

117TH CONGRESS
1ST SESSION

S. 403

To preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24, 2021

Mr. YOUNG (for himself and Mr. SCOTT of South Carolina) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

A BILL

To preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair and Open Com-
5 petition Act” or the “FOCA Act”.

6 **SEC. 2. PURPOSES.**

7 It is the purpose of this Act to—

1 (1) promote and ensure open competition on
2 Federal and federally funded or assisted construc-
3 tion projects;

4 (2) maintain Federal Government neutrality to-
5 wards the labor relations of Federal Government
6 contractors on Federal and federally funded or as-
7 sisted construction projects;

8 (3) reduce construction costs to the Federal
9 Government and to the taxpayers;

10 (4) expand job opportunities, especially for
11 small and disadvantaged businesses; and

12 (5) prevent discrimination against Federal Gov-
13 ernment contractors or their employees based upon
14 labor affiliation or the lack thereof, thereby pro-
15 moting the economical, nondiscriminatory, and effi-
16 cient administration and completion of Federal and
17 federally funded or assisted construction projects.

18 **SEC. 3. PRESERVATION OF OPEN COMPETITION AND FED-**

19 **ERAL GOVERNMENT NEUTRALITY.**

20 (a) PROHIBITION.—

21 (1) GENERAL RULE.—The head of each execu-
22 tive agency that awards or enters into any construc-
23 tion contract or that obligates funds pursuant to
24 such a contract, shall ensure that the agency, and
25 any construction manager acting on behalf of the

1 Federal Government with respect to such contract,
2 in its bid specifications, project agreements, or other
3 controlling documents does not—

4 (A) require or prohibit a bidder, offeror,
5 contractor, or subcontractor from entering into,
6 or adhering to, agreements with 1 or more
7 labor organizations, with respect to that con-
8 struction project or another related construction
9 project; or

10 (B) discriminate against or give preference
11 to a bidder, offeror, contractor, or subcon-
12 tractor because such bidder, offeror, contractor,
13 or subcontractor—

14 (i) becomes a signatory, or otherwise
15 adheres to, an agreement with 1 or more
16 labor organizations with respect to that
17 construction project or another related
18 construction project; or

19 (ii) refuses to become a signatory, or
20 otherwise adhere to, an agreement with 1
21 or more labor organizations with respect to
22 that construction project or another related
23 construction project.

24 (2) APPLICATION OF PROHIBITION.—This sub-
25 section shall apply with respect to—

1 (A) contracts awarded on or after the date
2 of the enactment of this Act; and

3 (B) subcontracts awarded under such con-
4 tracts.

5 (3) RULE OF CONSTRUCTION.—Nothing in
6 paragraph (1) may be construed to prohibit a con-
7 tractor or subcontractor from voluntarily entering
8 into an agreement described in such paragraph.

9 (4) FEDERAL ACQUISITION REGULATION.—Not
10 later than 60 days after the date of the enactment
11 of this Act, the Federal Acquisition Regulation shall
12 be revised to implement the provisions of this sub-
13 section.

14 (b) RECIPIENTS OF GRANTS AND OTHER ASSIST-
15 ANCE.—The head of each executive agency that awards
16 grants, provides financial assistance, or enters into cooper-
17 ative agreements for construction projects after the date
18 of the enactment of this Act shall ensure that—

19 (1) the bid specifications, project agreements,
20 or other controlling documents for such construction
21 projects of a recipient of a grant or financial assist-
22 ance, or by the parties to a cooperative agreement,
23 do not contain any of the requirements or prohibi-
24 tions described in subparagraph (A) or (B) of sub-
25 section (a)(1); or

1 (2) the bid specifications, project agreements,
2 or other controlling documents for such construction
3 projects of a construction manager acting on behalf
4 of a recipient or party described in paragraph (1) do
5 not contain any of the requirements or prohibitions
6 described in subparagraph (A) or (B) of subsection
7 (a)(1).

8 (c) FAILURE TO COMPLY.—If an executive agency,
9 a recipient of a grant or financial assistance from an execu-
10 tive agency, a party to a cooperative agreement with an
11 executive agency, or a construction manager acting on be-
12 half of such an agency, recipient, or party, fails to comply
13 with subsection (a) or (b), the head of the executive agency
14 awarding the contract, grant, or assistance, or entering
15 into the agreement involved, shall take such action, con-
16 sistent with the law, as the head of such agency deter-
17 mines to be appropriate.

18 (d) EXEMPTIONS.—

19 (1) IN GENERAL.—The head of an executive
20 agency may exempt a particular project, contract,
21 subcontract, grant, or cooperative agreement from
22 the requirements of 1 or more of the provisions of
23 subsections (a) and (b) if the head of such agency
24 determines that special circumstances exist that re-
25 quire an exemption in order to avert an imminent

1 threat to public health or safety or to serve the na-
2 tional security.

3 (2) SPECIAL CIRCUMSTANCES.—For purposes
4 of paragraph (1), a finding of special circumstances
5 may not be based on the possibility or existence of
6 a labor dispute concerning contractors or sub-
7 contractors that are nonsignatories to, or that other-
8 wise do not adhere to, agreements with 1 or more
9 labor organizations, or labor disputes concerning em-
10 ployees on the project who are not members of, or
11 affiliated with, a labor organization.

12 (3) ADDITIONAL EXEMPTION FOR CERTAIN
13 PROJECTS.—The head of an executive agency, upon
14 application of an awarding authority, a recipient of
15 grants or financial assistance, a party to a coopera-
16 tive agreement, or a construction manager acting on
17 behalf of any of such entities, may exempt a par-
18 ticular project from the requirements of any or all
19 of the provisions of subsection (a) or (b), if the head
20 of such agency finds—

21 (A) that the awarding authority, recipient
22 of grants or financial assistance, party to a co-
23 operative agreement, or construction manager
24 acting on behalf of any of such entities had
25 issued or was a party to, as of the date of the

1 enactment of this Act, bid specifications, project
2 agreements, agreements with 1 or more labor
3 organizations, or other controlling documents
4 with respect to that particular project, which
5 contained any of the requirements or prohibi-
6 tions set forth in subsection (a)(1); and

7 (B) that 1 or more construction contracts
8 subject to such requirements or prohibitions
9 had been awarded as of the date of the enact-
10 ment of this Act.

11 (e) DEFINITIONS.—In this section:

12 (1) CONSTRUCTION CONTRACT.—The term
13 “construction contract” means any contract for the
14 construction, rehabilitation, alteration, conversion,
15 extension, or repair of buildings, highways, or other
16 improvements to real property.

17 (2) EXECUTIVE AGENCY.—The term “executive
18 agency” has the meaning given the term “Executive
19 agency” in section 105 of title 5, United States
20 Code, except that such term does not include the
21 Government Accountability Office.

22 (3) LABOR ORGANIZATION.—The term “labor
23 organization” has the meaning given such term in

1 section 701 of the Civil Rights Act of 1964 (42
2 U.S.C. 2000e).

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