

Calendar No. 656

114TH CONGRESS }
2d Session }

SENATE

{ REPORT
114-366 }

CONSTRUCTION CONSENSUS PROCUREMENT
IMPROVEMENT ACT OF 2015

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1526

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.—Ordered to be printed
Filed, under authority of the order of the Senate of September 29, 2016

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**CONSTRUCTION CONSENSUS PROCUREMENT
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Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1526]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1526) 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, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 1526, the Construction Consensus Procurement Improvement Act of 2015, seeks to improve the procedure that civilian agencies use to select construction companies to perform design and con-

struction projects. The bill reduces Federal Government documentation requirements, reduces costs for construction companies bidding on Federal contracts, and ensures that the Government does not use a reverse auction to establish a fair and reasonable price for certain construction contracts.

II. BACKGROUND AND THE NEED FOR LEGISLATION

Currently, many Federal construction contracts are awarded using a two-phase “design build” procedure.¹ The first phase begins with an agency soliciting general design and background information from construction companies.² The agency then reviews the information and selects a subset of the companies to participate in the second phase of the selection process.³

In the second phase, the agency requests detailed design and cost information from the selected companies, evaluates that information, determines a fair and reasonable price, and awards the contract to the company that will provide the best value to the Government.⁴

While this two-phase design build procedure is generally useful, it has several downsides. First, for smaller projects, the requirement that the contracting officer confirm that ten criteria were reviewed and satisfied before beginning the two-phase procedure can be onerous both for the Government and the contractors.⁵

Second, the contracting officer must consider not less than five bidders in the second phase of the procedure.⁶ Some estimate that it costs a company between \$50,000 and \$100,000 to submit the full design documentation required at this stage of the procedure.⁷ When a contracting officer includes bidders in the second phase of the process that do not have a reasonable chance of winning the contract, it wastes their time and money.

Finally, the design build procedure outlined in statute and detailed in the Federal Acquisition Regulation (FAR) lack guidance on how to determine a fair and reasonable price. Without this guidance, a contracting officer could use a reverse auction to determine a fair and reasonable cost to the Government.⁸ In a reverse auction, the sellers continually lower their prices in order to win the award, as opposed to a regular auction where buyers raise their offers until they win the item for sale.⁹ To win the auction, in most cases the company must be the low bidder at the end of the auction.¹⁰ While this procedure generally results in a low price for the item, the quality of the product, delivery terms, and other impor-

¹Joseph C. Kovars, Barbara R. Gadbois and John R. Heisse, *Turning a Battleship: Design-build on Federal Construction Projects*, Ober-Kaler (2011), <http://www.ober.com/publications/1172-turning-battleship-design-build-federal-construction-projects>.

²Virginia E. Mitchell, *Two-Phase Design/Build Selection Process Speeds Contract Review*, U.S. Army AL&T Magazine (June 2011), <http://www.army.mil/article/58694/Two-Phase-Design-Build-Selection-Procedure-Speeds-Contract-Review/>.

³*Id.*

⁴*Id.*

⁵FAR 36.301 Use of two-phase design build selection procedures (1997).

⁶FAR 36.303-1(a)(4) (1997).

⁷Virginia E. Mitchell, *Two-Phase Design/Build Selection Process Speeds Contract Review*, U.S. Army AL&T Magazine (June 2011), <http://www.army.mil/article/58694/Two-Phase-Design-Build-Selection-Procedure-Speeds-Contract-Review/>.

⁸FAR 36.303-2(b) (1997).

⁹*Reverse Auctions, What are Reverse Auctions?*, (2008), <http://reverseauctions.com/index.html>.

¹⁰Gov't Accountability Office, GAO-14-108, *Guidance is Needed to Maximize COMPETITION AND Achieve Cost Savings* 3 (2013), <http://gao.gov/assets/660/659530.pdf>.

tant features may be lacking.¹¹ Therefore, reverse auctions are not appropriate for design build contracts that require design concepts, key personnel and technical solutions.¹²

The Government Accountability Office (GAO) recommended that the Director of the Office of Management and Budget issue guidance on the appropriate use of reverse auctions in a 2013 report.¹³ While in 2015, the Office of Federal Procurement Policy (OFPP) issued a memorandum mentioning reverse auction guidance, OFPP has failed to include reverse auction policy within the FAR.¹⁴ Without a FAR provision, agencies may use reverse auctions to set prices for design build contracts or to contract for building materials using the reverse auction process. For example, concerns with the use of reverse-auctions were highlighted when the United States Army Corps of Engineers issued a policy to stop using reverse auctions for construction contracts after finding that the reverse-auction methodology did not work for construction contracts due to their high degree of variability, and that they did not deliver promised savings.¹⁵

