

CONSTRUCTION CONSENSUS PROCUREMENT
IMPROVEMENT ACT OF 2017

MARCH 29, 2017.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. CHAFFETZ, from the Committee on Oversight and Government
Reform, submitted the following

R E P O R T

[To accompany H.R. 679]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 679) 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, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 5, line 3, after “shall compile”, insert the following: “and submit to the Director of the Office of Management and Budget”.

Page 5, insert after line 19 the following new subparagraph:

(C) SUBMISSION TO GAO.—Not later than 30 days after the deadline described under subparagraph (A), the Director of the Office of Management and Budget shall compile and submit the reports submitted to the Director under such subparagraph to the Comptroller General.

Page 5, line 21, strike “for each annual report”.

Page 5, beginning on line 23, strike “the compliance of each executive agency” and insert the following: “the reports submitted under subsection (a)(2)(C) and agency compliance”.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

H.R. 679, the Construction Consensus Procurement Improvement Act of 2017, will encourage competition and reduce costs associated with participation in federal design-build construction contract competitions, particularly for small businesses. The bill encourages agencies to utilize a two-step bid and proposal process for these contracts. The two-step process can also reduce the time spent by contracting officers reviewing multiple complicated design proposals in a single step process. H.R. 679 will also prohibit use of the reverse auction process for complex design-build construction services.

BACKGROUND AND NEED FOR LEGISLATION

In fiscal year 2016, the federal government spent \$473 billion on contracts for goods and services. Approximately \$21 billion (or 4 percent) was spent on federal construction/architect and engineering (A&E) projects. Small business prime contractors receive about \$7.4 billion (or 36 percent) of this spending.¹ H.R. 679 would streamline the procurement process for design-build construction or A&E projects, reduce participation costs, and encourage smaller businesses to compete for this work.

Current process for buying design-build construction services

Typically, the federal government uses one of two processes for buying design-build construction services—either the “design-bid-build” or the “design-build” process. Under the “design-bid-build” process, the procuring entity treats design and construction services as two separate requirements. With this “design-bid-build” process, the procuring entity awards contracts sequentially and separately with two contracts to two awardees. Alternatively, under the “design-build” process, the procuring entity combines the design and construction services into a single requirement. With this “design-build” process, a single contract is awarded to one company (which is often a team) responsible for both the design and

¹Data source is the Federal Procurement Data Systems-Next Generation (FPDS-NG), available at <http://www.fpds.gov>.

construction; thereby promoting accountability for completing the overall project.²

There are two source selection processes for the design-build contracts.³ First, there is the single-step design-build selection process where all construction and design teams must submit detailed and costly full proposals up front. Then the procuring agency evaluates all proposals and selects an awardee. Alternatively, there is a two-phase design-build selection process.⁴ Under this alternative process, teams submit information related to experience and past performance in phase one. The procuring agency then selects a limited number of the most qualified offerors (generally three to five) to advance to phase two of the competition. During phase two, these offerors submit detailed price and technical proposals that the procuring agency evaluates in order to make an award decision.

Encouraging use of the two-step design-build process

In contrast to the design-bid-build process, the design-build contracting process offers key benefits. For example, combining the design and construction in a single award and having a single prime contractor promotes accountability. The Design-Build Institute of America has cited metrics comparing design-build with design-bid-build project delivery demonstrating that the design-build method lowers unit costs (6 percent lower); increases delivery speed (33 percent faster); and decreases schedule growth (11 percent less).⁵

The design-build procurement process may involve a one or two-step process. However, the two-step process offers recognized benefits. First, the two-step process is a best practice in construction contracting.⁶ Second, the two-step process encourages competition by reducing overall participation costs. The one-step process requires highly complicated and costly proposals from all participants before determining participants' qualifications to complete the work. Experts have said that in order to develop accurate construction cost proposals, proposal teams must complete up to 80 percent of the design work and determine detailed space and material needs.⁷

Current law does encourage the use of a two-step process for design-build contracts and the selection of no more than two-to-five firms for phase two to encourage selection of the most qualified firms and encourage competition.⁸ However, there have been concerns expressed that agencies awarding construction contracts—typically the General Services Administration and the U.S. Army Corps of Engineers (USACE)—are overly reliant on the one-step design-build contract process. In addition, when the two-step process is used there are concerns that these agencies may be allowing

²41 U.S.C. § 3309.

