



U.S. CHAMBER OF COMMERCE



September 24, 2020

The Honorable James Inhofe
Chairman
Senate Armed Services Committee
Washington, DC 20510

The Honorable Jack Reed
Ranking Member
Senate House Armed Services Committee
Washington, DC 20510

The Honorable Adam Smith
Chairman
House Armed Services Committee
Washington, DC 20515

The Honorable Mac Thornberry
Ranking Member
House Armed Services Committee
Washington, DC 20515

Dear Chairmen Inhofe and Smith and Ranking Members Reed and Thornberry:

On behalf of the following members of the Acquisition Reform Working Group (ARWG), the American Council of Engineering Companies (ACEC), Associated General Contractors of America (AGC), Computing Technology Industry Association (CompTIA), Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), and United States Chamber of Commerce, we thank you for your leadership and work to produce the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2021.

Together, the ARWG organizations represent thousands of small, mid-sized, and large companies and hundreds of thousands of employees that provide goods, services, and personnel to the Department of Defense (DoD) and have extensive experience partnering with the federal government to meet many of our country's most critical needs and objectives.

We are writing to share our suggestions and proposals for the defense authorization legislation for FY 2021. We respectfully request your and your committees' consideration of our views on the following provisions.

Printed Circuit Boards

House Sec. 826. Additional requirements pertaining to printed circuit boards.

House Sec. Sec. 830B. Prohibition on procurement or operation of foreign-made unmanned aircraft systems.

Senate Sec. 808. Additional requirements pertaining to printed circuit boards.

Senate Sec. 5808. Additional requirements pertaining to printed circuit boards.

ARWG remains concerned with the broad applicability and programmatic impact of the House and Senate provisions related to printed circuit board (PCB) procurement. ARWG recommends the conferees direct the Secretary of Defense to implement a design verification standard to ensure that PCBs present no national security risk regarding counterfeiting, quality, or unauthorized access. Subsequent to this submission, ARWG will provide specific recommendations on these matters separately.

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services/Equipment

Sec. 828. Sense of Congress on the prohibition on certain telecommunications and video surveillance services or equipment. ARWG supports with modifications. ARWG members recognize and share Congressional concern over the national security threat posed by China. However, the language in Sec. 889(a)(1)(B) of the FY 2019 NDAA establishing the ban on Huawei/ZTE and other covered entities was broadly drafted without definitions to properly scope the problem and allow companies to identify covered equipment posing a risk to their systems and the government.

Sec. 828 recognizes industry was not provided adequate time for implementation based on the relevant interim rule (IR) not being released until 30 days prior to implementation. ARWG agrees more time is needed and therefore requests suspension of implementation of the rule until companies are provided enough time to identify covered equipment in systems and replace the items of concern. Guidance needs to be added to the language to provide scoping and definitions to prevent the uncertainty and ambiguity currently impacting companies.

Comprehensive Reform to Sustainment of Major Weapon Systems

Many provisions in both the House and Senate versions of the FY 2021 NDAA are reflective of strong Congressional concern that the Department of Defense (DoD) must take action to understand and document the current and future requirements for sustainment of its weapons systems to meet the National Defense Strategy. When taken individually, these provisions make small, disjointed steps forward to improve the readiness of our nation's forces. Each of these sections provides some movement towards improving the way DoD approaches sustainment of its weapon systems, but more needs to be done to drive outcome-based sustainment strategies, stakeholder alignment, and improved transparency in the Department's future sustainment requirements and budgets. ARWG encourages the conferees to examine these provisions collectively and with a holistic view of reforming the way DoD plans, budgets for, and executes activities related to the operation and maintenance of its weapons systems. This approach would provide a much-needed opportunity for the development of policy provisions that support a cohesive strategy to address near-term readiness shortfalls, while establishing a strategic framework to inform choices and investments that shape the future force. Without such action by Congress, DoD will likely continue to struggle to consistently maintain minimum readiness levels, including balancing the costs of sustaining legacy fleets, while attempting to modernize to meet an ever-advancing threat. In undertaking this effort, ARWG recommends the following:

- **House Sec. 351:** Establishes a quadrennial National Defense Sustainment and Logistics Review (NDSLRL) to be performed every 4 years, with the first review directed to be completed 18 months after passage of the NDAA. ARWG suggests modification to reflect a review of current sustainment metrics and logistics, rather than being the starting point of the process when the initial review is released likely in the summer of 2022.
- **House Sec. 355:** Requires the Secretary of Defense (SECDEF) to establish an independent advisory panel to conduct a review and make recommendations related to the weapon system sustainment ecosystem, similar to the advisory panel on acquisition reform commonly referred to as the “Section 809” panel. ARWG suggests a modification to incorporate the interim results into the initial NDSLRL mentioned in Section 351, rather than releasing a final report six months after the NDSLRL is completed. ARWG also suggests tasking the panel with reviewing the adequacy of current budget materials for oversight, planning, and transparency in meeting materiel readiness requirements.
- **House Sec. 357:** Requires DoD to develop materiel readiness metrics and objectives for major weapon systems, to regularly review and update the metrics and objectives, and to report on them with the annual budget request. ARWG supports the section as establishing consistency in materiel readiness metrics is essential to alignment of all stakeholders - such as the Defense Logistics Agency (DLA) - with the readiness objectives of each military service.
- **House Sec. 913:** Requires each military department to establish a Deputy Assistant Secretary for Sustainment position, with responsibilities for developing lifecycle sustainment plans and budget requests for each major weapon system’s sustainment. ARWG supports designation of a primary focal point in each service for sustainment reviews and budgetary analysis including cost modeling which could facilitate implementation of recommended reforms.

