

GOVERNMENT NEUTRALITY IN CONTRACTING ACT

MARCH 23, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government Reform, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 1671]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 1671) to preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 1671, the Government Neutrality in Contracting Act, will ensure that federal agencies neither prohibit nor promote project labor agreements (PLAs) in federally-funded or federal government construction contracts.¹ In 2009, Executive Order 13502 established a preference for PLAs in federal or federally-assisted construction contracts. H.R. 1671 would prevent agencies from referencing PLAs when evaluating construction contract bids by ensuring that no preference is given either in favor or against PLAs. The purpose of this bill is to promote efficient and nondiscriminatory administration and completion of construction projects. The bill will also help to ensure that the federal government, and therefore American taxpayers, receive the best possible value in construction contracts. H.R. 1671 accomplishes this by ensuring robust competition through equal treatment of union and non-union contractors.

BACKGROUND AND NEED FOR LEGISLATION

In 2009, President Barack Obama signed Executive Order (E.O.) 13502 on the use of project labor agreements. E.O. 13502 strongly encourages the use of PLAs in federal or federally-assisted construction projects. Although the E.O. does not explicitly mandate the use of PLAs in federal or federally-assisted contracts, agencies have used it to openly encourage funding recipients to mandate PLAs. For example, federal agencies have issued guidance stating that contractors who participate in PLAs may receive preference during the evaluation process or allow projects to mandate PLAs in contracts.²

Mandated PLAs are particularly concerning given that PLAs can drive up the cost of federal or federally-assisted construction projects by as much as 18 percent.³ For example, a study of 551 California school construction projects, 65 of which were built using PLAs, showed that PLA contracts increased the construction costs by \$29 to \$32 per square foot.⁴ This same study concluded that PLAs are not a “costless policy tool”, but instead a cost increasing policy initiative.⁵

The Government Neutrality in Contracting Act will promote efficient administration and completion of federal and federally-as-

¹Project Labor agreements are comprehensive pre-hire collective bargaining agreements that establish terms and conditions of employment for a specific construction project. U.S. Dept. of Transportation, Construction Program Guide, <https://www.fhwa.dot.gov/construction/cqit/pla.cfm>.

²See Letter from Stephen E. Sandherr, Chief Executive Officer, Associated General Contractors of America to Marta Anerton, Contract Specialist, U.S. Army Corps of Engineers (July 30, 2014) (discussing the Army Corps intent to require the use of PLAs on a construction project); Federal Highway Administration, Interim Guidance on the use of Project Labor Agreements (May 7, 2010), <http://www.fhwa.dot.gov/construction/contracts/100507.cfm>; Memorandum from Department of the Army on Procurement Instruction Letter (PIL) 2011-01-R1, USACE Policy Relating to the Use of Project Labor Agreements (PLAs) for Federal onstruction Projects (Dec. 16, 2011), http://www.acq.osd.mil/dpap/cpic/cp/docs/PIL_2011-01-R1_Project_Labor_Agreements_Policy.pdf.

³Letter from American Council of Engineering Companies, et. al. to Rep. Jason Chaffetz, Chairman, Comm. on Oversight and Gov't Reform, and, Elijah Cummings, Ranking Member, Comm. on Oversight and Gov't Reform (Jan. 11, 2016) on file with Comm.

⁴Vince Vasquez, et. Al., Measuring the Cost of Project Labor Agreements on School Construction in California, National University System Institute for Public Research (2011).

⁵*Id.*

sisted construction projects. A review of federal construction projects during from 2001–2009, during which President George W. Bush’s E.O. prohibiting mandated PLAs was in place, found no delays caused by significant labor disputes.⁶ In comparison, a review of state construction projects with mandated PLAs found numerous instances of delay as a result of labor disputes. Further, evidence of delays caused by PLAs are also evident at the state level. For example, a review by the New Jersey Department of Labor found that PLA projects experienced an average duration of 100 weeks compared to non-PLA projects duration of 78 weeks.⁷ By eliminating the potential for delays that result from mandated PLAs, this bill will ensure that the federal government, and by extension the taxpayer, receives the best value in construction contracts.

Under the Competition in Contracting Act, P.L. 98–494, agencies are required to “obtain full and open competition through the use of competitive procedures” in all procurements.⁸ PLAs, however, can effectively reduce competition by excluding certain contractors and their employees from competing for construction projects—because not all contractors participate in PLAs. Currently, more than 80 percent of the private construction workforce in the United States is non-union.⁹ In addition, because PLAs increase the cost of the project, fewer individuals will bid on the construction projects, thereby reducing competition.¹⁰ A poll conducted by the Associated Builders and Contractors, Inc. of its members found that 98 percent of all respondents would be less likely to bid on a contract where a PLA was mandated.¹¹ The requirement of a PLA, or even providing preference to such agreements, would therefore effectively hamper the ability of that 80 percent of contractors to effectively compete for construction contracts.