³The federal government has used this design-build method since the late 1980s and early 1990s. Ralph C. Nash & John Cibinic, *Design-Build Contracting: Can the Federal Government Use This Technique Effectively?* No. 12 Nash & Cibinic Rep. 68 (1994).

⁴48 C.F.R. § 36.303.

⁵Design-Build Institute of America Presentation to Staff (Dec. 2016) *citing* Construction Industry Institute/Penn State research.

⁶Design-Build Institute of America, *Federal Sector Design-Build Done Right—Best Design-Build Practices* at 5–6 (Nov. 2015).

⁷*Assessing Government's Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Services and the Census of the H. Comm. on Oversight and Gov't Reform*, 113th Cong. (2013) (statement of Charles D. Dalluge on behalf of the American Institute of Architects).

⁸41 U.S.C. § 3309(d).

too many offerors into phase two; thereby increasing the burden on contracting officials and offerors.⁹

While the one-step process can offer the advantage of speed to the government, it can also be more expensive, burdensome, and time-consuming for potential contractors because they must make a significant investment on proposal costs with somewhat limited chances of winning the overall contract. This can discourage firms from competing and ultimately reduce the number of federal market participants.

A 2012 survey by the American Institute of Architects found that between 2007 and 2011, architecture firms spent a median of \$260,000 for each design-build project, which is a significant investment particularly for small businesses.¹⁰ With the two-step process, there is a lower entry cost because bidders' proposals focus on demonstrating experience and past performance qualifications. Then, as the number of potential bidders decreases in phase two, bidders have a greater chance of winning the award and therefore a greater return on investment with their cost proposals. The advantages of the two-step process are limited though when over five bidders advance to phase two.

The Construction Consensus Procurement Improvement Act of 2017 encourages the use of the two-step process where potential offerors initially submit information regarding their experience and past performance. During this initial phase of the competition, the government considers this information and down selects to the most qualified offerors. Then in phase two, the offerors, that have been deemed qualified, submit detailed price and technical proposals. The two-step design-build process will encourage the federal government to select the most qualified participants for phase two. Then, those phase-two participants have a greater incentive to submit a competitive proposal because they have a greater chance of winning the award. Encouraging use of the two-step process for design and construction services will reduce the costs of competing in the government marketplace for small businesses and reduce the time contracting officers must spend reviewing numerous complicated design proposals in the one-step process.

Prohibiting the use of reverse auctions for design and construction services

Currently, U.S. code does not define the term "reverse auction." However, the Office of Management and Budget (OMB) released guidance in 2015 on the effective use of reverse auctions.¹¹ Reverse auctions provide a contracting methodology to bid down prices and is a particularly useful tool for the purchase of commodity goods and services. The 2015 OMB Guidance directs agencies to consider a number of issues in considering the appropriate use of reverse

⁹Assessing Government's Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Services and the Census of the H. Comm. on Oversight and Gov't Reform, 113th Cong. (2013) (statement of Charles D. Dalluge on behalf of the American Institute of Architects); The Hill, *A Better Way to Build More Efficient Government* by Helen Combs Dreiling (Oct. 4, 2014).

¹⁰Assessing Government's Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Services and the Census of the H. Comm. on Oversight and Gov't Reform, 113th Cong. (2013) (statement of Charles D. Dalluge on behalf of the American Institute of Architects).

¹¹OMB Memorandum on *Effective Use of Reverse Auctions* from Office of Federal Procurement Administrator Anne E. Rung Memorandum for Chief Acquisition Officers and Senior Procurement Executives (June 1, 2015).

auctions and describes typical circumstances where reverse auctions would be useful, including “acquisitions for commercial items and simple services that often fall under the [simplified acquisition threshold].”¹² However, the reverse auction tool, in which the emphasis is on price over quality, may not be appropriate for the procurement of non-commodity goods, like complicated design and construction services.

