

# *Construction Industry Procurement Coalition*

October 12, 2023

The Honorable Mike Rogers  
Chairman  
U.S. House Committee on Armed Services  
Washington, DC 20515

The Honorable Adam Smith  
Ranking Member  
U.S. House Committee on Armed Services  
Washington, DC 20515

The Honorable Jack Reed  
Chairman  
U.S. Senate Committee on Armed Services  
Washington, DC 20510

The Honorable Roger Wicker  
Ranking Member  
U.S. Senate Committee on Armed Services  
Washington, DC 20510

## **Re: Construction Industry Procurement Coalition — National Defense Authorization Act for FY 2024**

Dear Chairman Rogers, Ranking Member Smith, Chairman Reed, and Ranking Member Wicker:

We, the undersigned construction industry trade and professional organizations represents tens of thousands of firms and individuals engaged in architecture, engineering, surveying and mapping, prime contracting, subcontracting, specialty trade contracting, supplying, construction and program management and surety bond production. We write to share our suggestions and proposals for the National Defense Authorization Act for Fiscal Year 2024.

We respectfully request your and your committees' consideration of the views from the Construction Industry Procurement Coalition (CIPC) as you draft legislation.

### **EXCLUDE:**

#### **Senate Section 2811 – Temporary Expansion of Authority for use of Turn-Key Single Step Selection Procedures for Repair Projects.**

CIPC strongly opposes language in the bill that raises the threshold for the use of single-step design-build from \$4,000,000 to \$12,000,000. While traditional two-step design-build – and newer procurement models such as progressive design-build – put more emphasis on the qualifications of the design-build team, single-step design build puts the emphasis on the team that submits the cheapest bid. This creates the potential for lesser qualified teams to submit bids that underestimate project costs, creating more risk for agency owners in terms of both cost and schedule. At a time when the trend in government procurements is decidedly in the direction of QBS principles – where the emphasis is placed on experience, innovation, and the ability to deliver on time and on budget – this provision runs counter to that trend. We respectfully urge the Committee to remove this provision from the bill.

**Senate Section 2877 – Requirement that all material types be considered for design-bid-build military construction projects.** This section seems to be a solution in search of a problem. DoD construction agencies are already required to evaluate Best Value procurement methods. In addition, requiring SES-level certification of every design-bid-build will likely cause needless delays on an already lengthy construction procurement process.

**House Section 804 – Pilot program on payment of costs for denied Government Accountability Office bid protests.** This section will explore making permanent the current pilot project that requires a contractor that has revenue over \$250 million and who files a protest with the Government Accountability Office (GAO) to allow that agency to withhold costs incurred possessing a protest. Those costs would be released to the contractor if it wins the protest or the solicitation is canceled. Provisions such as this creates a conflict of interest and perverse incentive where GAO will make money for its own operations if it rules against a contractor. Congress should reject any policy that requires contractors to pay for what amounts to *due process* in the federal construction market.

**House Section 2807 – Certification of consideration of certain methods of construction for military construction projects and annual report.** Similar to Senate Section 2877, this section appears to be a solution in search of a problem. Currently, there is no required design decisions for DD Form 1391, which is used by DoD to submit requirements and justifications in support of funding requests for military construction to Congress. DoD construction agencies are required to evaluate Best Value procurement methods. In addition, requiring SES-level certification of every design-bid-build will likely cause needless delays on an already length procurement process.

#### **INCLUDE:**

**Senate Section 325 – Dashboard of funding relating to perfluoroalkyl substances and polyfluoroalkyl substances.** This section would create an online dashboard for information pertaining to all activities of the Department of Defense (DoD) relating to perfluoroalkyl substances and polyfluoroalkyl substances. This vital information will allow federal agencies and industry be more informed about the locations and projects that may contain these “forever chemicals.” CIPC urges Congress to make this information available in a manner that is easily accessible for contractors to access information about potential contamination on DoD projects.

**Senate Section 820 – Prohibition on requiring defense contractors to provide information relating to greenhouse gas emissions.** This section would prohibit requiring defense contractors from reporting information relating to greenhouse gas emissions (GHG). Currently, there are multiple proposed federal regulations that will soon dramatically increase reporting and compliance with GHG standards. The technology and expertise currently do not exist to support these proposed rules on a large scale. CIPC urges Congress to include language to make it clear that the regulatory agencies cannot require contractors to pay a fee to circumvent this prohibition of funding.

**Senate Section 1041 – Extension of admission to Guam or the Commonwealth of the Northern Mariana Islands for certain nonimmigrant H-2B workers.** This section will extend the current admissions of H-2B workers in Guam until 2029. The H-2B program currently has strict labor and wage protections that construction contractors who utilize the program must stringently abide by. CIPC encourages Congress to extend H-2B worker status in all areas of the country to address the severe workforce shortage in the construction industry.

**Senate Section 2802 – Ordering authority for maintenance, repair, and construction of facilities of Department of Defense.** This section will allow maintenance and repair of a facility of the Department of Defense or for a minor military construction project, including allowing contingency expenses up to 10 percent of the cost of the project. This authority will allow construction agencies to more easily cope with the rising cost of construction materials and reduce the need for these agencies to go back to Congress for additional funding on ongoing projects.

