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Congress of the United States House of Representatives

June 7, 2011

The Honorable Robert M. Gates
Secretary, Department of Defense
1000 Defense Pentagon
Washington, D.C. 20503

Dear Mr. Secretary:

As I am sure you are aware, during the consideration of the Fiscal Year 2012 National Defense Authorization Act, members of the House Armed Services Committee (HASC) transferred more than \$651 million from a newly established "Mission Force Enhancement Transfer Fund" to increase funding for their priorities in the bill. As a means of ensuring that these budgetary legislative proposals would not run afoul of the moratorium on earmarks in the House of Representatives, language is included in the bill wherever additional funds have been allocated which says, "Merit-based or Competitive Decisions - A decision to commit, obligate, or expend funds... with or to a specific entity shall -- (1) be based on merit-based selection procedures in accordance with the requirements of sections 2304(k) and 2374 of title 10, United States Code, or on competitive procedures; and (2) comply with other applicable provisions of law."

Sadly, some members have already issued press releases touting that the funding they secured will be going to specific locations, and even entities, and some descriptions of funds sound remarkably similar to earmarked projects those members received in the past. Even worse, watchdog organizations and stories in the press have criticized these member additions as being nothing more than an end-run around the earmark moratorium.¹

From past meetings with officials from the Department's Office of the Comptroller, we know that in accordance with the Federal Acquisition Regulation (FAR) funds are considered to have been competed even when awarded using "other than full and open competition." This option is authorized when one of several exceptions is present, including the existence of only one responsible source (or limited sources) that can do the work, unusual and compelling urgency, and national security.

¹ See, "CAGW Outraged About Defense Slush Fund," May 31, 2011, <http://www.cagw.org/newsroom/releases/2011/cagw-outraged-about-defense.html>, and also, "Add-On to One is Earmark to Another," Megan Scully, *National Journal Daily*, May 19, 2011.

In an effort to prevent this process from becoming an end-run around the earmark moratorium, I would appreciate an explanation from the Department of Defense on how it plans to award these additional funds. Specifically:

- How will the Department implement a requirement to award funds with “merit-based selection procedures?”
- Will the Department of Defense interpret “competitive procedures,” as specified in the legislation in its current form, to be the same as a requirement for full and open competition that would ensure a full solicitation and multiple bids being evaluated?
- Will the Department use the FAR as its guidance for awarding these funds competitively?
- If the requirements to use “merit-based selection” or “competitive procedures” are included in the final measure signed into law, will it be possible for Members of Congress to know where the funds would end up before they are awarded?
- Would it be possible for these additional funds to be awarded to recipients of earmarks from previous years to perform similar tasks as those they performed with past earmarked dollars, while still complying with the “merit-based selection processes” or “competitive award process” requirement?
- Would it be possible for Members of Congress to influence the awarding process of these additional funds, were the Department required by law to award them under a “merit-based selection processes” or through “competitive procedures?”

In order to provide more transparency to this process, I successfully offered two amendments to the fiscal year 2012 defense authorization act: the first requires that your Department make public on its website any written communications it receives from Congressional offices seeking to influence the expenditure of funds added by members; the second requires your Department to report to Congress on what these additional funds were used for, and how that funding was awarded. I believe the answers to the questions I have posed will be influential in determining what steps must be taken to ensure that funds added by Members of Congress to the Fiscal Year 2012 National Defense Authorization Act and future legislation does not violate the intent of the House earmark moratorium.

I know your time is very valuable, and I appreciate your attention to this request and look forward to a prompt response.

Sincerely,

JEFF FLAKE
Member of Congress