September 26, 2022

The Honorable Jack Reed
Chairman
Armed Services Committee
U.S. Senate
228 Russell Senate Office Building
Washington, DC 20510

The Honorable James Inhofe
Ranking Member
Armed Services Committee
U.S. Senate
228 Russell Senate Office Building
Washington, DC 20510

The Honorable Adam Smith
Chairman
Armed Services Committee
U.S. House of Representatives
2216 Rayburn House Office Building
Washington, DC 20515

The Honorable Mike Rogers
Ranking Member
Armed Services Committee
U.S. House of Representatives
2216 Rayburn House Office Building
Washington, DC 20515

Re: Positions on Provisions in National Defense Authorization Act for Fiscal Year 2023

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

A broad coalition of stakeholders representing federal contractors across multiple industries write in opposition to proposed labor-related amendments in the House version of the National Defense Authorization Act for Fiscal Year 2023 (H.R. 7900).[1] As proposed, the provisions will increase the costs of doing business with the federal government, dissuade new entrants to the defense industrial base, create uncertainty in the federal contracting procurement process and harm competition in the federal contracting marketplace for both small businesses and traditional larger firms.

Schakowsky Amendment Giving Preference to U.S. Department of Defense Contractors With Union Agreements

Sec. 809[2] amends Chapter 241 of title 10, U.S. Code, by adding Sec. 3310, which directs the secretary of defense to give preference to contractors submitting offers for federal contracts if they "have a collective bargaining agreement with a labor organization or a majority of the employees of the offeror," or sign a union neutrality agreement or worker strike replacement agreement with applicable unions.[3] These agreements typically can restrict employer communications with its employees, eliminate employee privacy and eliminate access to secret ballot elections during union representation elections.

The DOD should not provide a preference to contractors based on whether or not its workforce is unionized or whether they are willing to sign union neutrality agreements or prohibitions against replacing striking workers with various unions. Full and open competition promotes better pricing, more innovation and encourages better quality goods and services. Such a preference would eliminate many small businesses and experienced providers of goods and services to the DOD and create barriers to new entrants at a time when the government is already struggling to attract innovative commercial solutions.

[1] H.R. 7900 was passed by the U.S. House of Representatives on July 14, 2022, Roll Call 350: https://clerk.house.gov/Votes/2022350
[2] See Sec. 809 text: https://www.congress.gov/bill/117th-congress/house-bill/7900/text#H5B985688C6C54D37A412610EA7714542.
[3] This language was added to the House NDAA via an amendment offered by Rep. Jan Schakowsky, D-Ind., that was passed 220-209 (Roll Call 312).

Jayapal Amendment on Fair Labor Standards Act Violations

Sec. 5817[4] directs the secretary of labor to ensure that new "enforcement and compliance databases of the Department of Labor… identify persons that have been finally adjudicated to have violated labor laws" defined as the Davis-Bacon Act, the Service Contract Act and the Fair Labor Standards Act.

Sec. 5817[5] further directs the secretary of labor to initiate a debarment proceeding against a covered person with two or more willful or repeated violations of the Fair Labor Standards Act of 1938 (29 U.S.C. 201, et seq.) in the last five years identified in this new DOL database. We oppose the adoption of any similar language in the Senate bill and ask future conferees to strip this language out of the bill.

Sec. 5817 would direct all federal agency and department heads to automatically initiate a permanent or temporary debarment proceeding against federal contractors with Fair Labor Standards Act violations from the previous five years. However, this requirement would supersede the current, proven suspension and debarment process; would create a double jeopardy scenario for employers that may have qualifying FLSA violations; would deny federal contractors due process; and may harm competition in the federal contracting marketplace.

Under the current procurement system, each federal agency has its own federal contracting officers, and the Federal Acquisition Regulation requires that the federal contracting officers determine the eligibility and responsibility of a contractor, including assessing compliance with workplace laws and regulations, before awarding a contract. Moreover, once the contract is awarded, federal contracting officers have the responsibility to review the contractor, and their robust oversight and investigative capabilities are meant to ensure federal contractors continue to abide by federal laws. If the contractor is determined to have violated federal law, in addition to being subject to the remedies and penalties of the laws that were violated, the federal contracting officer can use several mechanisms to hold the contractor accountable, including imposing fines, future oversight and suspension or debarment.

