

Calendar No. 382

115TH CONGRESS
2^D SESSION

S. 2113

[Report No. 115–231]

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

APRIL 18, 2018

Reported by Mr. JOHNSON, without amendment

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,*

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

2 (a) SHORT TITLE.—This Act may be cited as the
3 “Construction Consensus Procurement Improvement Act
4 of 2017”.

5 (b) TABLE OF CONTENTS.—The table of contents for
6 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.

7 **SEC. 2. CONGRESSIONAL FINDINGS.**

8 Congress makes the following findings:

9 (1) The acquisition procedures that are often
10 used effectively to procure products and other forms
11 of services are not always appropriate for the pro-
12 curement of design and construction services.

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

17 (3) Design-build is a procurement technique
18 Federal officials have adopted from the private sec-
19 tor that has worked well for the procurement of de-
20 sign and construction services.

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

1 (5) Reverse auctions are another procurement
 2 technique Federal officials have adopted from the
 3 private sector and used successfully to award con-
 4 tracts for the procurement of products that are com-
 5 mercially equivalent to commodities.

6 (6) Despite their success in other contexts, re-
 7 verse auctions are generally inappropriate for the
 8 procurement of design and construction services,
 9 given the unique nature of each such project.

10 **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-**
 11 **MENT.**

12 (a) CIVILIAN CONTRACTS.—

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

15 “(b) CRITERIA FOR USE.—

16 “(1) CONTRACTS WITH A VALUE OF AT LEAST
 17 \$3,000,000.—Two-phase selection procedures shall be
 18 used for entering into a contract for the design and
 19 construction of a public building, facility, or work if
 20 a contracting officer determines that the project has
 21 a value of \$3,000,000 or greater.

22 “(2) CONTRACTS WITH A VALUE LESS THAN
 23 \$3,000,000.—For any project that a contracting offi-
 24 cer determines has a value of less than \$3,000,000,
 25 the contracting officer shall make a determination

1 on whether two-phase selection procedures are ap-
2 propriate for use for entering into a contract for the
3 design and construction of a public building, facility,
4 or work if—

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

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

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

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

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

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

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

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

23 “(v) the capability of the agency to
24 manage the two-phase selection process;
25 and

1 “(vi) other criteria established by the
2 agency.”.

3 (2) ANNUAL REPORTS.—

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

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

16 (ii) the contract or order was awarded
17 without using two-phase selection proce-
18 dures.

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

1 (C) SUBMISSION TO GAO.—Not later than
 2 30 days after the deadline described under sub-
 3 paragraph (A), the Director of the Office of
 4 Management and Budget shall compile and sub-
 5 mit the reports submitted to the Director under
 6 such subparagraph to the Comptroller General.

7 (b) GAO REPORTS.—Not later than 270 days after
 8 the deadline under subsection (a)(2)(A), the Comptroller
 9 General of the United States shall issue a report analyzing
 10 the reports submitted under subsection (a)(2)(C) and
 11 agency compliance with the requirements of section
 12 3309(b) of title 41, United States Code, as amended by
 13 subsection (a)(1).

14 **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**
 15 **FOR THE AWARD OF A CONTRACT FOR DE-**
 16 **SIGN AND CONSTRUCTION SERVICES.**

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

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

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

1 (1) the term “design and construction services”

2 means—

3 (A) site planning and landscape design;

4 (B) architectural and engineering services

5 (as defined in section 1102 of title 40, United

6 States Code);

7 (C) interior design;

8 (D) performance of substantial construc-

9 tion work for facility, infrastructure, and envi-

10 ronmental restoration projects;

11 (E) delivery and supply of construction

12 materials to construction sites; or

13 (F) construction or substantial alteration

14 of public buildings or public works; and

15 (2) the term “reverse auction” means, with re-

16 spect to any procurement by an executive agency—

17 (A) a real-time auction conducted through

18 an electronic medium among two or more

19 offerors who compete by submitting bids for a

20 supply or service contract, or a delivery order,

21 task order, or purchase order under the con-

22 tract, with the ability to submit revised lower

23 bids at any time before the closing of the auc-

24 tion; and

1 (B) the award of the contract, delivery
2 order, task order, or purchase order to the of-
3 feror, in whole or in part, based on the price
4 obtained through the auction process.

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