

DESIGN-BUILD EFFICIENCY AND JOBS ACT OF 2014

DECEMBER 12, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

[To accompany H.R. 2750]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 2750) to amend title 41, United States Code, to require the use of two-phase selection procedures when design-build contracts are suitable for award to small business concerns, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Design-Build Efficiency and Jobs Act of 2014”.

SEC. 2. DESIGN-BUILD SELECTION PROCEDURES.

(a) CIVILIAN AGENCY CONTRACTS.—Section 3309 of title 41, United States Code, is amended—

(1) in subsection (d), by striking “agency determines with respect to” and all that follows through the period at the end, and inserting the following: “head of the agency approves the contracting officer’s justification that an individual solicitation must have greater than 5 finalists to be in the Federal Government’s interest. The contracting officer must provide written documentation of how a maximum number of offerors exceeding 5 is consistent with the purposes and objectives of the two-phase selection process.”; and

(2) by adding at the end the following:

“(f) DESIGN AND CONSTRUCTION CONTRACTS.—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 contract has a value of \$1,500,000 or greater, as adjusted for inflation in accordance with section 1908 of this title, unless the head of the agency approves the contracting officer’s justification that procedures other than two-phase selection procedures are in the best interest of the Federal Government.

“(g) REPORTS.—

“(1) AGENCY REPORTS.—Beginning on the date that is 1 year after the effective date of this subsection, and for each of the 4 years thereafter, each agency shall submit to the Comptroller General of the United States and publish in the Federal Register an annual report regarding all cases in the preceding year—

“(A) in which more than 5 finalists were selected for phase-two requests for competitive proposals; or

“(B) for a contract that has a value of \$1,500,000 (as adjusted for inflation in accordance with section 1908 of this title) or greater for which the two-phase selection procedures were not used.

“(2) GAO REPORT.—In the first full fiscal year that is 5 years after the effective date of this subsection, the Comptroller General of the United States shall publish a report that, based on the information provided in the agency reports required under paragraph (1), analyzes the degree to which agencies have complied with the requirements of this section.”.

(b) DEFENSE CONTRACTS.—Section 2305a title 10, United States Code, is amended—

(1) in subsection (d), by striking “agency determines with respect to” and all that follows through the period at the end, and inserting the following: “head of the agency approves the contracting officer’s justification that an individual solicitation must have greater than 5 finalists to be in the Federal Government’s interest. The contracting officer must provide written documentation of how a maximum number of offerors exceeding 5 is consistent with the purposes and objectives of the two-phase selection process.”; and

(2) by adding at the end the following:

“(g) DESIGN AND CONSTRUCTION CONTRACTS.—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 contract has a value of \$1,500,000 or greater, as adjusted for inflation in accordance with section 1908 of title 41, unless the head of the agency approves the contracting officer’s justification that procedures other than two-phase selection procedures are in the best interest of the Federal Government.

“(h) REPORTS.—(1) Beginning on the date that is 1 year after the effective date of this subsection, and for each of the 4 years thereafter, each agency shall submit to the Comptroller General of the United States and publish in the Federal Register an annual report regarding all cases in the preceding year—

“(A) in which more than 5 finalists were selected for phase-two requests for competitive proposals; or

“(B) for a contract that has a value of \$1,500,000 (as adjusted for inflation in accordance with section 1908 of title 41) or greater for which the two-phase selection procedures were not used.

“(2) In the first full fiscal year that is 5 years after the effective date of this subsection, the Comptroller General of the United States shall publish a report that, based on the information provided in the agency reports required under paragraph (1), analyzes the degree to which agencies have complied with the requirements of this section.”.