In addition to the work individual federal contracting officers conduct, the Interagency Suspension and Debarment Committee serves as a federal forum for procurement suspension- and debarment-related issues and to assist in developing unified federal policy. The most recent ISDC report submitted to the Senate Committee on Homeland Security and Governmental Affairs and is for FY2020.[6] According to the ISDC report, "agencies reported issuing 415 suspensions, 1,317 proposed debarments, and 1,256 debarments Governmentwide in FY 2020, notwithstanding the COVID-19 pandemic and dispersed, remote, or socially distanced workforce," illustrating a robust suspension and debarment process that would be disrupted by Rep. Jayapal's Sec. 5817 or similar language.

In addition to supplanting the existing process, automatically initiating debarment proceedings against federal contractors, as Jayapal's Sec. 5817 does, would create a double jeopardy for employers. There are already federal penalties and remedies if an employer violates the FLSA.[7] These remedies were passed by Congress after careful deliberations. If a contractor satisfies the penalty for a violation, that violation should not be held against the contractor in the future. The Jayapal amendment would

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[4] Sec. 5817 text: https://www.congress.gov/bill/117th-congress/house-bill/7900/text#H447D39D1D6564AB89BB6417CD013A4AF.

[5] This language was added to the House NDAA via an amendment offered by Rep. Pramila Jayapal, D-Wash., that was passed en bloc No. 5. Of note, Rep. Jayapal did not vote in support of the NDAA at final passage.

[6] Available at: https://www.acquisition.gov/sites/default/files/page_file_uploads/ISDC_FY_2020_Section_873_Report_(use_for_web_upload).pdf.

[7] See federal penalties and remedies for FLSA violations at: https://webapps.dol.gov/elaws/whd/flsa/screen74.asp.

undermine the current system by imposing additional, retroactive penalties for claims that have already been resolved. It will also make it less likely that employers settle claims quickly in order to ensure there is no possibility of a settlement being considered a violation in the future.

Furthermore, if enacted, this requirement would deny due process to federal contractors and would provide leverage for unions and other parties to exert pressure on companies with federal contracts, which could lead to a variety of additional problems for the government and private federal contracting community. It may harm competition and could lead to high-performing businesses, including small businesses and those owned by women or persons of color, being excluded from the federal contracting process. It could result in job losses, as suspended or debarred federal contractors would be forced to lay off employees if denied the ability to compete for federal contracts. This would likely have a ripple effect of job losses through the federal contracting supply chain and negatively impact agency missions.

Jones Amendment on National Labor Relations Act 8(a) Violations

Sec. 868[8] states that the "Secretary of Defense may not enter into a contract with an employer found to have violated section 8(a) of the National Labor Relations Act (29 U.S.C. 158) during the three-year period preceding the proposed date of award of the contract"[9] for contracts entered into on or after Sept. 30, 2023. Sec. 868[10] provides exceptions if:

(1) before awarding a contract, such employer has settled all violations described under subsection (a) in a manner approved by the National Labor Relations Board and the employer is in compliance with the requirements of any settlement relating to any such violation; or

(2) (A) each employee of such employer is represented by a labor organization for the purposes of collective bargaining; and

(B) such labor organization certifies to the Secretary that the employer—

(i) is in compliance with any relevant collective bargaining agreement on the date on which such contract is awarded and will continue to preserve the rights, privileges, and benefits established under any such collective bargaining agreement; or

(ii) before, on, and after the date on which such contract is awarded, has bargained and will bargain in good faith to reach a collective bargaining agreement.

We oppose the Jones amendment for the same reasons we oppose the Jayapal amendment, as this requirement would supersede the current, proven suspension and debarment process; would create a double jeopardy scenario for employers that may have qualifying NLRA 8(a) violations; would deny federal contractors due process; and is likely to harm competition in the federal contracting marketplace.

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[8] Section 868 available at: https://www.congress.gov/bill/117th-congress/house-bill/7900/text#H8DC7023C96E843FB87C050A2A2CF3982.

[9] Definition of NLRA 8(A) violations via the National Labor Relations Board: https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1#:~:text=It%20is%20unlawful%20for%20an,they%20forget%20about%20the%20union.

[10] This language was added to the House NDAA via an amendment offered by Rep. Mondaire Jones, D-N.Y., agreed to 221-207 (Roll No. 311).