The USACE conducted a study of reverse auctions for construction services and found the reverse auction process did not deliver the promised savings in construction contracts. Specifically, the USACE found that using reverse auctions for construction projects did not provide “significant or marginal savings” and construction services, unlike commodities, are variable and complex services.¹³

This bill prohibits the use of reverse auctions for substantial construction and design services.

LEGISLATIVE HISTORY

On January 24, 2017, Representative Mark Meadows (R-NC) introduced H.R. 679, the Construction Consensus Procurement Improvement Act of 2017, with Representatives Sam Graves (R-MO), Steve Russell (R-OK), Blake Farenthold (R-TX), and Stephen Lynch (D-MA). On February 2, 2017, the Committee on Oversight and Government Reform ordered H.R. 679 reported favorably, as amended, by voice vote.

In the 114th Congress, the House and Senate consider bills similar to H.R. 679. On May 17, 2016, the House Committee on Oversight and Government Reform considered and reported favorably, as amended, H.R. 5199. On February 10, 2016, the Senate Committee on Homeland Security and Governmental Affairs considered S. 1526, the Construction Consensus Procurement Improvement Act of 2015 and ordered it favorably reported with an amendment in the nature of a substitute. In 2015, two other related bills were introduced, H.R. 1666, the Design-Build Efficiency and Jobs Act of 2015, and H.R. 838, the Security in Bonding Act of 2015.

In the 113th Congress, the House Committee on Oversight and Government Reform reported H.R. 2750, the Design-Build Efficiency and Jobs Act of 2014. This bill similarly required a two-phase selection process for the award of design and construction contracts valued greater than \$1.5 million, but this bill did not include a prohibition on reverse auctions.

SECTION-BY-SECTION

Section 1. Short title

This section designates the bill as the “Construction Consensus Procurement Improvement Act of 2017.”

Section 2. Congressional findings

This section makes six findings: (1) acquisition procedures that are often used effectively to procure products and other forms of services are not always appropriate for procurement of design and construction services; (2) federal procurement officials often adopt

¹²*Id.* at 2.

¹³USACE, Final Report Regarding the USACE Pilot Program on Reverse Auctioning 11–12 (2004).

contracting techniques from the private sector and have used those techniques effectively to procure products and services; (3) design-build is a procurement technique federal officials have adopted from the private sector that has worked well for procurement of design and construction services; (4) the current statutory framework for design-build could benefit from legislative refinement; (5) reverse auctions are another procurement technique federal officials have adopted from the private sector and used successfully to award contracts for the purchase of products that are commercially equivalent to commodities; and (6) despite their success in other contexts, reverse auctions are generally inappropriate for procurement of design and construction services, given the unique nature of each such project.

Section 3. Design-build construction process improvement

For civilian contracts for design and construction of a public building, facility, or work, the bill requires two-phase selection procedures be used for contracts with a value of \$3 million or greater.

For such contracts valued *at less than* \$3 million, the bill requires the contracting officer to make a determination on whether to use two-phase selection procedures based on consideration of several factors. The contracting officer is required to consider the following factors: (1) whether the contracting officer anticipates three or more offers will be received; (2) whether design work must be performed before an offeror can develop a price or cost proposal; (3) whether the offeror will incur a substantial amount of expense in preparing the offer; and (4) other information, including the (i) extent to which the project requirements have been adequately defined; (ii) time constraints for delivery of the project; (iii) capability and experience of potential customers; (iv) suitability of the project for use of the two-phase selection procedures; (v) capability of the agency to manage the two-phase selection process; and (vi) other agency established criteria.

