

Congress of the United States

Washington, DC 20515

May 24, 2023

The Honorable Lloyd Austin
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Austin,

We write to request information about how the Department of Defense (DoD or “the Department”) is preventing price gouging when companies refuse to provide requested cost or pricing data. Multiple Inspector General audit reports over the past few decades have highlighted the problem of DoD being overcharged on sole-source contracts, where cost or pricing data was not used to determine a fair and reasonable price.¹

The *Truth in Negotiation Act*, later renamed the *Truthful Cost or Pricing Act*, requires the government to obtain data to determine whether prices are fair and reasonable.² This data is necessary for the Department to ensure government contracts are at a fair and reasonable price. DoD has reported, however, that there are “chronic issues” of contractors refusing to provide that data.³ In fact, DoD Inspector General (DoD IG) reports have some of the Department’s top contractors, including Lockheed Martin,⁴ Pratt and Whitney,⁵ and Raytheon⁶, have refused or claimed to be unable to provide it.

¹ U.S. Department of Defense, Office of the Inspector General, “Audit of the Business Model for TransDigm Group Inc. and Its Impact on Department of Defense Spare Parts Pricing,” December 13, 2021, p. 18, <https://media.defense.gov/2021/Dec/27/2002914678/-1/-1/1/DODIG-2022-043%20508.PDF>.

² U.S. Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, “PGI 215.4 – Contract Pricing, PGI 215.402 Pricing Policy,” https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/current/PGI215_4.htm#:~:text=The%20Truthful%20Cost%20and%20Pricing,or%20pricing%20data%20requirements%20applies;ProPricer,“KnowTINA’sThreshold:Embrace the Truth in Negotiations Act,” November 22, 2022, https://www.propricer.com/blog/know-tinas-threshold-embrace-the-truth-in-negotiations-act.

³ Government Accountability Office, “Spare Part Contracts: Collecting Additional Information Could Help DOD Address Delays in Obtaining Cost or Pricing Data,” May 26, 2021, p. 7, <https://www.gao.gov/assets/720/714558.pdf>.

⁴ U.S. Department of Defense, Office of the Inspector General, “The Air Force Did Not Adequately Determine or Document Fair and Reasonable Prices for Lot 7 Sole-Source Initial Spare Parts for the C-5 Aircraft,” February 7, 2017, pp. 5-13, <https://media.defense.gov/2017/Feb/07/2001714317/-1/-1/1/DODIG-2017-053.pdf>.

⁵ U.S. Department of Defense, Office of the Inspector General, “U.S. Air Force Spent Billions on F117 Engine Sustainment Without Knowing What a Fair Price Was,” March 11, 2016, p. 1, <https://media.defense.gov/2016/Mar/11/2001714219/-1/-1/1/DODIG-2016-059.pdf>.

⁶ U.S. Department of Defense, Office of the Inspector General, “Naval Supply Systems Command Needs to Improve Cost Effectiveness of Purchases for the Phalanx Close-In Weapon System,” December 19, 2014, p. 11, <https://media.defense.gov/2018/Jul/23/2001945902/-1/-1/1/DODIG-2015-053.PDF>.

In other cases, the Government Accountability Office has found companies delaying providing this data for sole-source contracts for as long as 1,154 days.⁷ This appears to be a tactic to avoid having to negotiate a fair deal. These delays and denials have real costs for taxpayers: in one case involving helicopter engine parts, the company delayed fulfilling a request for cost data by 459 days - and when DoD finally received this data, it was able to reduce the cost of a \$157.7 million contract by 25 percent.⁸

The latest DoD's *Annual Report to Congress on Denials of Contracting Officer Uncertified Cost or Pricing Data Requests* contained deeply troubling findings: it revealed that just two contractors: Boeing and TransDigm denied Air Force and Defense Logistics Agency (DLA) requests for pricing data for an astonishing 10,934 items.⁹ Even more troubling, DoD believes this problem "may be more prevalent than what is represented in this report, particularly with respect to sole source commercial items."¹⁰ This is a deeply troubling finding that reveals these contractors' contempt for the Department and the taxpayers.

Boeing accounted for 97 percent of the denials listed in the report.¹¹ All of the Boeing items reported were under a single Air Force contract.¹² Boeing has not only refused to provide transparent answers to the Department, it has even refused to provide cost and pricing data to another division of its own company.¹³ These denials make it impossible for DoD officials to make sure the agency is not being ripped off.¹⁴

TransDigm – which has a history of collecting excessive profits¹⁵ – is the other large bad actor on price and cost reporting. TransDigm refused to provide pricing data for 275 requests for the Defense Logistics Agency.¹⁶

The rationale for these cost pricing denials were alarming and highlighted a need for greater accountability. These rationales included: "would not be beneficial, data did not exist, no reason provided, or not required to provide the information" which accounted for 97.5 percent of denials (or 10,659) and "Asserted Commerciality" accounted for 2.4 percent (or 261).¹⁷ Other contractors were simply not responsive (12), did not explain (1), or below Truth in Negotiation

⁷ Government Accountability Office, "Spare Part Contracts: Collecting Additional Information Could Help DOD Address Delays in Obtaining Cost or Pricing Data," May 26, 2021, p. 13, <https://www.gao.gov/assets/720/714558.pdf>.

⁸ *Id.*, p. 15.

⁹ U.S. Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, "Annual Report to Congress on Denials of Contracting Officer Uncertified Cost or Pricing Data Requests, October 2020 – September 2021," January 2022, pp. 1-2 (On file with the Office of Senator Elizabeth Warren).

¹⁰ *Id.*

¹¹ *Id.*, p. 2.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*, p. 3.