Additionally, the idea that PLAs in federal and federally-assisted construction contracts does not impact small business because of the large size of these contracts is a misconception. The Small Business Administration notes that the construction industry in particular is made up of a large number of small businesses; with a more than an 86 percent of construction firms considered small businesses.¹² However, these small businesses are mostly non-union and are disadvantaged when PLAs are involved. As a result, the use of PLAs can negatively impact the small business set-asides put in place by Congress to promote small businesses.¹³ The Government Neutrality in Contracting Act will help ensure that

⁶Maury Baskin, *Government-Mandated Project Labor Agreements: The Public Record of Poor Performance* (2011).

⁷*Id.*

⁸41 U.S.C. 3301(a)(1).

⁹National Right to Work Legal Defense Foundation, http://www.nrtw.org/neutrality/na_6.htm.

¹⁰Paul Carr, *Investigation of Bid Price Competition Measured through Prebid Project Estimates, Actual Bid Prices, and Number of Bidders*, J. of Construction, Engineering and Management (Nov. 2005).

¹¹Letter from Ben Brubeck, Director of Labor and Federal Procurement, Associated Builders and Contractors, Inc. to Tom Dickert, USACE (Mar. 22, 2011) (additional surveys cited in the letter show between 70–86 percent of nonunionized contractors surveyed would be unlikely to bid on projects requiring PLAs).

¹²Office of Advocacy, *The Small Business Economy: A Report To The President*, U.S. Small Business Administration, (2009).

¹³Ben Brubeck, *Government Project Labor Agreement Mandates Harm Small Businesses*, The Truth About PLAs (June 2, 2010), <http://thetruthaboutplas.com/2010/06/02/government-project-labor-agreement-mandates-harm-small-businesses/>.

policies designed to promote and support small business in government contracting are unencumbered by the use of PLA preferences.

The Committee notes that 23 states currently bar the use of government-mandated PLAs,¹⁴ with 20 of these states having imposed the prohibition in the wake of the 2009 E.O.¹⁵

LEGISLATIVE HISTORY

H.R. 1671, the Government Neutrality in Contracting Act, was introduced by Congressman Mick Mulvaney (R–SC) on March 26, 2015 and referred to the House Committee on Oversight and Government Reform. At a January 12, 2016 business meeting, the Committee ordered H.R. 1671 favorably reported by voice vote. Currently, H.R. 1671 has 103 cosponsors.

The Senate companion, S. 71, was introduced by Senator David Vitter (R–LA) and referred to the Committee on Homeland Security and Governmental Affairs on January 7, 2015. That bill currently has 11 cosponsors.

SECTION-BY-SECTION

Section 1. Short title

Designates the short title of the bill as the “Government Neutrality in Contracting Act”.

Section 2. Purposes

Establishes that the purpose of the bill is to promote economical, efficient, and nondiscriminatory administration and completion of federal construction projects. The bill accomplishes this by ensuring open competition on federal construction projects and those using federal funds and reducing construction costs for the government. The bill also ensures that the federal government remains neutral toward labor relations of contractors. Finally the bill expands job opportunities, particularly among small and disadvantaged businesses and prevents discrimination against contractors and employees based on labor affiliation status.

Section 3. Preservation of open competition and Federal Government neutrality

Section 3(a) establishes that after the date of enactment, the head of each executive agency shall ensure that it does not require or prohibit a party seeking a construction contract from participating or entering into agreements with labor organizations related to the construction project. It also requires that the agency does not discriminate or give preference to a party because it signs or adheres to a PLA or refuses to do so.

Section 3(b) establishes the same general rule in Section 3(a) to neither support nor prohibit signing such labor agreements with

¹⁴Kevin Dayton, Community College Board in California Will Be Accountable to Voters, UnionWatch.org (Oct. 17, 2015), <http://unionwatch.org/community-college-board-in-california-will-be-accountable-to-voters/>.

¹⁵Carl Horowitz, New Bill Would Ban Mandatory Project Labor Agreements, National Legal and Policy Center (April 30, 2015), <http://nlpc.org/stories/2015/04/30/new-bill-would-ban-mandatory-project-labor-agreements>. (Although the article states only 19 states enacted bans following the 2009 executive order, the article was printed before Nevada had passed its ban). See Joanna Masterson, Nevada Bans PLA Mandates, Construction Executive (July 28, 2015), <http://www.constructionexec.com/Articles/tabid/3837/entryid/4140/nevada-bans-pla-mandates.aspx>.

one or more labor organization—for the purposes of grants, financial assistance, or cooperative agreements.

Section 3(c) states that if an executive agency, an entity receiving funds from an agency, a party to, or construction manager operation on behalf of a cooperative agreement fails to comply with the general rule, then the head of the agency “shall take such action, consistent with law, as the head of the agency determines to be appropriate.”

