes that a contractor is compliant with the EVMS Guidelines, that report gives false assurance to DoD executives and to the SASC that the reported EVM metrics are valid. It is not true that the EVMS Guidelines in EIA-748 are similar to the Generally Accepted Accounting Principle (GAAP) and that a successful DCMA audit is tantamount to a CPA certification. The loopholes and ambiguities in EIA-748 enable the poor behavior to go undetected. Unless reported EVM progress is tied to validated technical performance and to the product, not the statement of work, the EVM process can be a sham.***

Likewise, when subjective criteria are used to determine award fees, DoD program managers historically declare contractors "Excellent" and continue to approve high fees regardless of the true but understated magnitude of the cost overruns and behind schedule conditions. Ask Ash Carter.

It is time to end the twin shams and to reverse DoD's assessment that the "utility of EVM has declined to a level where it does not serve its *intended purpose*."

8/24/09:

I have submitted multiple requests to legislators and DoD officials that DoD try to "claw back" an estimated \$100 M of undeserved award fees because the Program Office became aware of the "poor behavior" that CODSIA warned of.

It is also interesting to note that, for Award Fee Period 11, **85% of the award fee was based on subjective criteria**. It is no wonder that there have been **frequent, large Bogus Bonus Awards despite cost overruns and behind schedule conditions**. It is recommended that **GAO be requested to evaluate a sample of major defense acquisitions that use award fees to determine the distribution, mean and median percentages of subjective criteria. I believe that OMB and DoD should provide guidance to limit the percent of award fee that is based on subjective criteria.**

8/23/09:

Previously, I recommended that you ask the following Burning Questions:

The appeals court found that there was enough information about the fraud to **“set the government on the trail of the fraud.” So,**

1. **Why did the government not follow the “trail of the fraud” after receiving the DCMA report in 2007? It did not act until I notified the GAO Fraudnet and Sen. McCain.**
2. **Why did the government continue to pay award fees after receiving the DCMA report in 2007?**
3. **Why did the government not follow the trail of the fraud after the appeals court affirmed the decision of the district court?**
4. **Why not expose the alleged fraud now to deter future “poor behavior” (CODSIA’s candid admission) that will result in undeserved fees?**
5. **Sen. Ernst’s “Make ‘em Squeal” page says:”** lowans sent me to Congress with a specific mission: cut wasteful spending and make Washington squeal.” Even though the alleged, fraudulent actions took place many years ago, I believe that the same greedy, culture exists now. Certainly, the statutes and acquisition regulations, that enable bogus bonuses, have not changed. So why not “Make ‘em Squeal” now to:
 - a. Shame the actors
 - b. Deter future deception and fraud
 - c. Justify real acquisition reform.
6. **Why not claw back \$100 M?**

Also, from my previous email, request **GAO to conduct a study of the incentive or award fees most recently paid on the F-35 Lightning II Joint Strike Fighter and the CVN-78 Gerald Ford carrier development contracts.**

8/23/19:

The Bogus Bonus Act is ambiguous regarding the term “performance” and is inconsistent with OMB Circular No. A–11 (2016), Capital Programming Guide, Page 27 (OMB Guide). The OMB Guide specifies that the program achieve integrated cost, schedule, and **technical** performance management. I recommend that you propose a markup to correct these issues.

Background/Rationale for Markup:

1. The OMB Guide states the need for the program “to achieve integrated cost, schedule, and **technical** performance management.”
2. The FAR and DFARS specify the use of EIA-748. However, EIA-748 has a loophole which allows the use of technical performance measures to be *optional*. As I allege in the “EVMS Lite” white paper and other documents, contractors generally opt *not* to integrate cost, schedule, and technical

performance. I have participated in many programs in which the failure of EIA-748 to link technical performance and product requirements (product scope) with EVM (Quality Gap) has led to a lack of transparency and accountability by the contractors and subcontractors (F-35, Global Hawk, MP-RTIP, B-2). Thus, EVM reports failed to provide early warnings of cost overruns and behind schedule conditions.

3. The markup proposed below will:
 - a. Provide incentives for contractors to “to achieve integrated cost, schedule, and **technical** performance management.”
 - b. Provide incentives for contractors to actually integrate cost, schedule, and technical performance in their EVMS reports.
 - c. Close the Quality Gap and achieve better program outcomes.

The proposed markup follows:

Markup to “Bogus Bonus Ban Act of 2019”.