Improving Budget Transparency to Support Sustainment Planning and Execution

- **House Sec. 811:** Requires the National Defense Strategy to include a strategic framework for prioritizing and integrating sustainment of major defense acquisition programs, core logistics capabilities, and the National Technology and Industrial Base. This would also add advising the SECDEF on sustainment of major defense acquisition programs and core logistics capabilities to the duties of the Under Secretary of Defense for Acquisition and Sustainment. ARWG suggests modification to include collaboration with NDSLRL (Sec. 351) and the advisory panel (Sec. 355), and to address budgetary needs to meet materiel readiness objectives and execution reviews of major weapon systems.
 - **Senate Sec. 171:** Requires an annual lifecycle cost of aircraft submission to Congress, to include the estimated level of annual funding necessary to operate, maintain, sustain, and support each aircraft program throughout the lifecycle of the program. ARWG suggests modification to specifically document lifecycle estimates by fiscal year for the FYDP in budget justification materials provided to Congress and to identify Operation & Maintenance (O&M) implications and trade space with procurement decisions, such as deferrals.
 - **Senate Sec. 862:** Requires the military departments to submit operating and support costs of a subset of the highest projected future lifecycle expenditures to Congress and to publish those figures on a public website maintained by the Director of the Cost Assessment and Program Evaluation. ARWG suggests modification to require results of sustainment reviews to be published in support of budget justification materials.
- Senate Sec. 6001:** Requires an annual report on suggestions to improve the budget justification submission and related materials to provide more relevant and streamlined data to Congress

and the general public. ARWG supports this provision as an essential step to improving and strengthening budget visibility on of the largest segments of the DoD budget, and to enhance data available to all stakeholders and decision-makers throughout the planning, programming, budgeting, and execution processes.

Cybersecurity Requirements on Government Contractors and the Private Sector

House Sec. 1634. Defense industrial base cybersecurity threat hunting and sensing, discovery, and mitigation.

House Sec. 1637. Critical infrastructure cyber incident reporting procedures.

Senate Sec. 1631. Defense industrial base participation in a cybersecurity threat intelligence sharing program.

Senate Sec. 1632. Assessment on defense industrial base cybersecurity threat hunting.

Senate Sec. 1635. Expansion of authority for access and information relating to cyber attacks on operationally critical contractors of the Armed Forces.

Senate Sec. 3131. Reporting on penetrations of networks of contractors and subcontractors.

ARWG welcomes the promotion of greater collaboration and consultation around cybersecurity and integrity of networks between the federal government and the private sector, including those companies in the defense industrial base and that contract with federal agencies. However, many in our industry are concerned by elements of Sections 1634 and 1637 of the House NDAA and Sections 1631, 1632, 1635, and 3131 of the Senate NDAA, which either expand or may lead to further expansion of the government's right to information and reports about or access to private sector networks, beyond the minimum amount that is absolutely necessary to secure government systems and information.

For these reasons, ARWG urges conferees to not include Sections 1634 and 1637 of the House bill and Sections 1631, 1632, 1635, and 3131 of the Senate legislation, as passed by the House or Senate, respectively, in the final NDAA. Instead, industry urges defense authorizers to ensure that any expanded or new authorities for network information, reporting, or access included as part of this or other legislation are narrowly focused on securing government systems and information. Such authorities should not cover private sector commercial networks that are unrelated to the performance of defense or government contracts, must not harm or unnecessarily impede the global business operations of the wide range of companies that do business with the Department, and should safeguard propriety information, equipment, and functionality of networks, while addressing liability and just cause concerns. Ideally, any new authorities would emphasize greater collaboration and seek mutual buy-in between agency and company cyber professionals.

National Cyber Director

House NDAA, Sec. 1132. National Cyber Director.

Senate NDAA, Sec. 1637. Independent assessment of establishment of a National Cyber Director.

ARWG requests the Senate accept the House version of this provision. House Section 1132 establishes the National Cyber Director position, rather than delaying establishment to complete an independent assessment. We do not believe a further assessment is required to establish the need for this position.

Artificial Intelligence and Emerging Technologies

House Sec. 224. Board of Directors for the Joint Artificial Intelligence Center. ARWG Supports. This section proposes to add five individuals from the private sector to the Board of Directors. Industry supports including members of the private sector in this organization and encourages DoD to engage meaningfully with the private companies throughout the Center’s activities.

House Sec. 241. Steering committee on emerging technology. ARWG Supports with modifications. This provision develops policy recommendations governing the development and use of emerging technologies. The provision does not explicitly require engagement and collaboration with industry when developing policies. We encourage DoD to require the steering committee to engage meaningfully with the private sector throughout its activities.