**House Section 332 – Prizes for development of technology for thermal destruction of perfluoroalkyl substances or polyfluoroalkyl substances.** This section would create a grant program for research and development relating to PFAS-free alternatives for currently unavoidable (i.e., essential) uses of perfluorooctanesulfonic acid (PFOS). There are approximately 5,000 PFAS in use in a wide variety of common commercial products like cosmetics, apparel, carpeting, sealants, and fire-retardants. Environmental Protection Agency is focusing most of its efforts on a handful of PFAS, chiefly perfluorooctanoic acid (PFOA) and PFOS that are considered ubiquitous, meaning that trace amounts are found nearly everywhere. This section will provide support for efforts to find commonsense solutions for products often considered hazardous.

**House Section 829 – Modification and extension of temporary authority to modify certain contracts and options based on the impacts of inflation.** This section will allow for the extension of a temporary program to provide economic relief to industry until 2024. However, any guidance from DoD has been slow and Congress did not provide sufficient funding for this authority. CIPC urges DoD to implement guidance and for Congress to robustly fund this important temporary authority.

**House Section 830 – Modification of contracts and options to provide economic price adjustments.** Like Section 829, this provision will allow for relief to contractors by relaxing the strict requirements for receiving economic price adjustments for certain contracts. CIPC urges Congress to robustly fund this authority.

**House Section 1822 – Limitation on funds relating to Federal contractor disclosure of greenhouse gas emissions and climate-related financial risk.** This section will restrict funding proposed regulations requiring contractors to disclose greenhouse gas emissions levels, climate-related financial risk, greenhouse gas emissions reduction targets, and other climate metrics. Currently, there are multiple proposed federal regulations that will soon dramatically increase reporting and compliance with greenhouse gas emissions standards. The technology and expertise currently do not exist to support these reporting requirements on a large scale. CIPC urges Congress to include language to make it clear that the regulatory agencies cannot require contractors to pay a fee to circumvent this prohibition of funding.

**House Section 2831 – Improvements relating to access to military installations in United States.** CIPC supports the standardization of access to military installations but is concerned about aspects of requiring screening not less than 24 hours and not more than 48 hours prior to the time of such delivery. One of the major factors military construction contractors needed to address is how to allow large delivery trucks access to drop off their material when they arrive from across the country to deliver materials, but do not have Defense Biometric Identification System (DBIDS). Understanding this is a voluntary program for base commanders. CIPC recommends report language clarifying this screening requirement that could end up delaying access rather than expediting it.

**Senate Section 2876 – Increase of Limitation on Fee for Architectural and Engineering Services Procured by Military Departments.**

CIPC strongly supports the elimination of the limitation on fee for architectural and engineering services. This change is long-overdue and is consistent with the principles noted above where engineering procurements should be based on the qualifications of the design team, project goals, innovation, and the complexity and risk factors involved with the project, and not on artificial limits that would conflict with these objectives. Often the services required for small projects are as much as for larger projects as more responsibility for sustainability, reduction of resource use, safety, survivability, and similar requirements are placed on designers. As complexity and responsibility increase for all projects, small businesses in particular are disproportionately impacted by fee limitations. Negotiation of fair and reasonable costs of services should

be used for all architectural and engineering services. Until that is accomplished, raising the 6% design cost limitation cap, which dates to 1939, to 10% is a reasonable compromise.

**AMEND:**

**Senate Section 2874 – Clarification of Other Transaction Authority for Installation or Facilities Prototyping.**

Section 4022(i) of title 10, United States Code, is amended to include facility repair projects, remove the aggregate value limit, and allow the use of the amounts available for military construction. We are concerned about the increased use of other transaction authority (OTA) in design and construction. OTA's are agreements outside the Federal Acquisition Regulations and most laws that govern engineering procurement, including the Brooks Act. Qualification-Based Selection (QBS) is the federal government's long-standing procurement mechanism for acquiring professional engineering services, ensuring that the most experienced design team is hired to deliver the project and to protect the health and safety of the public. The use of OTAs circumvents this well-established process, raising concerns over design quality and safety.

While the contracting agent could insert traditional contracting provisions into agreements, there is no requirement to do so. **CIPC recommends adding a new paragraph (B) to 4022(i), (2) Limits, that reads “(B) shall use Qualification-Based Selection (40 USC 1101) for acquisition of the architectural and engineering services for all prototype projects.”**

Thank you for your consideration of the construction industry.

Sincerely,

The Below Signed Associations:

American Concrete Pipe Association

Associated General Contractors of America

American Council of Engineering Companies

American Subcontractors Association

Construction Management Association of America

Council on Federal Procurement of Architectural & Engineering Services

Design-Build Institute of America

Federal Procurement of Architectural & Engineering Services

Independent Electrical Contractors

International Institute of Building Enclosure Consultants

National Association of Surety Bond Producers

National Society of Professional Surveyors

National Stone, Sand & Gravel Association

The Surety & Fidelity Association of America

U.S. Geospatial Executives Organization