Is:

(b) ELEMENTS.—The guidance under subsection (a) shall—

(1) ensure that all new contracts using award fees link such fees to outcomes (which shall be defined in terms of program cost, schedule, and *performance*);

(3) provide guidance on the circumstances in which contractor performance may be judged to be excellent or superior and the percentage of the available award fee which contractors should be paid for such performance;

Should be: (yellow highlights)

(1) ensure that all new contracts using award fees link such fees to outcomes, **including interim outcomes**, (which shall be defined in terms of program cost, schedule, and **technical** performance);

ADD: (9) Ensure that the guidance in Sec. 2(b)3 includes technical performance

8/19/19:

I sent two letters on award fees to Rep. Waxman in 2007 and 2008 when he was Chairman of the Committee on Government and Oversight Reform. They are pertinent to the Bogus Bonus Act. The letters, which are attached, are:

- Subject: Award Fees and Contract Oversight, June 22, 2007
- Subject: Award Fees, Contract Oversight and Lockheed Martin, March 10, 2008

Both letters discuss a NDIA position paper on award fee incentives that was sent to the Deputy Under Secretary of Defense on May 11, 2007. NDIA states “Some defense contractors have misused incentives by tying achievement of EVM cost and schedule metrics to award and incentive fees and thereby **sacrificing objective program status reporting in favor of “making the number.”** NDIA warns that continuation of these incentives may cause contractors to **report unreliable information on contract status and constrained estimates of the final cost.** The position paper also states that:

1. These types of incentive provisions could fundamentally be driving higher proposal cost and longer schedules to ensure the desired incentives are achieved.
2. With incentives based on EVM reports, contractors may "**manage data and reports,**" "**cut corners,**" and "**not do appropriate re-design or re-test.**"

I previously stated that Sen. Ernst has an opportunity to *shine a light on these bogus bonus fees and to discourage or preclude contractors from engaging in the type of "poor behavior"* that CODSIA warned about in 2009. The NDIA position paper, written two years before the CODSIA's warning about "poor behavior," augments CODSIA with similar confessions of "making the number" and "manage data and reports." *It is time for acquisition reform, legislative or regulatory, to finally forbid the behaviors and practices cited by CODSIA and NDIA.*

8/13/19:

FYI. An extract of a Northrop Grumman legal brief is attached.

Northrop pleads that my False Claims Act case should be dismissed because "The *essential allegations of Relator's award fee fraud claims – that Defendants violated EVMS rules by improperly deploying MR to falsely improve their cost performance measures and thereby received higher award fees than otherwise would have been the case – were publicly disclosed* long before Relator filed this lawsuit."

This is true. Ironically, the DCMA and GAO reports were based on my prior EVMS surveillance findings (internal audit reports). I alerted HQ DCMA of the F-35 problems in 2007. HQ DCMA initiated a complete investigation which eventually resulted in the cited GAO report and, several years later, to decertification of Lockheed's EVMS system and suspension of future award fees (but not recovery of the previously paid fees). The general in the program office, Gen. Heinze, was fired in 2010, as discussed by Ash Carter.

The district and appeals court agreed. Consequently, the case was eventually dismissed because of prior reporting of the charges by DCMA and GAO. I believe that the *courts' findings corroborate my charges*. I hope this evidence convinces you and Sen. Ernst that award fees were paid on the basis of false cost performance reports. Included in the court filings are other evidence, including a "Memorandum of Agreement" between Lockheed and Northrop that laid out the mechanics of the planned conspiracy and, of course, documentation of the fraudulent transactions.

The courts' findings were publicly reported only in legal journals and on my website. Through her actions, Sen. Ernst has an opportunity to shine a light on these bogus bonus fees and to discourage or preclude contractors from engaging in the type of "poor behavior" that CODSIA warned about in 2009.

8/12/19:

Recommended GAO Study and Report:

Conduct a study of the incentive or award fees most recently paid on the F-35 Lightning II Joint Strike Fighter and the CVN-78 Gerald Ford carrier development contracts.

(2) ELEMENTS.—The study

(1) shall include an assessment of the following

(A) the extent to which the Department has established award or incentive fee criteria that are based on the verification, on a timely basis, of the **quality and technical maturity of the features and functions of the product being developed and tested and that the Department has defined and documented** technical performance objectives such as technical performance measures, progress against requirements, and exit criteria of life-cycle phases.

(B) the extent to which the prime contractors have reported schedule performance in their contract performance reports for the most current incentive or award fee period that is based on verified, objective measures of technical performance

(C) **the extent to which the prime contractors have been paid award or incentive fees, in the most recent period, that is based on verified technical and schedule performance**

(D) For the F-35 contract, the extent to which the prime contractor has reported schedule performance that includes verified objective measures of technical performance for development of Block 4 software and the Automatic Logistics Information System (ALIS).

(E) For the CVN-78 contract, the extent to which the prime contractor has reported schedule performance that includes verified objective measures of technical performance for development of the advanced arresting gear (AAG) and the electromagnetic aircraft launch system (EMALS).