AIRC Report

Of note, the House version of NDAA for fiscal year 2022 contained a similar provision (Sec. 865) as the Jayapal amendment that was not contained in the Senate amendment and removed from the agreement in December 2021. Of note, pages 208 and 209 of the Joint Explanatory Statement to Accompany the NDAA for Fiscal Year 2022 addresses a forthcoming Acquisition Innovation Research Center report on changes to debarment statutes for federal contractors with labor law violations:[11]

> *We note that the conference report (H. Rept. 116-617) accompanying the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 directed the Department of Defense to enter into an agreement with the Acquisition Innovation Research Center (AIRC), established by section 835 of the National Defense Authorization Act of Fiscal Year 2020 (Public Law 116-92), to report on the extent to which existing statutory and discretionary debarment procedures address the Department's interests and to identify any gaps in the current requirements for statutory debarment as a result of labor law violations. The report will include recommendations on statutory and regulatory changes needed to improve the transparency, efficiency, and effectiveness of the current debarment system as it relates to labor law violations.*
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> *We note that the AIRC study is ongoing and encourage the academic researchers to refine the focus of their efforts to study and make recommendations related to: (1) The impact of labor violations on the supply chain, balanced with the need to consider participation by small businesses, which tend to be more adversely impacted by debarment; (2) The availability of Fair Labor Standards Act (FLSA) records to Department of Defense contracting officers and the need for increased transparency and workforce training on labor laws and FLSA enforcement; and (3) The extent to which the current discretionary model of debarment best serves the Government's interest, or whether an adjudicatory model should be considered.*
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> *We direct the Secretary of Defense to support the execution of AIRC study with appropriate resources, and access to data, information, and personnel.*
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> *We anticipate the results of this study will bring to light new information that is not widely available or understood, therefore, not later than 60 days after the conclusion of this AIRC study, we direct the Secretary to provide a briefing to the congressional defense committees on the study's findings and what legislative changes the Department would propose, if any, in response to AIRC recommendations.*
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> *We support rigorous oversight of labor laws and the need to protect the Department from doing business with individuals and companies who pose a business risk to the Government. We further reemphasize that contractors cited for violations such as failing to pay minimum wage and overtime and keep accurate records could be replaced with more responsible contractors to improve the integrity of the defense industrial base.*

It is premature to make changes to the federal contracting suspension and debarment system via the Jayapal (Sec. 5817) and Jones (Sec. 865) amendments prior to the publication of the AIRC, particularly as the recommendations may result in better outcomes for taxpayers, the federal contracting workforce and federal agencies.

[11] Available at: https://rules.house.gov/sites/democrats.rules.house.gov/files/17S1605-RCP117-21-JES-U1.pdf.

Kim and Garamendi Amendments on Military Construction Local Hire and State Licensing

House Sec. 2809 (Rep. Andy Kim, D-N.J.) and House Sec. 2809B (Rep. John Garamendi, D-Ca.) enact new and onerous requirements for military construction contractors, which goes against decades of federal contracting policies and precedent, including requiring all contractors and subcontractors performing a military construction contract to be licensed in the state where the work will be performed and mandating local hiring preferences.

The state licensing requirement represents a momentous shift in the way both the DOD and defense contractors perform work. There has never been a state licensing requirement for federal construction contractors, let alone military construction contractors, to perform work. 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. Most military construction contractors perform work across many states and territories. This section will severely restrict military construction contractors' ability to perform work. Consequently, the section will lead many contractors to leave the market, reduce competition and jeopardize the delivery of critical military infrastructure projects.

Local hire programs create arbitrary local hiring goals that are not based on any analysis of whether the local workforce is qualified to work in construction. As a result, many firms are obliged to hire workers who are neither qualified to work or interested in construction. In some communities, as many as 80% of workers hired to comply with local hire programs do not stay through the duration of the project.

There is no requirement for officials imposing local hire agreements to actively recruit people into the construction industry. Construction firms have held job fairs to recruit workers in communities with local hire requirements where zero candidates have appeared. Considering the lack of attention placed on construction in most high schools today, too few job seekers even have construction on their radar as a career choice.

As a program designed to entice more people from disadvantaged communities into high-paying, middle-class construction careers, they do not work. While they have existed in form or another since the 1970s, local hire requirements have made no measurable impact on the demographics of the construction workforce. It is time to acknowledge these programs do not work and try a better, more effective approach.

Conclusion

Our coalition asks that you oppose the House-passed Jayapal, Jones, Schakowsky, Kim and Garamendi language from being adopted in the Senate bill and eliminate any similar language in conference.

Staff may reach out to Ben Brubeck, vice president of regulatory, labor and state affairs with Associated Builders and Contractors (brubeck@abc.org) and Allison Dembeck, vice president of education and labor advocacy with the U.S. Chamber of Commerce (adembeck@uschamber.com), to discuss this matter further.

Sincerely,