House Sec. 248. Acquisition of ethically and responsibly developed artificial intelligence technology. ARWG Supports. Industry supports the government’s efforts to develop an ethical, legal, and sustainable standards-based framework for the acquisition and use of artificial technology. The private sector looks forward to engaging with the government on this important issue.

House Sec. 5501. Department of Energy Artificial Intelligence Research Program. ARWG Supports with modifications. ARWG recommends including language in Section 5501 to expressly authorize the use of indirect costs, including independent research and development (IR&D), in any cost-sharing arrangements for cooperative agreements awarded pursuant to the Department of Energy’s Artificial Intelligence Research Program. Disallowing IR&D as a source of cost-sharing, as a method of leveling the playing field for commercial companies that do not have IR&D portfolios, has the unintended consequence of potentially excluding companies in the defense industrial base (DIB) from the competitive field.

Senate Sec. 3156. Review of future of computing beyond exascale at the National Nuclear Security Administration. The proposal seeks to inventory computing needs of NNSA and identify which computing architectures that can potentially meet those needs. While quantum computing, novel computing, and hybrid computing architectures are not time limited, classical computing architectures are limited to capabilities employed on the date of enactment of the Act. This creates an “apples and oranges” comparison and does not fully account for the technological advancements that will occur across all of the computing options available to the NNSA to meet their computing needs in the coming decades. Making the recommended revision below would ensure that NNSA has full visibility into future capabilities to inform their options and considerations to address their needs:

REDLINE

(b) ELEMENTS.—The review required by subsection (a) shall address the following: (1) Future computing needs of the National Nuclear Security Administration that exascale computing will not accomplish during the 20 years after the date of the enactment of this Act. (2) Computing architectures that potentially can meet those needs, including— (A) classical computing architectures ~~employed as of such date of enactment;~~

Commercial Item Procurements

House Sec. 820. Documentation pertaining to commercial item determinations. ARWG Supports. ARWG supports House Section 820 which would require DoD to establish a process to ensure that the procuring contracting officer provides a copy of the commercial item determination to the Defense Contract Management Agency’s CIG for inclusion in the commercial items database, and to the

contractor asserting commerciality of the product or service. This will help reduce acquisition lead times and supports Congressional intent behind the preference for commercial items in section 2377 of title 10, United States Code.

House Sec. 820C. Commercial product determination applies to components and support services.

ARWG **Supports**. House Sec. 820C clarifies a contracting officer may presume a prior commercial item determination shall serve as a determination for subsequent procurements of components or parts associated with such commercial product or services procured in support of such commercial product.

Section 2306a of title 10, United States Code, as well as the Defense Federal Acquisition Regulation Supplement, make it clear a contracting officer may presume a prior commercial item determination shall serve as a determination for subsequent procurements (unless the contracting officer follows the process to overturn the prior determination). However, a July 2019 revision to the *Department of Defense Guidebook for Acquiring Commercial Items Part A: Commercial Item Determination*, inserted the statement “[Commercial Item Determinations] for subcomponents and spare parts of items determined to be commercial must be considered independently.” As a result, contracting officers are working diligently to comply with the Guidebook’s direction to complete and document a Commercial Item Determination (CID) on parts and subcomponents of items that have already been determined to be commercial. This is of little value to the government and runs counter to Congressional intent behind the preference for acquisition of commercial items in section 10 U.S.C. 2377.

Senate NDAA, Sec. 841. Authority to acquire innovative commercial products and services using general solicitation.

ARWG **Supports with modifications**. ARWG supports this effort to streamline procedures and expand procurement authorities related to acquiring innovative commercial solutions. This provision, which codifies DoD’s Commercial Solutions Opening (CSO) authority, will expedite DoD’s access to industry’s most innovative commercial offerings, while a general solicitation will minimize administrative burdens for industry.

However, ARWG recommends that Congress revise and clarify the definition of the term “innovative” provided in Sec. 841 to ensure that both traditional and non-traditional contractors can benefit from the authority provided. Doing so will enable the benefits of authority to be applied across the defense industrial base and will greatly increase the Department’s access to innovation.

Contractor Business Systems

House NDAA, Sec. 804. Contractor business systems.

Senate NDAA, Sec. 845. Definition of business system deficiencies for contractor business systems.

ARWG **Supports**. The FY 2011 NDAA and the DFARS provide for a single audit standard when evaluating the sufficiency of a system—“significant deficiency.” DoD’s outdated definition does not account for materiality and differing degrees of deficiencies. Reporting deficiencies based on degree of severity, consistent with generally accepted auditing standards, will allow for more efficient and accurate audits. The current single standard should be replaced by a more appropriate materiality standard that accounts for different types of deficiencies. This will allow contracting officers to make more informed decisions on the acceptability of the business system. Implementing a standard of materiality will also conform standards used to audit contractors to the standards used to audit DoD’s own business systems and process. The 809 Panel included an identical recommendation in their Volume 3 Report.