COMMITTEE STATEMENT AND VIEWS

PURPOSE AND SUMMARY

The Federal Government spends roughly \$500 billion per year on the procurement of goods and services.¹ Of this figure, approximately \$40 billion, or eight percent, is spent on federal construction and architect and engineering (A&E) projects.² The federal sector is a significant and growing portion of the nation's overall construction market, accounting for 40 percent of the value of all ongoing private and public sector construction activity in 2010, compared to about 20 percent share in the previous decade.³ Furthermore, of the \$40 billion the Federal Government spends each year on federal construction and A&E projects, approximately \$17 billion, or 42 percent, goes to small business prime contractors,⁴ indicating particularly strong participation by small businesses in these fields. These figures demonstrate the need to further streamline the construction and A&E contracting process to allow for vibrant participation by all commercial businesses including small businesses and to effectively provide services to the taxpayers.

FISCAL YEAR 2012 FEDERAL CONTRACTS FOR CONSTRUCTION AND A&E⁵

FY 2012	Total Contract Spend	Construction Spend	A&E Spend
All Prime Contractors	\$516.9B	\$41.5B	
		\$36.2B	\$5.3B
Small Business Prime Contractors	\$89.9B (17.4%, or 22.3% of total eligible dollars*).	\$17.3B (41.7%)	
		\$15.9B (43.9%)	\$1.4B (26.4%)

* Some contracts, such as those under federal mandatory sources authority (e.g., supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled), are excluded.

To procure construction and A&E services, federal agencies typically use one of two approaches. Under the traditional “design-bid-build” approach, design and construction are treated as two separate requirements and contracted sequentially and separately with two contracts and two companies. In contrast, under “design-build” contracts, design and construction are combined into a single requirement. A single contract is awarded to one company (often a team) responsible for both the design and construction.⁶

¹ Prime Award Spending Data, USASpending.gov, available at <http://www.usaspending.gov>.

² *Id.* For purposes of this report, “federal construction” means the initial construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. See 48 C.F.R. § 2.101, § 22.502 (2010). “A&E” is statutorily defined as the professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property, [or] other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services” as regulated by state laws. 40 U.S.C. § 1102 (2012).

³ U.S. Census Bureau, Value of Construction Put in Place, Annual Data, available at <https://www.census.gov/construction/c30/c30index.html>.

⁴ Federal Procurement Data System ad hoc report, available at <https://www.fpds.gov> (last accessed Nov. 22, 2013).

⁵ *Id.*

⁶ 48 C.F.R. § 36.102 (Federal Acquisition Regulation).

Within design-build contracting, there are two source-selection techniques. Under a “single-step design-build” (or “turn-key”) process, all construction and design teams must submit full proposals up front. The procuring agency then evaluates all proposals received and selects a winner.

A more frequently used technique is “two-phase design-build” selection procedures (also referred to as “two-step” design-build). Under this technique, companies are required to submit information related to experience and past performance in step one. Based on this information, the procuring agency selects a limited number of the most qualified offerors, generally three to five, to advance to phase two of the competition. The down-selected offerors then submit much more detailed price and technical proposals for evaluation.⁷

Design-build contracts hold substantial benefits for the government, since they combine design and construction in a single contract with a single prime contractor with clear accountability for delivery and performance. However, because these contracts would previously have been performed as two separate contracts, they require highly complicated and costly proposals. In order to develop an accurate construction cost, teams must complete up to 80 percent of the design work and determine detailed space and material needs.⁸ Some in industry report that developing a full proposal for a design-build contract can exceed three percent of the value of the project.⁹

For example, bidding on a \$20 million design-build project could cost more than \$600,000 for each offeror. The winning offeror can recover its bid and proposal (B&P) costs, but that remedy is not available to the losing offerors. Thus, if ten firms bid on a \$20 million project, that would amount to \$5.4 million (i.e., \$600,000 times nine) in unrecovered B&P costs. Likewise, if a firm bids on ten jobs in a year and wins one fifth of those jobs, the firm still must absorb \$4.8 million (i.e., \$600,000 times eight) in unrecovered B&P costs. Further, these B&P costs are not isolated to the prime contractor, but also apply to subcontractors, that are often small businesses. Given that a subcontractor may be part of several teams bidding on any given job, each with its own approach, the subcontractors’ expenses may be more than the prime contractor.

