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THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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CONTRACTOR BLACKLISTING

Oppose Contractor Blacklisting in National Defense Authorization Act (NDAA)

Action Needed:

Remove Section 830 of the Senate version of the NDAA (S.1519). This section is inconsistent with the Congressional Review Act and therefore should be removed prior to enactment. There is no comparable provision in the House version of the bill.

Background:

- The FY 2018 NDAA includes a provision that would require Contracting Officers consider violations of the Occupational Safety and Health Act (OSHA) as part of the responsibility determination process prior to award of a Department of Defense contract. The provision gives contracting officers the ability to debar a construction contractor on a contract-by-contract basis with little cause. Prime contractors will also be responsible for evaluating violations of its subcontractors at all tiers, forcing subcontractors to disclose sensitive information to the prime contractor that may be a competitor on another contract, which could lead to bid protests and extortion. AGC members already consider safety and health on job sites as a top priority in the workplace and the provision in the NDAA does nothing to improve workplace safety.

AGC Message:

- **The Provision is Substantially Similar to Fair Pay and Safe Workplaces Rule that Congress Repealed Earlier this Year.** Congress passed a Congressional Review Act earlier this year that repealed the Fair Pay and Safe Workplaces Executive Order. That Order required federal prime contractors to report violations of 14 federal labor laws – including OSHA violations – and "equivalent" state laws for contracting officers to use during the pre-award responsibility determination process. Any reported OSHA violations by either the federal prime contractor or their subcontractors would allow contracting officers to effectively debar a contractor from being eligible for contract award.
- **There is No Evidence to Suggest Such a Provision is Needed.** This provision would provide a blunt bureaucratic solution for which there is a lack of statistically significant evidence of a systemic problem. Proponents of the language cite reports that fail to show evidence that demonstrates a contracting officer's ability to reliably predict a contractor's future performance based on that contractor's past compliance or noncompliance with safety laws.
- **The Provision is Unnecessary.** The Federal Acquisition Regulation (FAR) already provides a number of avenues, like suspension or debarment, for federal agencies to deal with "bad actors" that willfully or repeatedly violate the law. Federal agencies already have broad discretion to suspend or debar contractors for a wide range of improper conduct indicating a lack of business integrity, not just OSHA violations.

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