

114TH CONGRESS
1ST SESSION

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.

IN THE SENATE OF THE UNITED STATES

JUNE 8, 2015

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 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,*

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 2015”.

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.
- 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.

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 procure-
12 ment 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 procurement of design
20 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 purchase of products that are commer-
5 cially equivalent to commodities.

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

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

17 **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-**
18 **MENT.**

19 (a) CIVILIAN CONTRACTS.—

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

22 (A) by amending subsection (b) to read as
23 follows:

24 “(b) CRITERIA FOR USE.—

1 “(1) CONTRACTS WITH A VALUE OF AT LEAST
2 \$750,000.—Two-phase selection procedures shall be
3 used for entering into a contract for the design and
4 construction of a public building, facility, or work
5 when a contracting officer determines that the con-
6 tract has a value of \$750,000 or greater, as adjusted
7 for inflation in accordance with section 1908 of this
8 title.

9 “(2) CONTRACTS WITH A VALUE LESS THAN
10 \$750,000.—For projects that a contracting officer de-
11 termines have a value of less than \$750,000, the
12 contracting officer shall make a determination
13 whether two-phase selection procedures are appro-
14 priate for use for entering into a contract for the de-
15 sign and construction of a public building, facility,
16 or work when—

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

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

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

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

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

5 “(ii) the time constraints for delivery
6 of the project;

7 “(iii) the capability and experience of
8 potential contractors;

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

11 “(v) the capability of the agency to
12 manage the two-phase selection process;
13 and

14 “(vi) other criteria established by the
15 agency.”; and

16 (B) in subsection (d), by striking “The
17 maximum number specified in the solicitation
18 shall not exceed 5 unless the agency determines
19 with respect to” and all that follows through
20 the period at the end and inserting the fol-
21 lowing: “The maximum number specified in the
22 solicitation shall not exceed 5 unless the head
23 of the contracting activity, delegable to a level
24 no lower than the senior contracting official
25 within the contracting activity, approves the

1 contracting officer’s justification that an indi-
2 vidual solicitation must have greater than 5 fi-
3 nalists to be in the Federal Government’s inter-
4 est. The contracting officer shall provide writ-
5 ten documentation of how a maximum number
6 of offerors exceeding 5 is consistent with the
7 purposes and objectives of the two-phase selec-
8 tion process.”.

9 (2) ANNUAL REPORTS.—

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

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

20 (ii) the contract was awarded without
21 using two-phase selection procedures.

22 (B) PUBLIC AVAILABILITY.—The Director
23 of the Office of Management and Budget shall
24 facilitate public access to the reports, including
25 by posting them on a publicly available Internet

1 website. A notice of the availability of each re-
2 port shall be published in the Federal Register.

3 (b) DEFENSE CONTRACTS.—

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

6 (A) by amending subsection (b) to read as
7 follows:

8 “(b) CRITERIA FOR USE.—

9 “(1) CONTRACTS WITH A VALUE OF AT LEAST
10 \$750,000.—Two-phase selection procedures shall be
11 used for entering into a contract for the design and
12 construction of a public building, facility, or work
13 when a contracting officer determines that the con-
14 tract has a value of \$750,000 or greater, as adjusted
15 for inflation in accordance with section 1908 of title
16 41, United States Code.

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

1 “(A) the contracting officer anticipates
2 that 3 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 Department of Defense.”; and

24 (B) in subsection (d), by striking “The
25 maximum number specified in the solicitation

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

15 (2) ANNUAL REPORTS.—

16 (A) IN GENERAL.—Not later than Novem-
17 ber 30 of 2016, 2017, 2018, 2019, and 2020,
18 the Secretary of Defense shall compile an an-
19 nual report of each instance in which the De-
20 partment awarded a design-build contract pur-
21 suant to section 2305a of title 10, United
22 States Code, during the fiscal year ending in
23 such calendar year, in which—

24 (i) more than 5 finalists were selected
25 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 (c) GAO REPORTS.—

10 (1) CIVILIAN CONTRACTS.—Not later than 270
11 days after the deadline for the final reports required
12 under subsection (f) of section 3309 of title 41,
13 United States Code, as added by subsection (a)(1),
14 the Comptroller General of the United States shall
15 issue a report analyzing the compliance of the var-
16 ious Federal agencies with the requirements of such
17 section.

18 (2) DEFENSE CONTRACTS.—Not later than 270
19 days after the deadline for the final reports required
20 under subsection (f) of section 2305a of title 10,
21 United States Code, as added by subsection (b)(1),
22 the Comptroller General of the United States shall
23 issue a report analyzing the compliance of the De-
24 partment of Defense with the requirements of such
25 section.

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) PROHIBITION.—Not later than 180 days after the
5 date of the enactment of this Act, the Federal Acquisition
6 Regulatory Council, in consultation with the Adminis-
7 trator for Federal Procurement Policy, shall amend the
8 Federal Acquisition Regulation to prohibit the use of re-
9 verse auctions for awarding contracts for construction and
10 design services.

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

12 (1) the term “design and construction services”
13 means—

14 (A) site planning and landscape design;

15 (B) architectural and engineering services
16 (including surveying and mapping defined in
17 section 1101 of title 40, United States Code);

18 (C) interior design;

19 (D) performance of construction work for
20 facility, infrastructure, and environmental res-
21 toration projects;

22 (E) delivery and supply of construction
23 materials to construction sites; and

24 (F) construction or substantial alteration
25 or repair of public buildings or public works;
26 and

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

3 (A) a real-time auction conducted through
4 an electronic medium between a group of
5 offerors who compete against each other by
6 submitting bids for a contract or task order
7 with the ability to submit revised bids through-
8 out the course of the auction; and

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

11 **SEC. 5. ASSURING PAYMENT PROTECTIONS FOR CON-**
12 **STRUCTION SUBCONTRACTORS AND SUP-**
13 **PLIERS UNDER AN ALTERNATIVE TO A MIL-**
14 **LER ACT PAYMENT BOND.**

15 Chapter 93 of subtitle VI of title 31, United States
16 Code, is amended—

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

19 **“§ 9310. Individual sureties**

20 “If another applicable law or regulation permits the
21 acceptance of a bond from a surety that is not subject
22 to sections 9305 and 9306 and is based on a pledge of
23 assets by the surety, the assets pledged by such surety
24 shall—

1 “(1) consist of eligible obligations described
2 under section 9303(a); and

3 “(2) be submitted to the official of the Govern-
4 ment required to approve or accept the bond, who
5 shall deposit the assets with a depository described
6 under section 9303(b).”; and

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

“9310. Individual sureties.”.

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

10 Section 411(c)(1) of the Small Business Investment
11 Act of 1958 (15 U.S.C. 694b(c)(1)) is amended by strik-
12 ing “70” and inserting “90”.

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