Recognizing this B&P cost burden associated with preparing a full proposal, current law encourages agencies to use a two-step process when design-build contracts are employed. When the two-step process is used, current law generally requires no more than five firms be selected for phase two.¹⁰ The basis for restricting phase two to five firms is to not make it cost-prohibitive for potential offerors to bid.

However, concerns exist that current law has not deterred agencies from over-relying on one-step design build contracts or from al-

⁷ *Id.* See also 48 C.F.R. § 36.3.

⁸ *Assessing Government’s Use of Design-Build Contracts: Hearing before the Subcomm. on Federal Workforce, US Postal Service 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), available at <http://oversight.house.gov/hearing/assessing-governments-use-design-build-contracts/>.

⁹ Memorandum from Staff of the H. Comm. on Small Business to Members, Subcomm. on Contracting and the Workforce of the H. Comm. on Small Business (May 17, 2013), available at <http://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=331473>.

¹⁰ See 41 U.S.C. § 3309(d).

lowing too many offerors into phase two, when the two-step process is used. Critics contend that procuring agencies such as the U.S. Army Corp of Engineers (USACE) and the General Services Administration continue to solicit proposals through the one-step design-build procurement for large projects and that, even when two-step process is used, some contracting officers are short-listing as many as eight to ten firms after the first-step evaluation.¹¹

H.R. 2750, the Design-Build Efficiency and Jobs Act of 2013, attempts to address the imperfect application of the two-step design-build contracting process. The bill, as amended and reported by the House Committee on Oversight and Government Reform requires the use of two-phase selection procedures for any design-build requirements with a value of \$1.5 million or greater. The bill also requires that any contracting officer selecting more than five offerors for step two of the design-build process provide written justification as to why more offerors are necessary.

BACKGROUND AND NEED FOR LEGISLATION

Benefits of Design-Build Contracts

Design-build contracts combine the design and construction of a project into a single contract, which is then awarded to one company.¹² This process provides clear accountability for performance and increases efficiency related to contract award and administration.¹³ An industry group claims that the use of the design-build process “[c]uts costs by 6.1%, [i]ncreases overall project delivery speed by . . . 33.5%,” and “[g]reatly reduces claims and litigation,” among other benefits.¹⁴

Design-build contracting increases accountability by consolidating liability for both the design and construction processes. Under the traditional design-bid-build method of contracting, liability for the design phase is separated from liability in the construction phase.¹⁵ While the government is liable to the contractor on a standard approaching strict liability, its claim against the architect or engineer for design defects is judged by a negligence standard, leaving the government liable for all defects in between these standards.¹⁶

Recognizing its benefits, private-sector contractors began to use the design-build method more frequently.¹⁷ Government agencies like the General Services Administration, the Postal Service, and the USACE have used the design-build method of contracting since the late 1980s and early 1990s,¹⁸ while the Naval Facilities Engineering Command (NAVFAC) used an early variation of the design-build method on housing projects in the 1940s.¹⁹

¹¹ See *Assessing Government's Use of Design-Build Contracts*, *supra* note.

¹² 48 C.F.R. § 36.102.

¹³ Ralph C. Nash & John Cibinic, *Design-Build Contracting: Can the Federal Government Use This Technique Effectively?*, 8 No. 12 Nash & Cibinic Rep. 68 (1994).

¹⁴ *Assessing Government's Use of Design-Build Contracts* (written testimony for the record of the Design-Build Institute of America), *supra* note, available at http://www.dbia.org/advocacy/federal/Documents/DBIA%20Dec%203%20Testimony_Assessing%20gov't%20use%20of%20design-build.pdf.

¹⁵ See Nash & Cibinic, *supra* note.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Casey Halsey and William Quatman, *Design-Build Contracts: Revisited, 25 Years Later*, 34-SPG Construction Lawyer 5 at 6 (2014).

