AGC THE CONSTRUCTION ASSOCIATION

PRO Act Impact on Union Contractors

Background:

H.R. 2474, the *Protecting the Right to Organize Act of 2019*, is the most significant and controversial labor legislation in decades. The bill vastly expands union rights and employer risks. The legislation would not only help building trade unions organize open-shop contractors, it would also strengthen the unions' power to exert pressure on both open-shop and union contractors in several ways. Some key provisions that would negatively impact union contractors are summarized below.

Provisions of Importance to Union Contractors:

- **Repeals Restrictions on Secondary Boycotts and Picketing.** A secondary boycott occurs when a union that has a dispute with one employer exerts pressure on a neutral employer to stop doing business with the employer involved in the dispute. Current law prohibits secondary boycotts in most cases and places limitations on when and where a union can picket. The PRO Act would authorize secondary boycotts and common-situs picketing, and remove other picketing restrictions through elimination of National Labor Relations Act (NLRA) Sections 8(b)(4) and 8(b)(7).
- **Promotes Slowdowns and Intermittent Strikes.** An intermittent strike occurs when employees repeatedly stop work, typically for periods of short duration. These hit-and-run tactics can be especially disruptive as sporadic work stoppages are difficult for employers to anticipate and respond to. While some strikes are protected activity, intermittent strikes carried out for an improper purpose or in an improper way are now unlawful. The PRO Act seeks to allow intermittent strikes by adding to the NLRA that the "duration, scope, frequency, or intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited."
- **Mandates Interest Arbitration.** Under current law, when collective bargaining parties cannot settle negotiations, they have various options. Depending on the circumstances, the union may strike, the employer may unilaterally change terms and conditions of employment, or, if the parties have a relationship governed by NLRA Section 8(f), they may completely terminate their relationship. The use of arbitration to settle a collective bargaining impasse and set the terms of the agreement – called "interest arbitration" – is voluntary and uncommon in the construction industry. The PRO Act would mandate mediation and binding interest arbitration when negotiations over a first contract break down, allowing an outsider to determine wages, benefits, work rules, and other terms and conditions of employment. The bill is unclear as to whether these mandates would apply to first 8(f) agreements or to 9(a) agreements between parties previously signatory to an 8(f) agreement together. The PRO Act imposes binding arbitration with decisions that last for a period of two years.
- **Codifies Overly Broad "Joint Employer" Definition.** A company that is deemed to be a joint employer of another company's (e.g., a subcontractor's) employees, the company may be liable for the other company's unfair labor practices, may be subject to collective bargaining obligations of

the other company, and could lose certain protections from secondary activity now available to neutrals. The PRO Act would codify a vague and unfair decision of the Obama National Labor Relations Board that lowered the threshold for establishing joint employer status by allowing a finding of such status when a company exercises only indirect control over the other company's employees or has only reserved authority to control their terms and conditions of employment.

- **Expands Remedies Against Employers.** The Board currently has authority to impose various remedies against an employer found to have violated the NLRA, but it cannot impose civil penalties (fines). The PRO Act would authorize the Board to levy potentially high civil penalties against employers in a variety of circumstances, yet it does not authorize penalties against unions that violate the Act. It would also enable employees who file unfair labor practice charges to go to court if the Board declines to issue an injunction against the employer within 60 days.