

115TH CONGRESS
1ST SESSION

S. 2113

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

IN THE SENATE OF THE UNITED STATES

NOVEMBER 9, 2017

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

A BILL

To amend title 41, United States Code, to improve the manner in which Federal contracts for design and construction services are awarded, to prohibit the use of reverse auctions for design and construction services procurements, 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 2017”.

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
 7 of services are not always appropriate for the pro-
 8 curement 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
 12 products and services.

13 (3) Design-build is a procurement technique
 14 Federal officials have adopted from the private sec-
 15 tor that has worked well for the procurement of de-
 16 sign and construction services.

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

19 (5) Reverse auctions are another procurement
 20 technique Federal officials have adopted from the
 21 private sector and used successfully to award con-
 22 tracts for the procurement of products that are com-
 23 mercially equivalent to commodities.

1 (6) Despite their success in other contexts, re-
 2 verse auctions are generally inappropriate for the
 3 procurement of design and construction services,
 4 given the unique 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 \$3,000,000.—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 if
 15 a contracting officer determines that the project has
 16 a value of \$3,000,000 or greater.

17 “(2) CONTRACTS WITH A VALUE LESS THAN
 18 \$3,000,000.—For any project that a contracting offi-
 19 cer determines has a value of less than \$3,000,000,
 20 the contracting officer shall make a determination
 21 on whether two-phase selection procedures are ap-
 22 propriate for use for entering into a contract for the
 23 design and construction of a public building, facility,
 24 or work if—

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

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

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

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

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

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

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

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

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

22 “(vi) other criteria established by the
23 agency.”.

24 (2) ANNUAL REPORTS.—

1 (A) IN GENERAL.—Not later than Novem-
2 ber 30 of 2018, 2019, 2020, 2021, and 2022,
3 the head of each executive agency shall compile
4 and submit to the Director of the Office of
5 Management and Budget an annual report of
6 each instance in which the agency awarded a
7 design-build contract pursuant to section 3309
8 of title 41, United States Code, during the fis-
9 cal year ending in such calendar year, in
10 which—

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

13 (ii) the contract or order was awarded
14 without using two-phase selection proce-
15 dures.

16 (B) PUBLIC AVAILABILITY.—The Director
17 of the Office of Management and Budget shall
18 facilitate public access to the reports, including
19 by posting them on a publicly available Internet
20 website. A notice of the availability of each re-
21 port shall be published in the Federal Register.

22 (C) SUBMISSION TO GAO.—Not later than
23 30 days after the deadline described under sub-
24 paragraph (A), the Director of the Office of
25 Management and Budget shall compile and sub-

1 mit the reports submitted to the Director under
 2 such subparagraph to the Comptroller General.

3 (b) GAO REPORTS.—Not later than 270 days after
 4 the deadline under subsection (a)(2)(A), the Comptroller
 5 General of the United States shall issue a report analyzing
 6 the reports submitted under subsection (a)(2)(C) and
 7 agency compliance with the requirements of section
 8 3309(b) of title 41, United States Code, as amended by
 9 subsection (a)(1).

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

13 (a) FINDING.—Congress finds that, in contrast to a
 14 traditional auction in which the buyers bid up the price,
 15 sellers bid down the price in a reverse auction.

16 (b) PROHIBITION.—Not later than 180 days after the
 17 date of the enactment of this Act, the Federal Acquisition
 18 Regulation shall be amended to prohibit the use of reverse
 19 auctions as part of the two-phase selection procedures for
 20 awarding contracts for design and construction services.

21 (c) DEFINITIONS.—For purposes of this section—

22 (1) the term “design and construction services”
 23 means—

24 (A) site planning and landscape design;

1 (B) architectural and engineering services
2 (as defined in section 1102 of title 40, United
3 States Code);

4 (C) interior design;

5 (D) performance of substantial construc-
6 tion work for facility, infrastructure, and envi-
7 ronmental restoration projects;

8 (E) delivery and supply of construction
9 materials to construction sites; or

10 (F) construction or substantial alteration
11 of public buildings or public works; and

12 (2) the term “reverse auction” means, with re-
13 spect to any procurement by an executive agency—

14 (A) a real-time auction conducted through
15 an electronic medium among two or more
16 offerors who compete by submitting bids for a
17 supply or service contract, or a delivery order,
18 task order, or purchase order under the con-
19 tract, with the ability to submit revised lower
20 bids at any time before the closing of the auc-
21 tion; and

22 (B) the award of the contract, delivery
23 order, task order, or purchase order to the of-

- 1 feror, in whole or in part, based on the price
- 2 obtained through the auction process.