(F) The estimated cost savings to DCMA by eliminating EVMS compliance reviews by DCMA on the F-35 and CVN-78 programs.

8/10/19:

It is interesting to note that CODSIA warns that incentivizing contractors based on performance data could promote “poor behavior.” Certainly, that was proven true on the F-35 program. “Poor behavior” led to my initiation of an internal corporate ethics violation investigation at Northrop Grumman, my submittal to the GAO Fraudnet, DoD IG investigation, and finally, my whistleblower suit.

It is sad that, ten years after the CODSIA letter, the **conditions that encourage poor behavior still exist. I believe that statutory or regulatory action is needed to impede corporate malfeasance and to provide incentives for ethical corporate practices and better contract outcomes. Also, Senate action to publicize and shame the actions of Lockheed Martin and Northrop Grumman would deter future, greedy actions, even if the \$100 M of undeserved fees are not recovered.**

8/7/19:

Ash Carter was former Defense Secretary. He became aware of the bogus bonuses paid to the F-35 program prime contractor, Lockheed Martin, and recommended to Sec. Def Gates that the Marine general in charge be fired. In 2014, he gave a speech at Harvard Kennedy School in which he discussed that firing.

His speech referred to the March 2010 firing of Gen. Heinz by Gates. In 2010, Gates was not yet aware that of alleged fraudulent behavior by Lockheed and Northrop. That was not disclosed until I notified GAO Fraudnet in 2011. GAO turned the case over to the DoD IG in early 2012. However, Gates and Carter were aware of the cost and schedule overruns. They learned that the magnitude of the cost overruns was reduced by the inappropriate use of management reserve when the DCMA reported it in 2007 (DCMA verified my findings).

Excerpts from Carter's speech entitled, "Why Does Government Not Work? Winning Back the Trust":

"The Joint Strike Fighter is our largest single defense program in history. The promise was to build a 50 million per tactical aircraft that would be the best in the world. When I inherited the program, it was called hundred million dollars per, was way over cost...This is an embarrassment.

It was a cost-plus contract for the development, which is reasonable up to a point. Which simply means a contract vehicle wherein the contractor spends whatever it takes and sends you the bill and then asks for a fee on top of that.

So I asked the program manager and said let me see your award fee history. He brought it and I look at the award fee history over ten years. it's eighty-five percent a year. I said this is a disaster. You're giving eighty-five percent of your award fee every year. What's going on? And **he looked me in the eye and said, well I like the program manager on the Lockheed Martin side that I work with and he tells me if he gets less than eighty five percent of award fee, he's gonna get fired.** This guy was fired."

8/6/19:

First, I want to point out that the **bill addresses the situations in which the government program office is aware of reported cost or schedule overruns but approves award fees anyway (bogus bonus)**. I will discuss this in another email.

There are **two other situations** that should be addressed, possibly in a markup.

1. **Deception, not fraud:** The contractor submits monthly contract performance reports in which the magnitude of cost overruns or behind schedule conditions are intentionally understated. The contractor can get away with *deceptive* reporting because of shortcomings in the regulations (FAR/DFARS) which require use of EVMS. The standard itself has loopholes and ambiguities which facilitate deceptive reporting.
2. **Fraud:** The contractor submits fraudulent claims for award fee based on cooking the books.

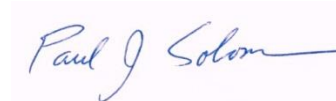
Although the fraud situation is the least prevalent, I will address this first. Please see the "F-35 Whistleblower Case" tab at my website, www.pb-ev.com. Also, my presentation at last year's Taxpayers Against Fraud Conference (whistleblower lawyers) is attached. I hope that you consider a hearing...to gain insight for crafting legislation to prevent future misdeeds and undeserved fees. Also, I am extremely disappointed that the JSF Program Office has not tried to recover \$100 M of allegedly, fraudulently-earned award fees (which is related to the bogus bonus scenario).

Conclusion

Please consider taking legislative and oversight actions as discussed in my letter to Rep. Waxman and in the emails dated August 6, 12, and 23.

This letter, and previous correspondence with legislators, is posted on my web site, www.pb-ev.com at the "Acquisition Reform" tab.

Yours truly,

A handwritten signature in blue ink that reads "Paul J. Solomon" with a long horizontal flourish extending to the right.

Paul J. Solomon
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Cc:

Sen. Joni Ernst, SASC
Under Secretary of Defense for Acquisition and Sustainment Ellen Lord, DoD

Attachments:

Letter to Rep. Waxman, subject: Award Fees, Contract Oversight and Lockheed Martin, dated March 10, 2008

Letter from Sen. McCain, dated March 5, 2015