Section 3(d) establishes exemptions for the general rule, including a finding of “special circumstances” to avert an imminent threat to public health or safety or to serve the national security. “Special circumstances” does not include the possibility or existence of a labor dispute. Also exempted are those situations where such labor agreements were in place prior to enactment of this bill.

Section 3(e) requires the Federal Acquisition Regulatory Council, no later than 60 days after enactment, to amend the Federal Acquisition Regulation to implement the provisions of this bill.

Section 3(f) provides definitions for: construction contract; Executive Agency with reference to Title 5; and Labor organization with reference to section 701(d) of the Civil Rights Act. Construction contract is defined as “any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.”

EXPLANATION OF AMENDMENTS

No amendments to H.R. 1671 were adopted during Full Committee consideration of the bill.

COMMITTEE CONSIDERATION

On January 12, 2016 the Committee met in open session and ordered reported favorably the bill, H.R. 1671, by roll call vote, a quorum being present.

ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 1671.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill preserves open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to preserve open competition and Federal Government neutrality towards the labor relations of Federal Government contractors on Federal and federally funded construction projects.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does direct the completion of specific rule makings within the meaning of 5 U.S.C. 551 as follows. H.R. 1671 section 3(e) requires the Federal Acquisition Regulatory Council, no later than 60 days, to amend the Federal Acquisition Regulation to implement the provisions of the bill.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104-4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST
ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

H.R. 1671—Government Neutrality in Contracting Act

H.R. 1671 would prohibit federal agencies working on construction projects from either requiring or prohibiting the use of project labor agreements (PLA) except in specific circumstances. On February 9, 2009, Executive Order 13502 encouraged all federal agencies to use PLAs on construction projects exceeding \$25 million. A PLA is a collective bargaining agreement that applies to a specific project and is effective only for the duration of that project. Under those agreements, which generally include provisions regarding wages and fringe benefits and procedures for resolving labor disputes, workers generally agree not to strike and contractors agree not to lock out workers. The bill would allow contractors and unions working on construction projects that involve the expenditure of federal funds to voluntarily negotiate and execute a PLA.

Information from the Army Corps of Engineers, General Services Administration, the Congressional Research Service, as well as union and non-union contractors, is not sufficient to allow CBO to determine whether the use of PLAs under current law results in any significant costs or savings to the federal government. However, because CBO expects that H.R. 1671 would not significantly change the contracting process or the use of PLAs, CBO estimates that implementing the bill would not have a significant effect on the federal budget.

Because enacting the bill could affect direct spending by agencies not funded through annual appropriations, pay-as-you-go procedures apply. CBO estimates, however, that any net change in spending by those agencies would be negligible. Enacting H.R. 1671 would not affect revenues.

CBO estimates that enacting H.R. 1671 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 1671 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

MINORITY VIEWS

The sole purpose of H.R. 1671 is to overturn Executive Order 13502, issued by President Obama on February 6, 2009.

Executive Order 13502 does not require the use of Project Labor Agreements (PLA) on any federal contract. The Executive Order states that:

In awarding any contract in connection with a large-scale construction project, or obligating funds pursuant to such a contract, an executive agency may, on a project-by-project basis, require the use of a project labor agreement where use of such an agreement will (i) advance the Federal Government's interest in achieving economy and efficiency in Federal procurement, producing labor-management stability, and ensuring compliance with laws and regulations governing safety and health, equal employment opportunity, labor and employment standards, and other matters, and (ii) consistent with law.¹

H.R. 1671 would create a permanent statutory prohibition preventing federal agencies from requiring the use of PLAs in any contract, bid specification, project agreement, or other controlling document for any construction contract. The legislation would also prohibit the inclusion of any provisions requiring the use of PLAs in the contracts associated with any projects funded by any type of federal assistance, including grants and cooperative agreements.

According to a report by the-then-General Accounting Office (GAO) issued in 1998, "PLAs have been used in all 50 states and the District of Columbia on federal, state, local government, or private sector construction projects." GAO also found that PLAs have been used extensively by the private sector, including on such projects as "the Trans-Alaska Pipeline and Disney World."²

Despite the wide use of PLAs in the private sector, under H.R. 1671, a federal agency would not be able to require the use of a PLA even if the agency found that a PLA would be in taxpayers' best interests and would achieve economy and efficiency in procurement.

It is a disservice to American taxpayers to prevent federal agencies from using a project management process that is widely used by the private sector to hire labor for construction projects in those

¹ Exec. Order No. 13502, 74 Fed. Reg. 6985, *Use of Project Labor Agreements for Federal Construction Projects* (Feb. 6, 2009) (online at www.whitehouse.gov/the-press-office/2009/02/06/eo-13502).

² General Accounting Office, *Project Labor Agreements: The Extent of Their Use and Related Information* (May 29, 1998) (GAO/GGD-98-82) (online at www.gao.gov/assets/230/225719.pdf).

circumstances when a PLA would protect the government's investment or save the government money.

ELIJAH E. CUMMINGS,
Ranking Member.

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