

Calendar No. 656114TH CONGRESS
2^D SESSION**S. 1526****[Report No. 114–366]**

To amend title 10 and title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, to amend title 31 and title 41, United States Code, to improve the payment protections available to construction contractors, subcontractors, and suppliers for work performed, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 8, 2015

Mr. PORTMAN (for himself, Ms. HIRONO, Ms. AYOTTE, and Mrs. SHAHEEN) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

OCTOBER 27, 2016

Reported under authority of the order of the Senate of September 29, 2016,
by Mr. JOHNSON, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To amend title 10 and title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, to amend title 31 and title 41,

United States Code, to improve the payment protections available to construction contractors, subcontractors, and suppliers for work performed, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
 5 “Construction Consensus Procurement Improvement Act
 6 of 2015”.

7 (b) **TABLE OF CONTENTS.**—The table of contents for
 8 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Congressional findings.
- Sec. 3. Design-build construction process improvement.
- Sec. 4. Prohibition on the use of a reverse auction for the award of a contract
for design and construction services.
- Sec. 5. Assuring payment protections for construction subcontractors and sup-
pliers under an alternative to a Miller Act payment bond.
- Sec. 6. SBA surety bond guarantee program.

9 **SEC. 2. CONGRESSIONAL FINDINGS.**

10 Congress makes the following findings:

11 (1) The acquisition procedures that are often
 12 used effectively to procure products and other forms
 13 of services are not always appropriate for procure-
 14 ment of design and construction services.

15 (2) Federal procurement officials often adopt
 16 contracting techniques from the private sector and
 17 have used those techniques effectively to procure
 18 products and services.

1 (3) Design-build is a procurement technique
2 Federal officials have adopted from the private sec-
3 tor that has worked well for procurement of design
4 and construction services.

5 (4) The current statutory framework for de-
6 sign-build could benefit from legislative refinement.

7 (5) Reverse auctions are another procurement
8 technique Federal officials have adopted from the
9 private sector and used successfully to award con-
10 tracts for the purchase of products that are commer-
11 cially equivalent to commodities.

12 (6) Despite their success in other contexts, re-
13 verse auctions are generally inappropriate for pro-
14 curement of design and construction services, given
15 the unique nature of each such project.

16 (7) To ensure payment protection for contrac-
17 tors, subcontractors, and suppliers working on Fed-
18 eral construction projects, bonds backed by indi-
19 vidual sureties must be placed in the care and cus-
20 tody of the Federal Government and be supported
21 by assets that are real, sufficient, verifiable, and
22 readily convertible into cash.

23 **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-**
24 **MENT.**

25 (a) CIVILIAN CONTRACTS.—

1 (1) IN GENERAL.—Section 3309 of title 41,
2 United States Code, is amended—

3 (A) by amending subsection (b) to read as
4 follows:

5 “(b) CRITERIA FOR USE.—

6 “(1) CONTRACTS WITH A VALUE OF AT LEAST
7 \$750,000.—Two-phase selection procedures shall be
8 used for entering into a contract for the design and
9 construction of a public building, facility, or work
10 when a contracting officer determines that the con-
11 tract has a value of \$750,000 or greater, as adjusted
12 for inflation in accordance with section 1908 of this
13 title.

14 “(2) CONTRACTS WITH A VALUE LESS THAN
15 \$750,000.—For projects that a contracting officer de-
16 termines have a value of less than \$750,000, the
17 contracting officer shall make a determination
18 whether two-phase selection procedures are appro-
19 priate for use for entering into a contract for the de-
20 sign and construction of a public building, facility,
21 or work when—

22 “(A) the contracting officer anticipates
23 that 3 or more offers will be received for the
24 contract;

1 “(B) design work must be performed be-
2 fore an offeror can develop a price or cost pro-
3 posal for the contract;

4 “(C) the offeror will incur a substantial
5 amount of expense in preparing the offer; and