Nontraditional Defense Contractors

House Sec. 802. Modification to the definition of nontraditional defense contractor. ARWG **Opposes.** This section would amend the current definition of “nontraditional defense contractor” found in section 2302(9) of title 10, United States Code. Specifically, this provision would add entities that are one hundred percent owned by an employee stock ownership plan to the list of nontraditional defense contractors eligible for certain DoD Other Transaction Authority (OTA) agreements. ARWG does not believe sufficient policy justification exists for modifying the current definition to include these unique employee-owned companies as nontraditional defense contractors based solely on their ownership status. Provided employee-owned companies meet all existing statutory requirements, the current definition does not exclude these companies from qualifying for nontraditional status.

Contractor Whistleblowers

Sec. 813. Contractor whistleblower protections relating to nondisclosure agreements. ARWG **Opposes.** The HASC Chairman’s mark included a proposal to amend 10 U.S.C. 2409 and 41 U.S.C. 4712 to clarify that contractors, subcontractors, or grantees are protected from reprisal for the disclosure of certain information, including gross mismanagement of a Federal contract or grant or an abuse of authority relating to a Federal contract or grant. ARWG does not oppose this section in its original form.

However, an amendment adopted in committee inserted a new subsection (c) pertaining to remedies and notifications. Paragraph (c)(1) would require the contractor to provide certain notifications to contracting officers to include notice of “any investigation of a complaint related to any such contract...” The Inspector General (IG) does not typically tell a contractor why they are investigating a matter; they are often intentionally vague to protect parties involved in the investigation. Requiring the contractor to seek out this information to report it back to the government is misguided. If Congress concludes that there is reason for contracting officers to be provided details pertaining to such investigations, such information should be provided to the contracting officer through official government channels such as the IG’s office.

Paragraph (c)(2), as amended in committee, is also very concerning. It would specify that the head of an agency may suspend payment until a contractor has taken “appropriate remedial action.” This language would permit an agency to suspend payments on all contracts held by the contractor—not just those related to the whistleblower allegation. Not only is the language vague and extremely broad, the subsection would likely raise significant issues as to how any challenge over suspension of payment would be handled in court. For example, if a contractor filed a claim challenging a suspension of payments in district court under the Administrative Procedures Act (APA), a judge could find that the district court lacks jurisdiction under the Contract Disputes Act, because it pertains to a Government contract. However, if raised before the Court of Federal Claims, that court could determine that the matter is instead an adverse agency action related to a non-contractual statute, and thus an APA claim that must be made in district court.

Rare Earth Elements (REE)

House Sec. 822. Expansion on the Prohibition on Acquiring Certain Metal Products.

House Sec. 824. Preference for Sourcing Rare Earth Materials from the National Technology and Industrial Base.

House Sec. 830D. Report on Partnerships for Rare Earth Material Supply Chain Security.

House Sec. 1782. Domestic Procurement of Tungsten and Tungsten Powder.

Senate Sec. 806. Analyses of Certain Materials and Technology Sectors for Action to Address Sourcing and Industrial Capacity.

Senate Sec. 809. Statement of Policy with Respect to Supply of Strategic Minerals and Metals for Department of Defense Purposes.

Senate Sec. 810. Report on Strategic and Critical Minerals and Metals.

Multiple provisions in both the House and Senate bills reflect Congress' concerns about reducing vulnerabilities in the United States' supply of strategic and critical mineral and metals. ARWG supports efforts to ensure diverse, reliable sources of these materials are available to support critical technologies, weapon systems, and medical devices for our warfighters advanced energy systems for greater energy security. However, we are concerned that the proposed House and Senate provisions duplicate efforts already led by the Department of Commerce in coordination with multiple federal agencies, including DoD. Moreover, House Section 822 has the greatest potential to cause unintended disruption, as this enhanced restriction would be effective within three years and impose particularly onerous requirements on ARWG members in the industrial base. As an alternative, we urge Congress to support recommendations in the Department of Commerce's comprehensive 2019 report, "A Federal Strategy to Ensure a Reliable Supply of Critical Minerals," which focuses on a combination of diplomacy, trade policy, financial strategies, and assistance for new rare earth source development and resource recovery.

Defense Industrial Base Policy and Assessments

Senate NDAA, Sec. 801. Policy recommendations for implementation of Executive Order 13806 (Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency).

Senate NDAA, Sec. 802. Assessment of national security innovation base.

Senate NDAA, Sec. 803. Improving implementation of policy pertaining to the national technology and industrial base.

Senate NDAA, Sec. 804. Modification of framework for modernizing acquisition processes to ensure integrity of industrial base.

Senate NDAA, Sec. 805. Assessments of industrial base capabilities and capacity.

Senate NDAA, Sec. 807. Microelectronics manufacturing strategy.

Senate NDAA, Sec. 5803. Improving implementation of policy pertaining to the national technology and industrial base.