Design-Build Reforms Have Been Successfully Implemented by Most States

At present, 47 States have passed laws authorizing the use of the design-build method of contracting on public projects in various forms, and with varying degrees of authority given to the Government.²⁰ Illustrating this point, industry experts have noted that “California . . . has perhaps the most design-build laws of any state, but some of the most limiting. For example, redevelopment agencies can use design-build in California but only for 10 total projects.”²¹ The only States that have not specifically authorized the use of design-build are Wisconsin, Iowa and North Dakota.²²

More recently, in 2013, California enacted a law authorizing State and local transportation authorities to implement a design-build procurement process for contracts on transportation projects.²³ The bill has been praised by the Orange County Transportation Authority (OCTA), which issued a news release stating “[w]ith design-build authority, transportation agencies will have the ability to streamline the delivery of highway projects key to the implementation of local sales tax measures, thereby saving local agencies additional costs and delays in project delivery.”²⁴

The Use of Design-Build Contracting Has Resulted in Savings and Improved Build Quality of Public Works

In 2007, the I-35 Bridge in Minneapolis, Minnesota collapsed during rush hour, a disaster that federal safety investigators attributed to a design flaw.²⁵ Soon after the incident, the Minnesota Department of Transportation, using the two-phase design-build technique, selected a joint venture to construct a replacement bridge, with a projected timeline of 14 months from design to completion.²⁶ After the selection process, the parties entered into a lump-sum contract, which incentivized the joint venture to complete the project in a timely manner by assessing a \$2 million penalty for every ten days that the project went on past the projected date of completion, and awarding a \$27 million maximum bonus for early completion.²⁷

These incentives worked. The joint venture completed the project more than three months before the estimated date of completion, 17 months after the disastrous collapse of the bridge, expeditiously restoring the much-needed public service. The joint venture received a \$25 million bonus.²⁸

The final cost of the new I-35W Bridge was \$265,590,000, and the project was completed on budget.²⁹ The new bridge “is a sustainable, redundant, high-strength, high-performance smart bridge” equipped with vibrating wire strain gauges, accelerometers and

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ A.B. 401, 2013–2014 Sess. (Cal. 2013).

²⁴ *OCTA Praises Passage of Design-Build Legislation*, Orange County on the Move (Oct. 21, 2013), available at <http://blog.octa.net/octa-praises-passage-of-design-build-legislation>.

²⁵ Frederic J. Frommer, *NTSB: Design errors factor in 2007 bridge collapse*, Associated Press, Nov. 13, 2008, available at http://usatoday30.usatoday.com/news/world/2008-11-13-628592230_x.htm.

²⁶ 2009 National Design-Build Awards Competition, Transportation Over \$50 million, I-35W Bridge at 1–2 (on file with the Committee).

²⁷ *Id.* at 10.

²⁸ *Id.* at 10, 13.

²⁹ *Id.* at 1, 17.

chloride sensors which are embedded to monitor its anticipated 100-year service life.”³⁰ The I-35W Bridge can serve as a model of public sector design-build success, illustrating the utility of the design-build contracting method in such projects.

Proponents of the design-build method of procurement claim that such method continues to produce favorable results in other ongoing projects. For example, the first span of the New NY Bridge, the replacement for the Tappan Zee Bridge across the Hudson River, is scheduled to open in 2016.³¹ Plans for the project were initially discussed in 1999, and \$88 million was spent in the following 11 years without any action taken to advance the project.³² Among other factors, in 2011, New York enacted design-build legislation that helped spur the project forward.³³ The state government claims that the use of design-build contracting will “help keep the project on-budget and on-time.”³⁴ The total cost of the new bridge is \$3.9 billion, significantly less than initial projections.³⁵ The bridge “will be designed to last 100 years without major structural maintenance,” and should be completed by 2018.³⁶

Additionally, the San Diego Freeway (I-405) Improvement Project will be completed using the design-build contracting method.³⁷ Interstate 405 is one of the busiest highways in the United States, carrying more than 300,000 daily vehicle trips in some of its sections, a number that is expected to increase.³⁸ OCTA stated regarding the Project, “it is estimated that the use of design-build will shave off two to three years from the project delivery date, allowing for cost savings up to \$100 million.”³⁹