6 “(D) the contracting officer has considered
7 information such as—

8 “(i) the extent to which the project re-
9 quirements have been adequately defined;

10 “(ii) the time constraints for delivery
11 of the project;

12 “(iii) the capability and experience of
13 potential contractors;

14 “(iv) the suitability of the project for
15 use of the two-phase selection procedures;

16 “(v) the capability of the agency to
17 manage the two-phase selection process;
18 and

19 “(vi) other criteria established by the
20 agency.”; and

21 (B) in subsection (d), by striking “The
22 maximum number specified in the solicitation
23 shall not exceed 5 unless the agency determines
24 with respect to” and all that follows through
25 the period at the end and inserting the fol-

1 lowing: “The maximum number specified in the
2 solicitation shall not exceed 5 unless the head
3 of the contracting activity, delegable to a level
4 no lower than the senior contracting official
5 within the contracting activity, approves the
6 contracting officer’s justification that an indi-
7 vidual solicitation must have greater than 5 fi-
8 nalists to be in the Federal Government’s inter-
9 est. The contracting officer shall provide writ-
10 ten documentation of how a maximum number
11 of offerors exceeding 5 is consistent with the
12 purposes and objectives of the two-phase selec-
13 tion process.”.

14 (2) ANNUAL REPORTS.—

15 (A) IN GENERAL.—Not later than Novem-
16 ber 30 of 2016, 2017, 2018, 2019, and 2020,
17 the head of each agency shall compile an annual
18 report of each instance in which the agency
19 awarded a design-build contract pursuant to
20 section 3309 of title 41, United States Code,
21 during the fiscal year ending in such calendar
22 year, in which—

23 (i) more than 5 finalists were selected
24 for phase-two requests for proposals; or

1 (ii) the contract was awarded without
2 using two-phase selection procedures.

3 (B) PUBLIC AVAILABILITY.—The Director
4 of the Office of Management and Budget shall
5 facilitate public access to the reports, including
6 by posting them on a publicly available Internet
7 website. A notice of the availability of each re-
8 port shall be published in the Federal Register.

9 (b) DEFENSE CONTRACTS.—

10 (1) IN GENERAL.—Section 2305a of title 10,
11 United States Code, is amended—

12 (A) by amending subsection (b) to read as
13 follows:

14 “(b) CRITERIA FOR USE.—

15 “(1) CONTRACTS WITH A VALUE OF AT LEAST
16 \$750,000.—Two-phase selection procedures shall be
17 used for entering into a contract for the design and
18 construction of a public building, facility, or work
19 when a contracting officer determines that the con-
20 tract has a value of \$750,000 or greater, as adjusted
21 for inflation in accordance with section 1908 of title
22 41, United States Code.

23 “(2) CONTRACTS WITH A VALUE LESS THAN
24 \$750,000.—For projects that a contracting officer de-
25 termines have a value of less than \$750,000, the

1 contracting officer shall make a determination
2 whether two-phase selection procedures are appro-
3 priate for use for entering into a contract for the de-
4 sign and construction of a public building, facility,
5 or work when—

6 “(A) the contracting officer anticipates
7 that 3 or more offers will be received for the
8 contract;

9 “(B) design work must be performed be-
10 fore an offeror can develop a price or cost pro-
11 posal for the contract;

12 “(C) the offeror will incur a substantial
13 amount of expense in preparing the offer; and

14 “(D) the contracting officer has considered
15 information such as—

16 “(i) the extent to which the project re-
17 quirements have been adequately defined;

18 “(ii) the time constraints for delivery
19 of the project;

20 “(iii) the capability and experience of
21 potential contractors;

22 “(iv) the suitability of the project for
23 use of the two-phase selection procedures;

1 “(v) the capability of the agency to
2 manage the two-phase selection process;
3 and

4 “(vi) other criteria established by the
5 Department of Defense.”; and

6 (B) in subsection (d), by striking “The
7 maximum number specified in the solicitation
8 shall not exceed 5 unless the agency determines
9 with respect to” and all that follows through
10 the period at the end and inserting the fol-
11 lowing: “The maximum number specified in the
12 solicitation shall not exceed 5 unless the head
13 of the contracting activity approves the con-
14 tracting officer’s justification that an individual
15 solicitation must have greater than 5 finalists
16 to be in the Federal Government’s interest. The
17 contracting officer shall provide written docu-
18 mentation of how a maximum number of
19 offerors exceeding 5 is consistent with the pur-
20 poses and objectives of the two-phase selection
21 process.”.