Collectively, these provisions require DoD to develop or implement U.S. industrial policies (to include recommended executive actions, programmatic changes, regulatory changes, and legislative proposals/changes) impacting the Defense Industrial Base (DIB). ARWG is concerned that the scope of these provisions includes a number of areas where the Department is ill-equipped to make policy recommendations, and that some recommendations would be made without consultation with agencies of jurisdiction (e.g., the U.S. Treasury in regard to capital controls and dollar policy). While we recognize the belief that economic and national security risks can be addressed through the federal acquisition process, we believe government acquisition policy should be addressed separately from trade policy and handled by the respective subject-matter experts in the U.S. government. ARWG encourages Congress to direct DoD to robustly coordinate with both industry and other government agencies when developing and implementing these provisions.

Semiconductor Manufacturing Incentives

House, NDAA Sec. 1821. Semiconductor incentive grants.

House NDAA, Sec. 1822. Department of Commerce study on status of semiconductor technologies in the United States industrial base.

House NDAA, Sec. 1823. Funding for development and adoption of secure semiconductor and secure semiconductor supply chains.

House NDAA, Sec. 1824. Advanced semiconductor research and design.

Senate NDAA, Sec. 1094. Semiconductor incentive grants.

Senate NDAA, Sec. 1095. Department of Defense.

Senate NDAA, Sec. 1096. Department of Commerce study on status of microelectronics technologies in the United States industrial base.

Senate NDAA, Sec. 1097. Funding for development and adoption of measurably secure microelectronics and measurably secure microelectronics supply chains.

Senate NDAA, Sec. 1098. Advanced semiconductor research and design.

Senate NDAA, Sec. 1099. Prohibition relating to foreign adversaries.

ARWG **Supports**. Industry supports including provisions in the final NDAA to boost the United States' leadership in semiconductor manufacturing and research. The United States is a natural location for advanced semiconductor manufacturing given its assets in terms of talent, laws protecting intellectual property, and automation. However, most advanced manufacturing infrastructure has been focused in foreign countries in recent years because these countries provide generally available support to manage the enormous upfront capital costs. Today, the semiconductor industry directly employs over 250,000 people in the United States, and accounts for over a million additional indirect jobs – and there is an appetite by companies to expand those numbers, creating new high-paying jobs in this highly innovative field. Federal investment will play a key role in the ability of companies to expand domestically, which will grow the United States' economy, promote our national security interests, and help secure our semiconductor supply chains.

Domestic Sourcing Requirements

House Sec. 825. Enhanced domestic content requirement for major defense acquisition programs.

ARWG is concerned about the increased domestic content requirements for major defense acquisition programs contained in Section 825. Given the complex nature of the global supply chain, particularly in the areas of information and communications technologies (ICT), the feasibility of this provision is questionable and cause for concern among industry partners of the Department.

House Sec. 829. Domestic sourcing requirements for aluminum. ARWG **Opposes**. This section will impose a new preference for domestic aluminum acquired through funds administered by the DoD, Federal Highway Administration, Federal Transit Administration, Federal Railroad Administration, Federal Aviation Administration, and Amtrak without providing time or understanding as to how this would impact the delivery of essential military and transportation construction projects on which our service members, economy and communities rely. The restructuring of an entire supply chain is a herculean undertaking that, without sufficient planning or thought—which this amendment does not provide—could significantly delay the building of new and repairing of existing barracks, data centers, roads, transit, intercity passenger rail projects, and more.

Contractor Support for STEM

House Sec. 212. Enhanced participation of DoD contractors in STEM activities. ARWG **Supports**.

Industry supports Sec. 212 which would require the Secretary of Defense to develop a program to partner with DoD contractors to promote interest in careers related to STEM and other disciplines identified under section 2192a(a) of that title. Sec. 212 would establish a program to enable DoD to partner with defense contractors to promote interest in careers related to STEM and other disciplines in support of these national concerns and objectives in mind. The program would maximize strategic partnerships between educational institutions and private industry to build and strengthen STEM communities; to increase diversity, equity, and inclusion by providing access to programs in historically underserved and underrepresented communities; and to encourage work-based learning experiences with employers such as internships and apprenticeships.

Small Business Concerns

House Sec. 831. Transfer of verification of small business concerns owned and controlled by veterans or service-disabled veterans to the Small Business Administration. ARWG **Opposes**. Moving from the Veterans Administration to Small Business Administration may be problematic and have unintended consequences. Requiring businesses to go from self-certification to having to apply for certification creates an unnecessary burden and may cause some previously classified firms to lose eligibility.

House Sec. 836. Past performance ratings of certain small business concerns. ARWG **Opposes**. This section will force a contracting officer to evaluate the relevant past performance experience of first-tier small business subcontractors and small business joint venture members. Agency contracting officers would expend significant resources refereeing the relationship between the prime contractor and its first-tier subcontractors, instead of focusing on the primary mission of ensuring a contractually compliant construction project. A contracting officer's role in holding contractors accountable for cost and work quality lies not in adjudicating contractual disputes between businesses, but rather in being a smart buyer, specifying quality requirements, and performing sufficient quality inspections. Such a government focus helps ensure taxpayers that projects are delivered in a safe, efficient and high-quality manner. A major tenet of government contracting is that the federal government has no privity of contract with subcontractors.