“Single-step Design-Build” vs. “Two-phase Design-Build”

The Federal Acquisition Regulation currently allows for two source selection procedures in design-build contracting.⁴⁰ Under single-step design-build or turn-key selection procedure, a request for proposal (RFP) is issued to the offerors, and all parties must respond with full proposals up front. Under the two-phase design-build selection process, potential offerors initially submit information regarding their experience and past performance history in step one, after which the procuring agency selects a limited number of offerors to advance to step two.⁴¹ In step two of the process, the offerors are required to submit full, detailed price and technical proposals.⁴² Typically, whether in the single-step process or in the step two of the two-phase process, once full proposals are received, a “best value” selection process is then used to determine the winning proposal, which allows for the government to have flexibility in balancing other factors in addition to cost, such as the design,

³⁰ *Id.* at 27.

³¹ The New NY Bridge, <http://www.newnybridge.com/about/index.html> (last visited July 30, 2014).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See OCTA, *supra* note.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 48 C.F.R. § 36.303.

⁴¹ 48 C.F.R. § 36.303-1.

⁴² 48 C.F.R. § 36.303-2.

the technical approach, the risk associated with the proposal, past performance and experience demonstrated in the proposal.⁴³

The advantage of the single-step selection process is, in some cases, speed. Requiring all offerors to submit full proposals up front can result in a faster award of a contract and delivery of the final project. However, industry groups look upon the single-step selection process unfavorably, claiming that it is more expensive, burdensome and time-consuming for contractors, and result in wasteful practices.⁴⁴ These groups argue that “the burden is disproportionately larger on the design community, many of which are small businesses, because such businesses have little or no chance of ever recouping their proposal costs under the single-step process.”⁴⁵

According to a witness who testified at the Committee’s December 2013 hearing, in order to develop an accurate construction cost, which is needed for a full proposal, teams must complete as much as 80 percent of the design work in advance.⁴⁶ These teams must employ architectural, mechanical, electrical, HVAC, structural building supply, materials and construction experts throughout this very costly and time-intensive process.⁴⁷ A 2012 survey from the American Institute of Architects Large Firm Roundtable reported that between 2007 and 2011, architecture firms spent a median of \$260,000 per project in public and private sector design-build projects, creating models, plans and other preparatory materials.⁴⁸ According to this witness, “[d]esign firms face the dilemma of betting it all on a contract they may not get or self selecting out of the federal design-build market all together.”⁴⁹

The two-phase selection design-build selection process ensures that only the most qualified offerors compete in step two, which in theory, may increase ‘effective’ competition by ensuring that qualified small business contractors are not precluded from the procurement process by their relatively limited resources, in conjunction with the cost of submitting a full proposal up front.⁵⁰ Presumably, offerors who advance to step two have much greater odds of winning the contract, and thus they are incentivized to submit more competitive proposals.⁵¹ At the same time, agencies save administrative resources that would otherwise be expended having to evaluate large number of would-be proposals from less qualified offerors.⁵²

Industry groups have criticized the government for its ongoing use of the single-step process. However, USACE, the single largest procurer of design-build services, has stated that “[t]he two-phase

⁴³ Acquisition.gov, *Select the Right Contractor: Use best-value evaluation and source selection*, http://www.acquisition.gov/comp/seven_steps/step6_use-best.html (last visited July 30, 2014).

⁴⁴ Rick Laezman, *Army Corps of Engineers Clarifies Single-Phase Procurement in Design/Build Projects*, Electrical Contractor (November 2012), <http://www.ecmag.com/section/your-business/army-corps-engineers-clarifies-single-phase-procurement-designbuild-projects>.

⁴⁵ *While Two-Step Design-Build Is Preferred Method For Government Contracting Officers, Single-Step Method May Be Used In Specific Circumstances*, 37 Construction Contracts Law Report 122 (July 19, 2013).