According to a study commissioned by the Department of Transportation, the use of the design build procurement process has been steadily increasing in the United States public building sector for more than ten years.¹⁶ Most of the design build contracts surveyed used the two-phase selection procedure because it assessed qualitative factors rather than relying solely on the low-cost bid.¹⁷ A 2013 report by Reed Construction Data corroborated this finding when it reported that more than 80 percent of the Department of Defense's construction projects were awarded using the design build procedure.¹⁸ The report also found that slightly more than 30 percent of all government construction projects used the design build procedure in 2012.¹⁹ Based on the body of support for two-phase design build procurements, it is important to address the flaws that may keep civilian agencies from using this procurement process for most of their construction contracts.

S. 1526 addresses the flaws in the current design build process to expand its use to award civilian construction contracts. First, the bill requires the use of the two-phase process for all construction projects over \$750,000. This eliminates the documentation requirement for many civilian agency construction projects. Second, the bill discourages the contracting officer from including more than five construction companies in the second phase by requiring the agency to report to Congress all design build procurements that

¹¹*Id.*

¹²FAR 36.303-2(a) (1997).

¹³Gov't Accountability Office. GAO-14-108, Guidance is Needed to Maximize Competition and Achieve Cost Savings, <http://www.gao.gov/products/GAO-14-108>.

¹⁴Office of Federal Procurement Policy. Memorandum on Effective Use of Reverse Auctions (June 1, 2015), <https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/effective-use-of-reverse-auctions.pdf>.

¹⁵Press Release, *Joint-Hearing Finds The Use Of Reverse Auction Contracts Limits Competition, Increases Costs For Taxpayer*, H. Comm. on Small Business, Subcomm. On Contracting & Workforce (Dec. 11, 2013), <http://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=364146>.

¹⁶U.S. Dep't of Transp. Fed. Highway Admin. Office of Int'l Programs, *Design-Build*, <http://international.fhwa.dot.gov/contractadmin/04.cfm> (last visited Oct. 24, 2016).

¹⁷*Id.*

¹⁸Tim Duggan & Darshan Patel, *Design-Build Project Delivery Market Share and Market Size Report* (May 2013), <http://www.dbia.org/resource-center/Documents/rsmeansreport-2013rev.pdf>.

¹⁹*Id.*

allow more than five firms to participate in the second phase of the design build procedure. Third, S. 1526 prohibits reverse auctions as part of the two-phase design build selection procedure. This prevents agency contracting officers from experimenting with inappropriate methods to determine a fair and reasonable price.

III. LEGISLATIVE HISTORY

S. 1526, the Construction Consensus Procurement Improvement Act of 2015, was introduced on June 8, 2015, by Senators Rob Portman (R–OH) and Mazie Hirono (D–HI). Senators Kelly Ayotte (R–NH) and Jeanne Shaheen (D–NH) joined as cosponsors on July 8, 2015, and August 5, 2015, respectively. The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 1526 at a business meeting on February 10, 2016. During the business meeting, Senator Portman offered a modified substitute amendment, which made improvements to the bill and removed language that had already been enacted into law through the Fiscal Year 2015 National Defense Authorization Act, Public Law 113–291, enacted December 19, 2014. The Committee approved the bill, as modified by the Portman modified substitute amendment, en bloc by voice vote. Members present for both the vote on the amendment and on final passage were: Johnson, McCain, Portman, Paul, Lankford, Ayotte, Ernst, Sasse, Carper, McCaskill, Tester, Baldwin, Heitkamp, Booker, and Peters.

III. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the “Construction Consensus Procurement Improvement Act of 2015.”

Section 2. Congressional findings

This section makes six findings: (1) acquisition procedures that are often used effectively for the procurement of other products and services are not always appropriate for design and construction services; (2) the Federal Government often effectively adopts contracting techniques from the private sector to procure products and services; (3) the design-build technique is a private sector practice adopted by the Government that works well for design and construction services; (4) the current statutory framework for design-build could benefit from legislative refinement; (5) reverse auctions are another private sector procurement technique that Federal officials have adopted and used successfully to award contracts for the purchase of products that are commercially equivalent to commodities; and (6) reverse auctions are generally inappropriate for procurement of design and construction services.

