December 2, 2021

TO THE MEMBERS OF THE UNITED STATES SENATE:

A broad coalition of stakeholders in the federal contracting community across multiple industries oppose Sec. 865 of the H.R. 4350, the National Defense Authorization Act, added to the House bill via amendment sponsored by Rep. Pramila Jayapal, D-Wash., and we strongly oppose any amendment to add similar provisions to the Senate bill.

The Jayapal amendment would direct all federal agency and department heads to automatically initiate a permanent or temporary debarment proceeding against federal contractors with certain qualifying Fair Labor Standards Act violations from the previous four years. However, this requirement would supersede the current, proven suspension and debarment process, would create a double jeopardy scenario for employers that may have qualifying FLSA violations, would deny federal contractors due process, may harm competition in the federal contracting marketplace and may result in job loss.

Under the current procurement system, each federal agency has its own federal contracting officers, and the Federal Acquisition Regulation requires that the federal contracting officers determine the eligibility and responsibility of a contractor, including assessing compliance with workplace laws and regulations, before awarding a contract. Moreover, once the contract is awarded, federal contracting officers have the responsibility to review the contractor, and their robust oversight and investigative capabilities are meant to ensure federal contractors continue to abide by federal laws. If the contractor is determined to have violated federal law, in addition to being subject to the remedies and penalties of the laws that were violated, the federal contracting officer can use several mechanisms to hold the contractor accountable, including imposing fines, future oversight and suspension or debarment.

In addition to the work individual federal contracting officers conduct, the Interagency Suspension and Debarment Committee serves as a federal forum for procurement suspension- and debarment-related issues and to assist in developing unified federal policy. The latest ISDC report submitted to the Senate Committee on Homeland Security and Governmental Affairs and available online is for FY2019. The report describes governmentwide efforts to improve the suspension and debarment process, as well as a summary of suspension and debarment activities. Based on information from 30 agencies—29 of which used procurement debarment in FY2019—722 suspensions were issued, 1,437 debarments were proposed and 1,199 debarments occurred. The report illustrates a working suspension and debarment process, one which the Jayapal amendment or similar language would supersede.

In addition to supplanting the existing process, automatically initiating debarment proceedings against federal contractors, as the Jayapal amendment does, would create a double jeopardy for employers. There are already federal penalties and remedies if an employer violates the FLSA. These remedies were passed by Congress after careful deliberations. If a contractor satisfies the penalty for a violation, that violation should not be held against the contractor in the future. The Jayapal amendment would undermine the current system by imposing additional, retroactive penalties for claims that have already been resolved. It will also make it less likely that

employers would settle claims quickly in order to ensure there is no possibility of a settlement being considered a violation in the future.

Furthermore, if enacted, this requirement would deny due process to federal contractors and would provide leverage for unions and other parties to exert pressure on companies with federal contracts, which could lead to a variety of additional problems for the government and private federal contracting community. It may harm competition and could lead to high-performing businesses, including small businesses and those owned by women or persons of color, being excluded from the federal contracting process. It could result in job losses, as suspended or debarred federal contractors would be forced to lay off employees if denied the ability to compete for federal contracts. This would likely have a ripple effect of job losses through the federal contracting supply chain and negatively impact agency missions.

Finally, of note, the House version of the NDAA for Fiscal Year 2021 (H.R. 6395) contained a similar provision (Sec. 848) that was not adopted in conference in 2020. However, on page 1718 of the NDAA FY21 conference report, conferees agreed to have the Acquisition Innovation Research Center conduct a study and make recommendations concerning reforms to the federal contractor suspension and debarment process. This study has not been completed, but we expect the AIRC report to share data on the frequency of contracts awarded to firms with FLSA violations and to provide better insights into how reforms to the suspension and debarment system would impact the mission of federal agencies. It seems premature to make changes to the system before the AIRC report is issued, particularly as the recommendations may result in better outcomes for taxpayers, the federal contracting workforce and federal agencies.

Our coalition asks that you oppose maintaining the House-passed Jayapal language in conference or including any similar language in the Senate bill. Staff may reach out to Ben Brubeck, vice president of regulatory, labor and state affairs with the Associated Builders and Contractors (brubeck@abc.org) and Allison Dembeck, vice president of education and labor advocacy with the U.S. Chamber of Commerce (adembeck@uschamber.com), to discuss this matter further.

Sincerely,

Associated Builders and Contractors
Associated General Contractors of America
The Center for Procurement Advocacy
HR Policy Association
Independent Electrical Contractors Association
International Franchise Association
U.S. Chamber of Commerce