This section requires agencies to compile and submit to the Office of Management and Budget (OMB) annual reports for five years on each instance in which the agency awarded a design-build contract where more than five finalists were selected for phase-two requests for proposals or the contract was awarded without using two-phase selection procedures. The OMB is required to submit these reports to the Government Accountability Office (GAO) for further analysis and make the agency reports publicly available.

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 amend the Federal Acquisition Regulation to prohibit the use of reverse auctions as part of the two-phase selection procedure for awarding contracts for substantial construction and design services.

This section defines “design and construction services” as site planning and landscape design; architectural and engineering services; interior design; performance of substantial construction work for facility, infrastructure, and environmental restoration projects; delivery and supply of construction materials to construction sites;

or construction or substantial alteration of public buildings or public works.

This section defines “reverse auction” as a real-time auction conducted through an electronic medium among two or more offerors that compete by submitting bids for a supply or service contract with the ability to submit revised lower bids at any time before the closing of the auction; and the award of the contract, delivery order, task order, or purchase order to the offeror in whole or in part, based on the price obtained through the auction process.

EXPLANATION OF AMENDMENTS

One amendment was offered by Representative Mark Meadows (R–NC). The amendment clarified a reporting requirement to OMB and GAO on agencies’ use of the two-phase selection process for design-build construction contracts. The amendment was agreed to by voice vote during the Committee business meeting.

AMENDMENT TO H.R. 679 OFFERED BY MR. MEADOWS OF NORTH CAROLINA

Page 5, line 3, after “shall compile”, insert the following: “and submit to the Director of the Office of Management and Budget”.

Page 5, insert after line 19 the following new subparagraph:

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Page 5, line 21, strike “for each annual report”.

Page 5, beginning on line 23, strike “the compliance of each executive agency” and insert the following: “the reports submitted under subsection (a)(2)(C) and agency compliance”.

COMMITTEE CONSIDERATION

On February 2, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 679, as amended, by voice vote, a quorum being present.

ROLL CALL VOTES

There were no recorded votes during consideration of H.R. 679.

CORRESPONDENCE

On January 30, 2017, the following associations signed a letter in support of H.R. 679: (1) American Council of Engineering Companies; (2) American Institute of Architects; (3) American Society of Civil Engineers; (4) American Subcontractors Association; (5) Associated General Contractors; (6) Construction Management Association of America; (7) Council on Federal Procurement of Architectural and Engineering Services; (8) Independent Electrical Contractors; (9) MAPPS; (10) National Association of Surety Bond Producers; (11) National Electrical Contractors Association; (12) National Society of Professional Surveyors; (13) Sheet Metal & Air Conditioning Contractors National Association; and (14) Surety & Fidelity Association of America.

JANUARY 30, 2017.

Re Support Construction Consensus Procurement Improvement Act, H.R. 679.

Chairman JASON CHAFFETZ,
Oversight & Government Reform Committee,
House of Representatives, Washington, DC.

Ranking Member ELIJAH CUMMINGS,
Oversight & Government Reform Committee,
House of Representatives, Washington, DC.

DEAR CHAIRMAN CHAFFETZ AND RANKING MEMBER CUMMINGS:
We, the undersigned 14 construction industry trade and professional organizations representing tens of thousands of firms and individuals engaged in architecture, engineering, surveying and mapping, prime contracting, subcontracting, specialty trade contracting, supplying, and surety bond producing, urge you to support the Construction Consensus Procurement Improvement Act, H.R. 679, on design-build and reverse auction procurement reform at the House Oversight and Government Reform Committee markup on January 31, 2017.

H.R. 679 would encourage more efficient and competitive utilization of design-build acquisition for design and construction services by reasonably limiting use of the one-step design-build procurement process. In addition, the bill would help provide reasonable limitations on federal use of reverse auction procurement for construction services. These reforms will help increase competition and federal contract award opportunities for all construction industry businesses, especially small businesses.

Again, we urge you to support H.R. 679 on design-build and reverse auction procurement reform. Thank you for your consideration of the construction industry.