⁴⁶ *Assessing Government’s Use of Design-Build Contracts* (statement of Charles D. Dalluge on behalf of the American Institute of Architects), *supra* note.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ James C. Dalton and Lloyd Caldwell, *Limitations on the Use of One-Step Procedures for Design-Build*, U.S. Army Corps of Engineers Engineering and Construction Bulletin (Aug. 6, 2012), available at http://wbdg.org/ccb/ARMYCOE/COEECB/ecb_2012_23.pdf.

⁵² *Id.*

selection procedure is the only design-build contracting method authorized for Civil Works and Support for Other projects,” and is the “highly preferred method” for contracting military construction and design-build services.⁵³ USACE further stated that it only uses the turn-key (i.e., single-step) process for military construction contracts when certain limiting criteria are met.⁵⁴ USACE’s preference for the two-phase process over the single-step process provides a useful example of a federal agency adapting more efficient contracting methods that also align with industry preferences.

Oversight by the House Oversight and Government Reform Committee

On December 3, 2013, the Subcommittee on Federal Workforce, U.S. Postal Service and the Census of the House Oversight and Government Reform Committee held a hearing entitled, “*Assessing Government’s Use of Design-Build Contracts*.” This hearing examined the government’s use of design-build contracts in the procurement process, and reviewed the reforms proposed by H.R. 2750. The hearing also highlighted the benefits the government could obtain from the use of two-phase design-build contracts, such as cost savings, and discussed the positive impact that the legislation would have on small businesses and other contractors, underscoring the need for design-build reforms in the federal construction contracting process.

LEGISLATIVE AND POLICY HISTORY

Title 41, Section 3309 of the United States Code was enacted on January 4, 2011, and currently provides design-build selection procedures for public contracts.⁵⁵ The statute states that “[u]nless the traditional acquisition approach of design-bid-build . . . or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures. . . .”⁵⁶ Section 3309 also outlines criteria for determining whether two-phase selection procedures are appropriate, describes procedures for the two-phase selection process, and requires a solicitation stating the number of offerors to be selected, limiting the maximum number of potential offerors to five, “unless the agency determines . . . 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.”⁵⁷

Considering the advantages of two-phase selection procedures when compared to the single-step selection process, the current statute is not descriptive enough and allows for too many public contracts to circumvent the two-phase selection process without appropriate documentation.

In August 2012, USACE published a memorandum entitled, “Limitations on the Use of One-Step Selection Procedures for Design-Build.”⁵⁸ The memorandum discussed USACE’s efforts to distance itself from the use of single-step selection procedures and im-

⁵³ Dalton and Caldwell, *supra* note.

⁵⁴ *Id.*

⁵⁵ See 41 U.S.C. § 3309 (2012).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Dalton and Caldwell, *supra* note.

plement two-step selection procedures because of the additional expenses single-step procedures impose on contractors, and citing the superiority of two-phase procedures in allowing for the selection of only the most qualified bidders.⁵⁹ USACE indicated that it had limited the use of one-step selection procedures to only authorized military construction contracts that meet three separate conditions,⁶⁰ further restricting the use of single-step selection procedures in favor of the two-step method.

On May 23, 2013, the Subcommittee on Contracting and Workforce of the House Committee on Small Business held a hearing entitled, “Building America: Challenges for Small Construction Contractors.” This hearing examined the obstacles faced by small business construction and A&E contractors, including “the misapplication of the current laws regarding design build contracting,” which “makes bidding on contracts cost prohibitive for qualified small business prime and subcontractors.”⁶¹

In July 2013, Representative Sam Graves, Chairman of the Committee on Small Business, introduced the Design-Build Efficiency and Jobs Act of 2013 (H.R. 2750), which was cosponsored by 16 Representatives listed as follows: Rep. Matt Cartwright, Rep. Gerald Connolly, Rep. Blake Farenthold, Rep. Richard Hanna, Rep. Jaime Herrera Beutler, Rep. Mark Meadows, Rep. Grace Meng, Rep. Jeff Miller, Rep. Mick Mulvaney, Rep. Erik Paulsen, Rep. Dennis Ross, Rep. Bradley Schneider, Rep. Kurt Schrader, Rep. Lee Terry, Rep. Scott Tipton, and Rep. Peter Welch.

