

118TH CONGRESS
1ST SESSION

S. 537

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 27, 2023

Mr. YOUNG (for himself, Mr. BUDD, Mr. CRAMER, Mr. RISCH, Mr. WICKER, Mr. HOEVEN, Mrs. BLACKBURN, Mr. SCOTT of Florida, Mr. PAUL, Mr. SCOTT of South Carolina, Mr. CRAPO, Mr. LEE, Mr. GRASSLEY, Mr. TILLIS, Mr. CORNYN, Mr. HAGERTY, Mr. CRUZ, Mr. MARSHALL, and Mr. TUBERVILLE) 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”.

1 **SEC. 2. PURPOSES.**

2 It is the purpose of this Act to—

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

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

10 (3) reduce construction costs to the Federal
11 Government and to the taxpayers;

12 (4) expand job opportunities, especially for
13 small and disadvantaged businesses; and

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

20 **SEC. 3. PRESERVATION OF OPEN COMPETITION AND FED-**
21 **ERAL GOVERNMENT NEUTRALITY.**

22 (a) PROHIBITION.—

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

1 any construction manager acting on behalf of the
2 Federal Government with respect to such contract,
3 in its bid specifications, project agreements, or other
4 controlling documents does not—

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

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

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

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

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

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

5 (B) subcontracts awarded under such con-
6 tracts.

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

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

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

21 (1) the bid specifications, project agreements,
22 or other controlling documents for such construction
23 projects of a recipient of a grant or financial assist-
24 ance, or by the parties to a cooperative agreement,
25 do not contain any of the requirements or prohibi-

1 tions described in subparagraph (A) or (B) of sub-
2 section (a)(1); or

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

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

20 (d) EXEMPTIONS.—

21 (1) IN GENERAL.—The head of an executive
22 agency may exempt a particular project, contract,
23 subcontract, grant, or cooperative agreement from
24 the requirements of 1 or more of the provisions of
25 subsections (a) and (b) if the head of such agency

1 determines that special circumstances exist that re-
2 quire an exemption in order to avert an imminent
3 threat to public health or safety or to serve the na-
4 tional security.

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

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

23 (A) that the awarding authority, recipient
24 of grants or financial assistance, party to a co-
25 operative agreement, or construction manager

1 acting on behalf of any of such entities had
2 issued or was a party to, as of the date of the
3 enactment of this Act, bid specifications, project
4 agreements, agreements with 1 or more labor
5 organizations, or other controlling documents
6 with respect to that particular project, which
7 contained any of the requirements or prohibi-
8 tions set forth in subsection (a)(1); and

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

13 (e) DEFINITIONS.—In this section:

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

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

24 (3) LABOR ORGANIZATION.—The term “labor
25 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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