Why Congress Should Oppose the "Put Our Neighbors To Work Act"

Background: The "Put Our Neighbors To Work Act" (H.R. 6764) contains a number of new and onerous requirements for military construction contractors, including a new requirement that all contractors and subcontractors performing a covered military construction contract be licensed in the state in which the work will be performed. Such requirements would lead to less jobs—not more—in military construction, upend decades of judicial precedent, be detrimental to the military construction marketplace, lead to project delivery delays and increased costs, and add confusion to wage and hour compliance. Should this bill be enacted, it would represent one of the most significant shifts in modern history for military construction and would have a profoundly negative impact on many business, especially small businesses, and our nation's military readiness.

Harm to Military Prime Contractors, Subcontractors and Small Businesses: Construction contractors of all types, especially small businesses, are confronted with an unparalleled crisis that threatens them both financially as well as the health, safety, and welfare of themselves and employees. According to the most recent jobs report, construction employment declined in April 2020 by 975,000 jobs, or 13 percent nationwide.[1] These businesses should not be burdened or distracted with ambiguous and duplicative requirements that are in H.R. 6764. These onerous requirements will cost businesses significant time and money at a time when businesses are struggling. The requirement of H.R. 6764 will fall hardest on small military construction contractors who have limited resources and bonding capacity.

Military construction projects are federally funded—not state funded—and federal tax dollars are not allocated to the states from which the dollars were received. It is inequitable to limit or prefer local contractors—a novel and dangerous requirement that has never occurred in federal contracting generally, and is quite apart from the vitally important industry of military construction. The local hiring preferences in H.R. 6764 would significantly impact a military construction contractor's workforce by creating scenarios where long-term, highly-skilled workers may have to be laid off in order to meet the local hiring mandate. Then, in order to comply with the requirements, employers would have to bring in unnecessary and unskilled workers to fill those now-vacant positions, creating additional costs and safety concerns. Local preference requirements falsely assume that there is a local pool of qualified military contractors and that they are capable of performing the work. It cannot be understated the monumental shift the local preference will have on military construction and the unintended and deleterious effects it would have on the competitive pool of qualified military construction.

Goes Against Judicial Precedent: H.R. 6764 goes against decades of judicial precedent and may be held unconstitutional. In the landmark case of *Leslie Miller, Inc. v. Arkansas* [2](1956), the Supreme Court held that contractors that bid on federal contracts cannot be required to first submit to state licensing procedures that determine a contractor's qualifications. The Supreme Court held that such state regulations are contrary to the

[1] Bureau of Labor Statistics. U.S. Department of Labor. Current Employment Statistics Highlights. May 8, 2020. Retrieved from: https://www.bls.gov/web/empsit/ceshighlights.pdf
[2] *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956)

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federal procurement statute and regulations, which solely provide standards for judging the "responsibility" of competitive bidders for federal contracting. Further, the Act does not provide any guidance on which set of rules to follow where the contradictions arise between state and federal rules. Rather, the Act requires military contractors to proceed at their own risk, subject to federal penalty.

Undermines the "Competition in Contracting Act": The Act's local preference undermines the Competition in Contracting Act (CICA).[3] For decades the CICA has been the cornerstone for the Federal Acquisition Regulation (FAR), has increased competition, reduced costs to the federal government, and reduced, if not eliminated, corruption in federal acquisitions. More competition for procurements reduces costs, levels the playing fields, and allow more small businesses to compete and win federal government contracts. Under CICA virtually all procurements must be competed as full and open so any qualified contractor can submit an offer. H.R. 6764 undermines the CICA by establishing a new local preference in military construction by picking winners and losers based on geography.

Superfluous Wage and Labor Requirements: H.R. 6764 requires written confirmation by the contractor to the relevant agency of a covered state that enforces workers' compensation or minimum wage laws. However, defense contractors are already required to comply with both state and federal worker compensation statutes.[4] As written, the Act seems to give the contractor the ability to choose the relevant agency. Military construction is—unless on the rare contract that is below the $250,000 threshold in which case it is unlikely there would be any subcontractors—covered by the Davis Bacon Acts and enforced by the U.S. Department of Labor, making state minimum wage laws meaningless and creating the likelihood of confusion and conflict, to the detriment of both the federal government and the contractor, especially the small business contractor. Additionally, under federal rules, however, subcontracts apply not only to services, but also to goods. In addition, it is unclear which state's workers' compensation and minimum wage laws would apply to the goods and/or equipment manufactured in state "X" but installed on a military base in state "Y".

Unknown Costs to Contractors and Government: The requirements in H.R. 6764 are a momentous shift, a sea change, in the way that both the Department of Defense and defense contractors perform work with unknown costs to both the government and contractors, especially small business contractors. Congress should not implement any of the Act's requirements until adequate economic analysis is performed. There are no published studies establishing that any of the requirements in H.R. 6764 would lower the cost, shorten the completion time, increase employment, or improve the quality of construction of public projects. Without such objective analysis, it would be irresponsible for Congress to enact H.R. 6764.

AGC Recommendation: AGC strongly urges Congress to oppose all efforts that would implement provisions of H.R. 6764 and create significant problems for military construction contractors and defense agencies.

[3] 41 U.S.C. 253; FAR Subpart 6.1"Full and Open Competition"
[4] 48 CFR § 28.307-2

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