Section 3. Design-build construction process improvement

This section replaces the current requirements in 41 U.S.C. § 3309(b) with a requirement that the two-phase selection procedure be used for design and construction of a public building, facility, or work valued at or above \$750,000. For smaller projects, having a value of less than \$750,000, it retains the requirement that the contracting officer perform an analysis of the project’s complexity before using the two-phase selection procedure.

This section also requires the head of each agency to create and publically post information regarding the procedures used to award design and construction contracts in fiscal years 2017 through 2021. Each agency must state the number of times that more than five bidders are included in the second phase of the two-phase procedure, as well as the number of design and construction contracts awarded using a procedure other than the two-phase selection procedure. The Director of the Office of Management and Budget is directed to facilitate public access to these reports. Finally, the section directs GAO to perform a one-time compliance review of this section within 270 days after enactment.

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

This section requires the Federal Acquisition Regulatory Council to prohibit the use of reverse auctions as part of the two-phase selection procedure for awarding contracts for construction and design services. The section includes a definition of design and a construction service that is consistent and broadly covers all contracts for design and construction of a public building, facility, or work. The section includes a definition of a reverse auction that the Federal Acquisition Regulatory Council is directed to include in the regulation so there is a clear and consistent understanding of the term and procedure across all Federal agencies.

IV. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this act and determined that the act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office's statement that the bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

V. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 29, 2016.

Hon. RON JOHNSON, *Chairman,*
Committee on Homeland Security and Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1526, the Construction Consensus Procurement Improvement Act of 2015.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

KEITH HALL.

Enclosure.

S. 1526—Construction Consensus Procurement Improvement Act of 2015

S. 1526 would amend current law to modify the federal government's procedures for awarding design and construction contracts for federal facilities and to prohibit the use of reverse auctions for such procurements. Specifically, the legislation would require a two-phase selection process for designing and constructing any federal facility with a cost of more than \$750,000. In phase one, firms would provide basic information on their experience and past performance; agencies then would select a few firms and invite them to submit a more detailed proposal in phase two.

CBO reviewed information on the process of awarding construction contracts by the Army Corps of Engineers (Corps) and the General Services Administration, two agencies that oversee construction of many federal facilities. Those agencies often use a two-phase process to select firms for construction projects but also use other acquisition strategies to award contracts. On the basis of information from those federal agencies, CBO estimates that implementing S. 1526 would cost \$10 million over the 2017–2021 period—\$2 million a year—because some agencies that currently evaluate certain projects using a one-phase process would incur somewhat higher costs to evaluate two rounds of proposals before selecting a firm for each construction project.

CBO also reviewed information on the use of reverse auctions in government procurement contracts by the Corps and GSA. Those agencies have found that using reverse auctions in complex procurements does not consistently result in lower procurement costs than would result from other methods such as sealed bids or negotiated procurements. Those agencies generally do not use reverse auctions to obtain such services. Consequently, CBO estimates that implementing S. 2139 would not result in any significant change in the government's bidding practice and thus 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 the bill would not affect revenues. CBO estimates that enacting S. 1526 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

S. 1526 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contacts for this estimate are Matthew Pickford and Aurora Swanson. This estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * *

TITLE 41—PUBLIC CONTRACTS

* * * * *

Subtitle I—Federal Procurement Policy

* * * * *

DIVISION C—PROCUREMENT

* * * * *

CHAPTER 33—PLANNING AND SOLICITATION

* * * * *

SEC. 3309. DESIGN—BUILD SELECTION PROCEDURES

(a) * * *

[(b) CRITERIA FOR USE.—A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when—

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

[(2) design work must be performed before an offeror can develop a price or cost proposal for the contract;

[(3) the offeror will incur a substantial amount of expense in preparing the offer; and

[(4) the contracting officer has considered information such as the following:

[(A) The extent to which the project requirements have been adequately defined.

[(B) The time constraints for delivery of the project.

[(C) The capability and experience of potential contractors.

[(D) The suitability of the project for use of the two-phase selection procedures.

[(E) The capability of the agency to manage the two-phase selection procedure.

[(F) Other criteria established by the agency.]

(b) CRITERIA FOR USE.—

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

(2) *CONTRACTS WITH A VALUE LESS THAN \$750,000.—For projects that a contracting officer determines have a value of less than \$750,000, the contracting officer shall make a deter-*

mination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when—

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

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

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

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

(i) the extent to which the project requirements have been adequately defined;

(ii) the time constraints for delivery of the project;

(iii) the capability and experience of potential contractors;

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

(v) the capability of the agency to manage the two-phase selection procedure; and

(vi) other criteria established by the agency.