SECTION-BY-SECTION
(AS AMENDED AND REPORTED BY THE COMMITTEE)

Section 1. Short title

Provides the title.

Section 2. Design-build selection procedures

For civilian agencies under Title 41 of the U.S. Code and Department of Defense under Title 10:

- i) Requires a written justification to the head of an agency when selecting more than five finalists in the design-build bidding process;
- ii) Mandates the use of two-phase selection procedures for any design-build requirements with a value of \$1,500,000 or greater (as adjusted for inflation), unless the agency head approves the contracting officer’s justification that other procedures are in the Federal Government’s best interest; and
- iii) Requires each agency that awards design and construction contracts to submit to the Comptroller General of the United States (GAO) and publish in the Federal Register an annual report for the next 5 years on: (1) all contracts for which more than five finalists were selected for phase-two requests for competitive proposals; or (2) contracts having a value of \$1,500,000 or greater for which the two-phase selec-

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ Memorandum from Staff of the H. Comm. on Small Business to Members, Subcomm. on Contracting and the Workforce of the H. Comm. on Small Business (May 17, 2013).

tion process was not used. Also requires GAO to assess the agency reports and publish a report.

EXPLANATION OF AMENDMENTS

On May 21, 2014, the Committee on Oversight and Government Reform held a markup of H.R. 2750. Committee Chairman Darrell Issa offered an Amendment in the Nature of a Substitute (ANS), making those policies effective government-wide by applying the same language to defense contracts.

Representative Stephen Lynch offered an amendment to Chairman Issa's ANS, which raised the dollar threshold for the requirement of two-phase selection procedures in design-build contracts to \$3 million, which agency heads would be permitted to waive under compelling circumstances. The \$3 million threshold provided in the Lynch Amendment reflects the notion that the previous \$750,000 threshold in the original bill would apply too broadly to small-scale projects. Chairman Issa offered an amendment to the Lynch amendment, adjusting the \$3 million threshold down to \$1.5 million, which was agreed to by voice vote. The Lynch amendment, as amended, was agreed to by voice vote. H.R. 2750, as amended, was agreed to by voice vote.

COMMITTEE CONSIDERATION

On May 21, 2014, the Committee met in open session and ordered reported favorably the bill, H.R. 2750, as amended, by voice vote, a quorum being present.

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 mandates the use of two-phase selection procedures for any design-build requirements with a value of over \$1,500,000. 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 goals and objectives are reflected in the descriptive portions of this report.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 2750 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 H.R. 2750 does not direct the completion of any specific rule makings within the meaning of 5 U.S.C. 551.

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 5 U.S.C. App., Section 5(b).

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates 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

H.R. 2750 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)(2) 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 H.R. 2750. However, clause 3(d)(3)(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.

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 H.R. 2750 from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 23, 2014.

HON. DARRELL ISSA,
*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. 2750, the Design-Build Efficiency and Jobs Act of 2014.

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

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2750—Design-Build Efficiency and Jobs Act of 2014

H.R. 2750 would amend federal law to modify the federal government's procedures for awarding design and construction contracts for federal facilities. The legislation would require contracting officers to provide written justification if they decide to allow more than five finalists into the bidding process for federal construction projects. H.R. 2750 also would require agencies to use a two-phase selection process. 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 more detailed proposals for evaluation for any contract that has a value greater than \$1.5 million.