Sec. 1642. Assistance for small manufacturers in the defense industrial supply chain on matters relating to cybersecurity. ARWG **Supports with modifications**. ARWG strongly supports providing meaningful assistance to small manufacturers that will need to comply with DoD's forthcoming Cybersecurity Maturity Model Certification (CMMC) requirements. However, ARWG recommends the provision more clearly specify that the small manufacturers that receive assistance may be DoD prime or subcontractors at any tier, and that the provision be made directive ("shall"), rather than permissive ("may"). In addition, ARWG recommends clarifying that the recipient Centers must have established programs in accordance with CMMC Accreditation Board training requirements; and require more frequent reports to the relevant congressional committees.

Construction Contracts

House Sec. 832. Equitable adjustments to certain construction contracts. ARWG **Supports**. This provision would require federal agencies to make interim partial payments to their construction prime contractors for unilateral changes in contract performance directed by the buying agencies. This reform will help small business construction contractors and subcontractors shoulder the financial burden of unilateral agency changes to a contract.

House Sec. 850. Certain contracts relating to construction or maintenance of a border wall. ARWG **Opposes.** This section would require the DoD to publish on a public website a list of contracts, task orders, or contract modifications related to the wall at the southern border. It creates the opportunity for blacklisting or targeting of firms by the public and potential clients. The federal government has already invested significant resources in providing contracting information and maintains a reasonable level of transparency. This unfairly targets companies that perform work on a project that has some opposition in the public.

Software and Systems Development

Senate Sec. 861. Implementation of modular open systems architecture requirements. ARWG **Supports with modifications.** ARWG is supportive of DoD efforts to implement “modular open system approaches” (MOSA) requirements established via Section 805 of the NDAA for FY 2017 (P.L. 114–328) and the intent of Section 861 to advance the Department’s efforts to enable cross-community connectivity and interoperability. However, some members are concerned that Section 861 would establish requirements for the implementation of MOSA that are overlapping or otherwise inconsistent with existing laws at 10 U.S.C 2320 and 10 U.S.C. 2446a-c. In addition, Section 861(b) would require DoD to prescribe regulations for “rights in interface software” that differ from the existing law at 10 U.S.C. 2320(a)(2)(F) and (G), which address rights in “interfaces developed with mixed funding” and “major system interfaces developed exclusively at private expense.”

Furthermore, ARWG opposes regulatory specification of detailed technical implementation as there is widespread disagreement in industry over what software data constitutes an interface, and there is significant litigation on the issue currently at the Supreme Court. However, ARWG supports the government requiring that major system interfaces are delivered in machine-readable formats to support joint all-domain interoperability, provided the major system interfaces are protected in accordance with their requisite data rights. ARWG recommends realigning this section to be consistent with Sections 805 and 809 of the FY 2017 NDAA.

Senate Sec. 882. Balancing security and innovation in software development and acquisition. ARWG urges DoD to consider using existing security standards and vulnerability management plan requirements, such as those based on standards published by the National Institute of Standards and Technology (NIST), rather than developing unique security requirements. Additionally, we strongly encourage DoD to work with industry partners to adopt best practices and inherent security measures already included in software, especially for commercial offerings. By understanding and building upon industry’s security best practices as a foundation, DoD will avoid duplicating effort or imposing security standards that require significant customization of commercial solutions to achieve compliance, which would ultimately increase the government’s costs.

Senate Sec. 884. Pilot program exploring the use of consumption-based solutions to address software-intensive warfighting capability. ARWG **Supports.** Industry supports the adoption of new, innovative methods to procure cutting-edge technologies in a streamlined manner. We support Congress encouraging DoD to take advantage of “as-a-Service” (aaS) approaches in commercial capability development, particularly where the capability is software-defined and cloud-enabled. We also support DoD’s commitment to adopting new approaches for the development and acquisition of software. To ensure consistency across the federal government regarding the adoption of consumption-based contracting models, we encourage DoD to coordinate with other federal agencies such as the General

Services Administration (GSA) to ensure lessons learned from this pilot program inform future consumption-based contracting policies and procedures.

House Sec. 220. Digital data management and analytics capability. ARWG **Supports**. Industry supports this provision as it modernizes DoD acquisition by digitizing and integrating all aspects of the acquisition process, including managing testing data to make data-driven program decisions.

Miscellaneous Provisions

House Sec. 815. Disclosure of beneficial owners in database for Federal agency contract and grant officers. ARWG **Opposes**. While we generally support updating the United States' lax beneficial ownership laws, this section would impose burdensome, duplicative reporting burdens on millions of American small businesses and threatens the privacy of law-abiding, legitimate small business owners. These onerous requirements will cost businesses significant time and money at a time when businesses are struggling.

House Sec. 841. Modifications to supervision and award of certain contracts. ARWG **Opposes**. This section requires new and onerous requirements for military construction contractors which goes against decades of federal contracting policies and judicial precedent, including requiring all contractors and subcontractors performing a military construction contract be licensed in the state where the work will be performed and mandating local hiring preferences. Mandating local hiring preferences would significantly impact a military construction contractor's workforce by creating scenarios where long-term, highly skilled workers may have to be laid off to meet the local hiring mandate. These provisions represent a momentous shift in the way both the DoD and defense contractors perform work. Additionally, these changes could result in unknown costs to both the government and contractors and could undermine the Competition in Contracting Act. Additionally, in *Leslie Miller, Inc. v. Arkansas* (1956), the Supreme Court held that contractors that bid on federal contracts cannot be required to first submit to state licensing procedures that determine a contractor's qualifications. The Supreme Court held that such state regulations are contrary to the federal procurement statutes and regulations that provide standards for judging the "responsibility" of competitive bidders for federal contracting.