22 (2) ANNUAL REPORTS.—

23 (A) IN GENERAL.—Not later than Novem-
24 ber 30 of 2016, 2017, 2018, 2019, and 2020,
25 the Secretary of Defense shall compile an an-

1 annual report of each instance in which the De-
2 partment awarded a design-build contract pur-
3 suant to section 2305a of title 40, United
4 States Code, during the fiscal year ending in
5 such calendar year, in which—

6 (i) more than 5 finalists were selected
7 for phase-two requests for proposals; or

8 (ii) the contract was awarded without
9 using two-phase selection procedures.

10 (B) PUBLIC AVAILABILITY.—The Director
11 of the Office of Management and Budget shall
12 facilitate public access to the reports, including
13 by posting them on a publicly available Internet
14 website. A notice of the availability of each re-
15 port shall be published in the Federal Register.

16 (c) GAO REPORTS.—

17 (1) CIVILIAN CONTRACTS.—Not later than 270
18 days after the deadline for the final reports required
19 under subsection (f) of section 3309 of title 41,
20 United States Code, as added by subsection (a)(1),
21 the Comptroller General of the United States shall
22 issue a report analyzing the compliance of the var-
23 ious Federal agencies with the requirements of such
24 section.

1 (2) DEFENSE CONTRACTS.—Not later than 270
 2 days after the deadline for the final reports required
 3 under subsection (f) of section 2305a of title 40,
 4 United States Code, as added by subsection (b)(1),
 5 the Comptroller General of the United States shall
 6 issue a report analyzing the compliance of the De-
 7 partment of Defense with the requirements of such
 8 section.

9 **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**
 10 **FOR THE AWARD OF A CONTRACT FOR DE-**
 11 **SIGN AND CONSTRUCTION SERVICES.**

12 (a) PROHIBITION.—Not later than 180 days after the
 13 date of the enactment of this Act, the Federal Acquisition
 14 Regulatory Council, in consultation with the Adminis-
 15 trator for Federal Procurement Policy, shall amend the
 16 Federal Acquisition Regulation to prohibit the use of re-
 17 verse auctions for awarding contracts for construction and
 18 design services.

19 (b) DEFINITIONS.—For purposes of this section—

20 (1) the term “design and construction services”
 21 means—

22 (A) site planning and landscape design;

23 (B) architectural and engineering services

24 (including surveying and mapping defined in

25 section 1101 of title 40, United States Code);

1 (C) interior design;

2 (D) performance of construction work for
3 facility, infrastructure, and environmental res-
4 toration projects;

5 (E) delivery and supply of construction
6 materials to construction sites; and

7 (F) construction or substantial alteration
8 or repair of public buildings or public works;
9 and

10 (2) the term “reverse auction” means, with re-
11 spect to procurement by an agency—

12 (A) a real-time auction conducted through
13 an electronic medium between a group of
14 offerors who compete against each other by
15 submitting bids for a contract or task order
16 with the ability to submit revised bids through-
17 out the course of the auction; and

18 (B) the award of the contract or task order
19 to the offeror who submits the lowest bid.