CBO estimates that implementing H.R. 2750 would have no significant net impact on the budget over the 2015–2019 period. CBO reviewed information on the process of awarding construction contracts by the Army Corps of Engineers and the General Services Administration. In general, those offices often use a two-phase process to select firms for construction projects. Under the bill, CBO expects that for projects that are not currently using this two-phase process, there would be some additional administrative costs for agencies; however, agencies also would spend less to analyze fewer construction bids. Consequently, CBO estimates that implementing H.R. 2750 would not require agencies to make a significant change in their typical contracting process and thus would not have a significant net effect on the federal budget.

Enacting the bill could affect direct spending by agencies not funded through annual appropriations; therefore, 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.

H.R. 2750 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Theresa Gullo, 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, existing law in which no change is proposed is shown in roman):

TITLE 41, UNITED STATES CODE

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SUBTITLE I—FEDERAL PROCUREMENT
POLICY

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CHAPTER 33—PLANNING AND SOLICITATION

* * * * *

§ 3309. Design-build selection procedures

(a) * * *

* * * * *

(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.] *head of the agency approves the contracting officer's justification that an individual solicitation must have greater than 5 finalists to be in the Federal Government's interest. The contracting officer must provide written documentation of how a maximum number of offerors exceeding 5 is consistent with the purposes and objectives of the two-phase selection process.*

* * * * *

(f) DESIGN AND CONSTRUCTION CONTRACTS.—*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 contract has a value of \$1,500,000 or greater, as adjusted for inflation in accordance with section 1908 of this title, unless the head of the agency approves the contracting officer's justification that procedures other than two-phase selection procedures are in the best interest of the Federal Government.*

(g) REPORTS.—

(1) AGENCY REPORTS.—*Beginning on the date that is 1 year after the effective date of this subsection, and for each of the 4 years thereafter, each agency shall submit to the Comptroller General of the United States and publish in the Federal Reg-*

ister an annual report regarding all cases in the preceding year—

(A) in which more than 5 finalists were selected for phase-two requests for competitive proposals; or

(B) for a contract that has a value of \$1,500,000 (as adjusted for inflation in accordance with section 1908 of this title) or greater for which the two-phase selection procedures were not used.

(2) GAO REPORT.—In the first full fiscal year that is 5 years after the effective date of this subsection, the Comptroller General of the United States shall publish a report that, based on the information provided in the agency reports required under paragraph (1), analyzes the degree to which agencies have complied with the requirements of this section.

* * * * *

TITLE 10, UNITED STATES CODE

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SUBTITLE A—GENERAL MILITARY LAW

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PART IV—SERVICE, SUPPLY, AND PROCUREMENT

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CHAPTER 137—PROCUREMENT GENERALLY

* * * * *

§ 2305a. Design-build selection procedures

(a) * * *

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(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 Government's interest and is consistent with the purposes and objectives of the two-phase selection process.] *head of the agency approves the contracting officer's justification that an individual solicitation must have greater than 5 finalists to be in the Federal Government's interest. The contracting officer must provide written documentation of how a maximum number of offerors exceeding 5 is consistent with the purposes and objectives of the two-phase selection process.*

* * * * *

(g) *DESIGN AND CONSTRUCTION CONTRACTS.*—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 contract has a value of \$1,500,000 or greater, as adjusted for inflation in accordance with section 1908 of title 41, unless the head of the agency approves the contracting officer's justification that procedures other than two-phase selection procedures are in the best interest of the Federal Government.

(h) *REPORTS.*—(1) Beginning on the date that is 1 year after the effective date of this subsection, and for each of the 4 years thereafter, each agency shall submit to the Comptroller General of the United States and publish in the Federal Register an annual report regarding all cases in the preceding year—

(A) in which more than 5 finalists were selected for phase-two requests for competitive proposals; or

(B) for a contract that has a value of \$1,500,000 (as adjusted for inflation in accordance with section 1908 of title 41) or greater for which the two-phase selection procedures were not used.

(2) In the first full fiscal year that is 5 years after the effective date of this subsection, the Comptroller General of the United States shall publish a report that, based on the information provided in the agency reports required under paragraph (1), analyzes the degree to which agencies have complied with the requirements of this section.

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