House Sec. 848. Prohibition on contracting with persons with willful or repeated violations of the Fair Labor Standards Act of 1938. ARWG **Opposes**. This section provides an overbroad solution and is inconsistent with the existing legal framework on this issue. The Federal Acquisition Regulation (FAR) already provides alternative avenues such as suspension or debarment for federal agencies to deal with "bad actors" that willfully or repeatedly violate the law. Federal agencies already have broad discretion to suspend or debar contractors for a wide range of improper conduct that would indicate a lack of business integrity, beyond just Fair Labor Standard Act violations.

House Sec. 1745. Requirements relating to program and project management. ARWG **Opposes**. The proposed change to contractor Earned Value Management (EVM) systems will require contractors to adopt a different standard for conducting EVM. A separate standard will require separate measurement and reporting requirements, resulting in delays, reporting and measurement discrepancies, and undue cost burden. Additionally, it will force the government to change its reporting and auditing regimes to match the new standard. The proposed change differs substantially from the current standard used by DoD, NASA, DHS, FAA, DoE and other federal programs. If this provision is enacted, it will cause a major disruption in government acquisition. Contractors will have to adjust their EVM systems, and DCMA,

who audits EVM on contracts, will have to conduct a complete review and adjust its auditing procedures.

House Sec. 1769. FedRamp Authorization Act. ARWG believes there is great value in a government-wide cloud security program that relies on a standardized baseline requirement. However, any such program should receive annual Congressional appropriations for its operations and the program's stakeholders should be required to work closely with industry to adopt commercial best practices. The certification process should be automated to the greatest possible extent and should be designed to encourage inter-agency certification reciprocity.

Senate Sec. 844. Contract authority for advanced development of initial or additional prototype units. ARWG **Supports**. We support this expansion of contract authority to provide follow-on development and demonstration as a separate contract line item associated with an initial competitive solicitation. This authority streamlines the procurement process by limiting requirements, in some instances, for additional solicitations and proposals.

Senate Sec. 846. Repeal of pilot program on payment of costs for denied Government Accountability Office bid protests. ARWG **Supports**. ARWG supports Congress's continued efforts to evaluate the use of bid protests. However, we believe the DoD should rely on an independent review and analysis of the detailed information collection provisions. The pilot program inappropriately takes the place of the independent review process and disincentivizes contractors from filing legitimate bid protests.

Senate Sec. 893. Repeal of apprenticeship program. ARWG **Supports**. This section repeals the requirement from the FY 2020 NDAA which added a 20 percent apprenticeship goal for military construction contractors, including incentives for military construction contractors that implement qualified training programs that exceed apprenticeship goals. The unilateral implementation of apprenticeship goals will eliminate large swaths of the construction industry from being able to compete for DoD projects. Additionally, traditional registered apprenticeship programs are not a good fit for all contractors, and many utilize alternate on-the-job training programs that meet their specific projects' needs and schedules. The registered model can be too rigid to fulfill all demands. Most of the construction industry training is performed outside of the registered apprenticeship model and the lack of registered apprenticeship programs in entire regions of the country will impose a disproportionate mandate on contractors based on where they perform work. Further, there is not enough capacity within the registered apprenticeship system for all contractors to meet the goal. While there are multiple paths into the industry, it is difficult for many firms to establish apprenticeship programs for construction workers and fill the gap between workers currently being upskilled through registered programs and the industry's needs.

Senate Sec. 5841. Waivers of certain conditions for progress payments under certain contracts during the COVID-19 national emergency. Sec. 5841. ARWG **Supports**. This section would the Secretary of Defense to waive section 2307(e)(2) of title 10, United States Code, with respect to progress payments during the National Emergency Act related to the COVID-19. Cash flow is critical to every construction business. This section will help give flexibility to ensure the ensuring payment for work is necessary for federal contractors and subcontractors to maintain mission readiness and ongoing operations.

In response to the COVID-19 emergency, DoD increased the customary progress payment rate for definitized contracts from 80% of cost to 90% of cost via a class deviation. Unfortunately, DoD could not accelerate contract financing payments on undefinitized contract actions (UCAs) successfully without

further statutory relief from Congress. DoD promptly implemented this new statutory authority via class deviation on April 3, 2020. However, the Coronavirus Aid, Relief, and Economic Security (CARES) Act did not address the progress payment rate cap for UCAs in 10 U.S.C. §2307(e)(2). ARWG supports Senate Section 5841 which provides the rate cap relief and completes the unfinished work of the CARES Act.

Senate Sec. 6083. Diesel emissions reduction. ARWG **Supports**. This section would reauthorize the DERA program and which provides greater financial assistance to the many equipment owner who seek a fair and effective way to reduce emissions from existing fleets of off-road equipment. DERA provides important grants and rebates to states and localities to upgrade or replace older diesel engines, including off-road construction equipment.