¹⁵ U.S. Department of Defense, Office of the Inspector General, "Audit of the Business Model for TransDigm Group Inc. and Its Impact on Department of Defense Spare Parts Pricing," December 13, 2021, p. ii, <https://media.defense.gov/2021/Dec/27/2002914678/-1/-1/1/DODIG-2022-043%20508.PDF>.

¹⁶ U.S. Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, "Annual Report to Congress on Denials of Contracting Officer Uncertified Cost or Pricing Data Requests, October 2020 – September 2021," January 2022, p. 2 (On file with the Office of Senator Elizabeth Warren).

¹⁷ *Id.*, p. 3.

Act (TINA) threshold (1).¹⁸ DoD needs to improve its efforts to collect pricing data, or use its authority to terminate contracts with vendors who refuse to provide it.

We have and will continue to take strong action to protect taxpayers and end contractors' rip-offs of DoD. Senator Warren called on the Department to investigate TransDigm for its abuses.¹⁹ In June 2022, we introduced the *Stop Price Gouging the Military Act*, to enhance the DoD's ability to access cost and pricing data.²⁰ This legislation aims to strengthen acquisition laws and enhance the Department's ability to access this pricing data to prevent rip-offs. Additionally, Senator Warren introduced the *Department of Defense Ethics and Anti-Corruption Act*, which would prevent abuse by increasing transparency and shutting the revolving door between DoD and contractors that abuse the rules.²¹

The new reports of contractor's refusal to provide pricing data are unacceptable. DoD must act to address this failure and protect taxpayer dollars.

Consequently, we ask that you provide the following information by June 12:

1. Is there an updated DoD Annual Report to Congress on Denials? This report is from October 1, 2020 and September 30, 2021.
2. In what instances or circumstances is certified cost or pricing data required? Not required?
3. What is DoD policy with regard to granting awards without cost or pricing data?
 - a. How are decisions made to grant awards in the absence of requested data?
4. What safeguards are in place to ensure that awards without requested pricing are not abused?
5. Have there been instances where the DoD wants to simplify contract acquisition and as a result uses a smaller contract pricing threshold?
6. Is the grant award without cost or pricing data process documented? (i.e., how decisions are made to grant or not) If no, is this something that will be systemically documented moving forward?

¹⁸ *Id.*

¹⁹ Letter from Senator Elizabeth Warren to Department of Defense Acting Inspector General Glenn Fine, May 19, 2017, <https://www.warren.senate.gov/imo/media/doc/2017-05-17%20Sen%20Warren%20letter%20to%20DODIG.pdf>.

²⁰ Office of Senator Elizabeth Warren, "Senator Warren and Representative Garamendi Introduce the Bicameral Stop Price Gouging the Military Act," press release, June 9, 2022, <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-representative-garamendi-introduce-the-bicameral-stop-price-gouging-the-military-act>; *Stop Price Gouging the Military Act*, S.4374, <https://www.congress.gov/bill/117th-congress/senate-bill/4374/text>.

²¹ *Department of Defense Ethics and Anti-Corruption Act of 2021*, S.2396, <https://www.congress.gov/bill/117th-congress/senate-bill/2396/text>.

7. Did the Army, Space Force, Navy, Marine Corps, or other components for DoD have any requests for certified or uncertified cost or pricing data denied in the past two years?
8. The report notes Defense Pricing and Contracting (DPC) “was evaluating the data collection processes” and “is using lessons learned to date to modify the process and advise contracting professionals.”²² What is the status of this evaluation and how has the contracting process been modified to address it?
9. Is DoD tracking when there are delays in pricing data delivery in response to requests?
 - a. For the past two years, how often have those delays occurred?
 - b. For the past two years, how long were those delays?
 - c. For the past two years, did any of those contracts have a final price less than what the contractor initially proposed? How much were the savings and what was the total value of any contracts?
10. What elevation procedures do contractor denials go through? Please describe in detail
11. Are all contractor denials of data required to follow the elevation procedures and reporting requirements? If no, why not?
12. What is the DoD doing to ensure accurate and detailed reporting from contractors to support fair and reasonable price determinations?
13. Why does DoD believe that denials of pricing data “may be more prevalent than what is represented in this report”?²³ What is DoD doing to address this problem?
14. What is the Departments response to denial explanations?
 - a. Does the department ask for more information?
15. Is the Departments response to denial reasoning documented through a formal process? If no, is this something that will be systemically documented moving forward?
16. Does DoD have any examples or reason to believe companies are manipulating process to keep contract actions below the TINA threshold and evade price reporting requirements? If yes, please provide.
17. Have there been instances where the DoD has been priced out of a transaction? If yes, please provide details, including what impact this had on readiness.
18. What is the Department of Defense doing to address the issue of diminishing manufacturers and sole source providers in the defense industrial base?

²² U.S. Department of Defense, Office of the Under Secretary of Defense for Acquisition and Sustainment, “Annual Report to Congress on Denials of Contracting Officer Uncertified Cost or Pricing Data Requests, October 2020 – September 2021,” January 2022, p. 3 (On file with the Office of Senator Elizabeth Warren).

²³ *Id.*, p. 1.

19. Is the DoD willing to update policy and guidance to make pricing data required?

20. Is the DoD willing to support the *Stop Price Gouging the Military Act*?

Sincerely,



Elizabeth Warren
United States Senator



John Garamendi
Member of Congress
Ranking Member,
Subcommittee on Readiness

CC: The Honorable William A. LaPlante, Under Secretary of Defense for Acquisition and Sustainment, U.S. Department of Defense