

**AMENDMENT IN THE NATURE OF A SUBSTITUTE**  
**TO H.R. 1209**  
**OFFERED BY MR. COMER OF KENTUCKY**

Strike all after the enacting clause and insert the following:

**1 SECTION 1. SHORT TITLE.**

2       This Act may be cited as the “Fair and Open Com-  
3 petition Act of 2023” or the “FOCA Act of 2023”.

**4 SEC. 2. PURPOSES.**

5       It is the purpose of this Act to—

6           (1) promote and ensure open competition on  
7 Federal and federally funded or assisted construc-  
8 tion projects;

9           (2) maintain Federal Government neutrality to-  
10 wards the labor relations of Federal Government  
11 contractors on Federal and federally funded or as-  
12 sisted construction projects;

13           (3) reduce construction costs to the Federal  
14 Government and to the taxpayers;

15           (4) expand job opportunities, especially for  
16 small and disadvantaged businesses; and

17           (5) prevent discrimination against Federal Gov-  
18 ernment contractors or their employees based upon

1 labor affiliation or the lack thereof, thereby pro-  
2 moting the economical, nondiscriminatory, and effi-  
3 cient administration and completion of Federal and  
4 federally funded or assisted construction projects.

5 **SEC. 3. PRESERVATION OF OPEN COMPETITION AND FED-**  
6 **ERAL GOVERNMENT NEUTRALITY.**

7 (a) PROHIBITION.—

8 (1) GENERAL RULE.—The head of each execu-  
9 tive agency that awards or enters into any construc-  
10 tion contract or that obligates funds pursuant to  
11 such a contract, shall ensure that the agency, and  
12 any construction manager acting on behalf of the  
13 Federal Government with respect to such contract,  
14 in its bid specifications, project agreements, or other  
15 controlling documents does not—

16 (A) require or prohibit a bidder, offeror,  
17 contractor, or subcontractor from entering into,  
18 or adhering to, agreements with 1 or more  
19 labor organizations, with respect to that con-  
20 struction project or another related construction  
21 project; or

22 (B) discriminate against or give preference  
23 to a bidder, offeror, contractor, or subcon-  
24 tractor because such bidder, offeror, contractor,  
25 or subcontractor—

1 (i) becomes a signatory, or otherwise  
2 adheres to, an agreement with 1 or more  
3 labor organizations with respect to that  
4 construction project or another related  
5 construction project; or

6 (ii) refuses to become a signatory, or  
7 otherwise adhere to, an agreement with 1  
8 or more labor organizations with respect to  
9 that construction project or another related  
10 construction project.

11 (2) APPLICATION OF PROHIBITION.—This sub-  
12 section shall apply with respect to—

13 (A) contracts awarded on or after the date  
14 of the enactment of this Act; and

15 (B) subcontracts awarded under such con-  
16 tracts.

17 (3) RULE OF CONSTRUCTION.—Nothing in  
18 paragraph (1) may be construed to prohibit a con-  
19 tractor or subcontractor from voluntarily entering  
20 into an agreement described in such paragraph.

21 (4) FEDERAL ACQUISITION REGULATION.—Not  
22 later than 60 days after the date of the enactment  
23 of this Act, the Federal Acquisition Regulation shall  
24 be revised to implement the provisions of this sub-  
25 section.

1 (b) RECIPIENTS OF GRANTS AND OTHER ASSIST-  
2 ANCE.—The head of each executive agency that awards  
3 grants, provides financial assistance, or enters into cooper-  
4 ative agreements for construction projects after the date  
5 of the enactment of this Act shall ensure that—

6 (1) the bid specifications, project agreements,  
7 or other controlling documents for such construction  
8 projects of a recipient of a grant or financial assist-  
9 ance, or by the parties to a cooperative agreement,  
10 do not contain any of the requirements or prohibi-  
11 tions described in subparagraph (A) or (B) of sub-  
12 section (a)(1); or

13 (2) the bid specifications, project agreements,  
14 or other controlling documents for such construction  
15 projects of a construction manager acting on behalf  
16 of a recipient or party described in paragraph (1) do  
17 not contain any of the requirements or prohibitions  
18 described in subparagraph (A) or (B) of subsection  
19 (a)(1).

20 (c) FAILURE TO COMPLY.—If an executive agency,  
21 a recipient of a grant or financial assistance from an exec-  
22 utive agency, a party to a cooperative agreement with an  
23 executive agency, or a construction manager acting on be-  
24 half of such an agency, recipient, or party, fails to comply  
25 with subsection (a) or (b), the head of the executive agency

1 awarding the contract, grant, or assistance, or entering  
2 into the agreement involved, shall take such action, con-  
3 sistent with the law, as the head of such agency deter-  
4 mines to be appropriate.

5 (d) EXEMPTIONS.—

6 (1) IN GENERAL.—The head of an executive  
7 agency may exempt a particular project, contract,  
8 subcontract, grant, or cooperative agreement from  
9 the requirements of 1 or more of the provisions of  
10 subsections (a) and (b) if the head of such agency  
11 determines that special circumstances exist that re-  
12 quire an exemption in order to avert an imminent  
13 threat to public health or safety or to serve the na-  
14 tional security.

15 (2) SPECIAL CIRCUMSTANCES.—For purposes  
16 of paragraph (1), a finding of special circumstances  
17 may not be based on the possibility or existence of  
18 a labor dispute concerning contractors or sub-  
19 contractors that are nonsignatories to, or that other-  
20 wise do not adhere to, agreements with 1 or more  
21 labor organizations, or labor disputes concerning em-  
22 ployees on the project who are not members of, or  
23 affiliated with, a labor organization.

24 (3) ADDITIONAL EXEMPTION FOR CERTAIN  
25 PROJECTS.—The head of an executive agency, upon

1 application of an awarding authority, a recipient of  
2 grants or financial assistance, a party to a coopera-  
3 tive agreement, or a construction manager acting on  
4 behalf of any of such entities, may exempt a par-  
5 ticular project from the requirements of any or all  
6 of the provisions of subsection (a) or (b), if the head  
7 of such agency finds—

8 (A) that the awarding authority, recipient  
9 of grants or financial assistance, party to a co-  
10 operative agreement, or construction manager  
11 acting on behalf of any of such entities had  
12 issued or was a party to, as of the date of the  
13 enactment of this Act, bid specifications, project  
14 agreements, agreements with 1 or more labor  
15 organizations, or other controlling documents  
16 with respect to that particular project, which  
17 contained any of the requirements or prohibi-  
18 tions set forth in subsection (a)(1); and

19 (B) that 1 or more construction contracts  
20 subject to such requirements or prohibitions  
21 had been awarded as of the date of the enact-  
22 ment of this Act.

23 (e) DEFINITIONS.—In this section:

24 (1) CONSTRUCTION CONTRACT.—The term  
25 “construction contract” means any contract for the

1 construction, rehabilitation, alteration, conversion,  
2 extension, or repair of buildings, highways, or other  
3 improvements to real property.

4 (2) EXECUTIVE AGENCY.—The term “executive  
5 agency” has the meaning given the term “Executive  
6 agency” in section 105 of title 5, United States  
7 Code, except that such term does not include the  
8 Government Accountability Office.

9 (3) LABOR ORGANIZATION.—The term “labor  
10 organization” has the meaning given such term in  
11 section 701 of the Civil Rights Act of 1964 (42  
12 U.S.C. 2000e).