Sincerely,

The Below Signed Associations:

American Council of Engineering Companies
American Institute of Architects
American Society of Civil Engineers
American Subcontractors Association
Associated General Contractors
Construction Management Association of America
Council on Federal Procurement of Architectural and Engineering Services
Independent Electrical Contractors
MAPPS
National Association of Surety Bond Producers
National Electrical Contractors Association
National Society of Professional Surveyors
Sheet Metal & Air Conditioning Contractors National Association
Surety & Fidelity Association of America

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill encourages competition

and reduces costs associated with participation in federal design-build construction contract competitions, particularly for small businesses. As such this bill does not relate to employment or access to public services and accommodations.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is 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 substantial design and construction services procurements, and for other purposes.

DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of section 551 or title 5, United States Code.

FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104-4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of Rule XXI.

COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974, which the Committee has included below.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

FEBRUARY 16, 2017.

Hon. JASON CHAFFETZ, *Chairman,*
Committee on Oversight and Government Reform,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 679, the Construction Consensus Procurement Improvement Act of 2017.

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.

H.R. 679—Construction Consensus Procurement Improvement Act of 2017

H.R. 679 would modify the federal government's procedures for awarding design and construction contracts for federal facilities and would prohibit the use of reverse auctions for such awards. Specifically, the legislation would require the selection process for designing and constructing any federal facility with a cost of more than \$3 million to use two phases. 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 (GSA), two agencies that oversee construction of many federal facilities. Those agencies often use a two-phase process to select firms for construction projects but can also use other acquisition strategies to award contracts. On the basis of information from those agencies, CBO estimates that implementing H.R. 679 would cost about \$600,000 a year and \$3 million over the 2018–2022 period, primarily for the Corps, because

those agencies 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. On that basis, CBO estimates that implementing H.R. 679 would not result in a significant change in the government's bidding practices 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 H.R. 679 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 679 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.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

TITLE 41, UNITED STATES CODE

* * * * *

SUBTITLE I—FEDERAL PROCUREMENT POLICY

* * * * *

CHAPTER 33—PLANNING AND SOLICITATION

* * * * *

§ 3309. Design-build selection procedures

(a) **AUTHORIZATION.**—Unless the traditional acquisition approach of design-bid-build established under sections 1101 to 1104 of title 40 or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work

when a determination is made under subsection (b) that the procedures are appropriate for use.

[(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 process.

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

(b) CRITERIA FOR USE.—

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

(2) *CONTRACTS WITH A VALUE LESS THAN \$3,000,000.—For any project that a contracting officer determines has a value of less than \$3,000,000, the contracting officer shall make a determination on 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 if—*

(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 process; and

(vi) other criteria established by the agency.

(c) PROCEDURES DESCRIBED.—Two-phase selection procedures consist of the following:

(1) DEVELOPMENT OF SCOPE OF WORK STATEMENT.—The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Federal Government's requirements (which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals that meet the Federal Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with sections 1101 to 1104 of title 40.

(2) SOLICITATION OF PHASE-ONE PROPOSALS.—The contracting officer solicits phase-one proposals that—

(A) include information on the offeror's—

- (i) technical approach; and
- (ii) technical qualifications; and

(B) do not include—

- (i) detailed design information; or
- (ii) cost or price information.

(3) EVALUATION FACTORS.—The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team), and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) SELECTION BY CONTRACTING OFFICER.—

(A) NUMBER OF OFFERORS SELECTED AND WHAT IS TO BE EVALUATED.—

(i) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work, or both; and

(ii) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b) to (d) of section 3306 of this title.

(B) SEPARATE EVALUATIONS.—The contracting officer separately evaluates the submissions described in clauses (i) and (ii) of subparagraph (A).

(5) AWARDING OF CONTRACT.—The agency awards the contract in accordance with chapter 37 of this title.

(d) SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR PHASE-TWO REQUESTS FOR COMPETITIVE PROPOSALS.—A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection

(c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Federal Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) REQUIREMENT FOR GUIDANCE AND REGULATIONS.—The Federal Acquisition Regulation shall include guidance—

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

* * * * *