20 **SEC. 5. ASSURING PAYMENT PROTECTIONS FOR CON-**
21 **STRUCTION SUBCONTRACTORS AND SUP-**
22 **PLIERS UNDER AN ALTERNATIVE TO A MIL-**
23 **LER ACT PAYMENT BOND.**

24 Chapter 93 of subtitle VI of title 31, United States
25 Code, is amended—

1 (1) by adding at the end the following new sec-
2 tion:

3 **“§ 9310. Individual sureties**

4 “If another applicable law or regulation permits the
5 acceptance of a bond from a surety that is not subject
6 to sections 9305 and 9306 and is based on a pledge of
7 assets by the surety, the assets pledged by such surety
8 shall—

9 “~~(1)~~ consist of eligible obligations described
10 under section 9303(a); and

11 “~~(2)~~ be submitted to the official of the Govern-
12 ment required to approve or accept the bond, who
13 shall deposit the assets with a depository described
14 under section 9303(b).”; and

15 ~~(2)~~ in the table of sections for such chapter, by
16 adding at the end the following new item:

“9310. Individual sureties.”.

17 **SEC. 6. SBA SURETY BOND GUARANTEE PROGRAM.**

18 Section 411(e)(1) of the Small Business Investment
19 Act of 1958 (~~15 U.S.C. 694b(e)(1)~~) is amended by strik-
20 ing “70” and inserting “90”.

21 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

22 (a) *SHORT TITLE.*—*This Act may be cited as the*
23 *“Construction Consensus Procurement Improvement Act of*
24 *2015”.*

1 (b) *TABLE OF CONTENTS.*—*The table of contents for*
2 *this Act is as follows:*

Sec. 1. Short title; table of contents.

Sec. 2. Congressional findings.

Sec. 3. Design-build construction process improvement.

*Sec. 4. Prohibition on the use of a reverse auction for the award of a contract
for design and construction services.*

3 **SEC. 2. CONGRESSIONAL FINDINGS.**

4 *Congress makes the following findings:*

5 (1) *The acquisition procedures that are often*
6 *used effectively to procure products and other forms of*
7 *services are not always appropriate for procurement*
8 *of design and construction services.*

9 (2) *Federal procurement officials often adopt*
10 *contracting techniques from the private sector and*
11 *have used those techniques effectively to procure prod-*
12 *ucts and services.*

13 (3) *Design-build is a procurement technique Fed-*
14 *eral officials have adopted from the private sector that*
15 *has worked well for procurement of design and con-*
16 *struction services.*

17 (4) *The current statutory framework for design-*
18 *build could benefit from legislative refinement.*

19 (5) *Reverse auctions are another procurement*
20 *technique Federal officials have adopted from the pri-*
21 *ivate sector and used successfully to award contracts*
22 *for the purchase of products that are commercially*
23 *equivalent to commodities.*

1 (6) *Despite their success in other contexts, reverse*
 2 *auctions are generally inappropriate for procurement*
 3 *of design and construction services, given the unique*
 4 *nature of each such project.*

5 **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-**
 6 **MENT.**

7 (a) *CIVILIAN CONTRACTS.—*

8 (1) *IN GENERAL.—Section 3309(b) of title 41,*
 9 *United States Code, is amended to read as follows:*

10 “(b) *CRITERIA FOR USE.—*

11 “(1) *CONTRACTS WITH A VALUE OF AT LEAST*
 12 *\$750,000.—Two-phase selection procedures shall be*
 13 *used for entering into a contract for the design and*
 14 *construction of a public building, facility, or work*
 15 *when a contracting officer determines that the project*
 16 *has a value of \$750,000 or greater, as adjusted for in-*
 17 *flation in accordance with section 1908 of this title.*

18 “(2) *CONTRACTS WITH A VALUE LESS THAN*
 19 *\$750,000.—For projects that a contracting officer deter-*
 20 *mines have a value of less than \$750,000, the con-*
 21 *tracting officer shall make a determination whether*
 22 *two-phase selection procedures are appropriate for use*
 23 *for entering into a contract for the design and con-*
 24 *struction of a public building, facility, or work*
 25 *when—*

1 “(A) the contracting officer anticipates that
2 3 or more offers will be received for the contract;

3 “(B) design work must be performed before
4 an offeror can develop a price or cost proposal
5 for the contract;