Thank you very much for your consideration of our perspectives. We look forward to working with both chambers as conference negotiations advance. If we can provide further detail, or should you have any questions about these proposals and recommendations as well as wish to discuss them further, please contact any of our organizations listed below.

Sincerely,

American Council of Engineering Companies (ACEC)
Associated General Contractors of America (AGC)
Computing Technology Industry Association (CompTIA)
Information Technology Industry Council (ITI)
National Defense Industrial Association (NDIA)
United States Chamber of Commerce

APPENDIX A: General Support for House NDAA Provisions

In addition to the provisions and comments above, ARWG supports the following House NDAA provisions as written:

- **Sec. 217. Modification of joint artificial intelligence research, development, and transition activities.**
- **Sec. 218. Modification of national security innovation activities and manufacturing pilot program.**
- **Sec. 223. Information technology modernization and security efforts.**
- **Sec. 278. Sense of Congress on the additive manufacturing and machine learning initiative of the Army.**
- **Sec. 280. Briefing and report on use of distributed ledger technology for defense purposes.**
- **Sec. 803. Major weapon systems: life-cycle sustainment plan.**
- **Sec. 805. Acquisition authority of the Director of the Joint Artificial Intelligence Center.**
- **Sec. 807. Alternative Space Acquisition System for the United States Space Force**
- **Sec. 816. Inclusion of optical transmission components in the analytical framework for supply chain risks.**
- **Sec. 843. Revisions to requirement to use firm fixed-price contracts for foreign military sales.**
- **Sec. 902. Assistant Secretary of Defense for Industrial Base Policy.**
- **Sec. 918. Comptroller General report on vulnerabilities of the Department of Defense resulting from offshore technical support call centers.**
- **Sec. 1006. Public availability of Department of Defense legislative proposals.**
- **Sec. 1259. Report on supply chain security cooperation with Taiwan.**
- **Sec. 1608. Limitation on awarding contracts to entities operating commercial terrestrial communication networks that cause interference with the Global Positioning System.**
- **Sec. 1609. Prohibition on availability of funds for certain purposes relating to the Global Positioning System.**
- **Sec. 1614. Report on risk to national security posed by quantum computing technologies.**
- **Sec. 1622. Cyberspace solarium commission.**

- **Sec. 1624. Responsibility for the Sector Risk Management Agency function of the Department of Defense.**
- **Sec. 1630. Establishment of integrated cyber center.**
- **Sec. 1638. Funding for National Center for Hardware and Embedded Systems Security and Trust.**
- **Sec. 1639. Strengthening Federal networks.**
- **Sec. 1771. Building United States capacity for verification and manufacturing of advanced microelectronics.**
- **Sec. 1804. Department of Homeland Security acquisition documentation.**
- **Sec. 1806. National supply chain database.**
- **Division E.**

APPENDIX B: General Support for Senate NDAA Provisions

In addition to the provisions and comments above, ARWG supports the following Senate NDAA provisions as written:

- **Sec. 212. Governance of fifth-generation wireless networking in the Department of Defense.**
- **Sec. 213. Application of artificial intelligence to the defense reform pillar of the National Defense Strategy.**
- **Sec. 215. Updates to Defense Quantum Information Science and Technology Research and Development program.**
- **Sec. 233. Department of Defense demonstration of virtualized radio access network and massive multiple input multiple output radio arrays for fifth generation wireless networking.**
- **Sec. 831. Report on acquisition risk assessment and mitigation as part of Adaptive Acquisition Framework implementation.**
- **Sec. 842. Truth in Negotiations Act threshold for Department of Defense contracts.**
- **Sec. 1046. Consideration of security risks in certain telecommunications architecture for future overseas basing decisions of the Department of Defense.**
- **Sec. 1084. Modernization effort.**
- **Sec. 1633. Assessing risk to national security of quantum computing.**
- **Sec. 3165. Use of high-performance computing capabilities for COVID-19 research.**
- **Sec. 5232. Development of standards and guidelines for improving cybersecurity workforce of Federal agencies.**
- **Sec. 5238. National Cybersecurity Challenges.**
- **Sec. 5239. Internet of Things.**
- **Sec. 5241. Report on Department of Defense strategy on artificial intelligence standards.**
- **Sec. 5244. CISA Director.**
- **Sec. 5891. Listing of other transaction authority consortia.**
- **Sec. 6046. Conditions for permanently basing United States equipment or additional military units in host countries with at-risk vendors in 5G or 6G networks.**

- **Sec. 9501. Report on attempts by foreign adversaries to build telecommunications and cybersecurity equipment and services for, or to provide such equipment and services to, certain allies of the United States.**
- **Sec. 9502. Report on threats posed by use by foreign governments and entities of commercially available cyber intrusion and surveillance technology.**
- **Sec. 9503. Reports on recommendations of the Cyberspace Solarium Commission.**
- **Sec. 9504. Assessment of critical technology trends relating to artificial intelligence, microchips, and semiconductors and related supply chains.**