6 “(C) the offeror will incur a substantial
7 amount of expense in preparing the offer; and

8 “(D) the contracting officer has considered
9 information such as—

10 “(i) the extent to which the project re-
11 quirements have been adequately defined;

12 “(ii) the time constraints for delivery
13 of the project;

14 “(iii) the capability and experience of
15 potential contractors;

16 “(iv) the suitability of the project for
17 use of the two-phase selection procedures;

18 “(v) the capability of the agency to
19 manage the two-phase selection process; and

20 “(vi) other criteria established by the
21 agency.”.

22 (2) ANNUAL REPORTS.—

23 (A) IN GENERAL.—Not later than November
24 30 of 2017, 2018, 2019, 2020, and 2021, the head
25 of each agency shall compile an annual report of

1 *each instance in which the agency awarded a de-*
2 *sign-build contract pursuant to section 3309 of*
3 *title 41, United States Code, during the fiscal*
4 *year ending in such calendar year, in which—*

5 *(i) more than 5 finalists were selected*
6 *for phase-two requests for proposals; or*

7 *(ii) the contract or order was awarded*
8 *without using two-phase selection proce-*
9 *dures.*

10 *(B) PUBLIC AVAILABILITY.—The Director of*
11 *the Office of Management and Budget shall fa-*
12 *cilitate public access to the reports, including by*
13 *posting them on a publicly available Internet*
14 *website. A notice of the availability of each re-*
15 *port shall be published in the Federal Register.*

16 *(b) GAO REPORTS.—Not later than 270 days after the*
17 *deadline for the final reports required under subsection (f)*
18 *of section 3309 of title 41, United States Code, as added*
19 *by subsection (a)(1), the Comptroller General of the United*
20 *States shall issue a report analyzing the compliance of the*
21 *various Federal agencies with the requirements of such sec-*
22 *tion.*

1 **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**
2 **FOR THE AWARD OF A CONTRACT FOR DE-**
3 **SIGN AND CONSTRUCTION SERVICES.**

4 (a) *FINDING.*—Congress finds that, in contrast to a
5 traditional auction in which the buyers bid up the price,
6 sellers bid down the price in a reverse auction.

7 (b) *PROHIBITION.*—Not later than 180 days after the
8 date of the enactment of this Act, the Federal Acquisition
9 Regulatory Council, in consultation with the Administrator
10 for Federal Procurement Policy, shall amend the Federal
11 Acquisition Regulation to prohibit the use of reverse auc-
12 tions as part of the two-phase selection procedure for award-
13 ing contracts for construction and design services.

14 (c) *DEFINITIONS.*—For purposes of this section—

15 (1) the term “design and construction services”
16 means—

17 (A) site planning and landscape design;

18 (B) architectural and engineering services
19 (including surveying and mapping defined in
20 section 1101 of title 40, United States Code);

21 (C) interior design;

22 (D) performance of substantial construction
23 work for facility, infrastructure, and environ-
24 mental restoration projects;

25 (E) delivery and supply of construction ma-
26 terials to construction sites; or

1 *(F) construction or substantial alteration of*
2 *public buildings or public works; and*

3 *(2) the term “reverse auction” means, with re-*
4 *spect to procurement by an agency—*

5 *(A) a real-time auction conducted through*
6 *an electronic medium among 2 or more offerors*
7 *who compete by submitting bids for a supply or*
8 *service contract with the ability to submit re-*
9 *vised lower bids at any time before the closing of*
10 *the auction; and*

11 *(B) the award of the contract, delivery*
12 *order, task order, or purchase order to the offer-*
13 *or, in whole or in part, based on the price ob-*
14 *tained through the auction process.*

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A BILL

To amend title 10 and title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, to amend title 31 and title 41, United States Code, to improve the payment protections available to construction contractors, subcontractors, and suppliers for work performed, and for other purposes.

OCTOBER 27, 2016

Reported with an amendment