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SMALL CONTRACTORS IMPROVE COMPETITION ACT OF 2015

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Mr. VITTER, from the Committee on Small Business and
Entrepreneurship, submitted the following

R E P O R T

[To accompany S. 2139]

The Committee on Small Business and Entrepreneurship, to which was referred the bill (S. 2139) to amend the Small Business Act to prohibit the use of reverse auctions for the procurement of covered contracts, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

I. INTRODUCTION

The Act (S. 2139) was introduced by Chairman David Vitter and Ranking Member Jeanne Shaheen on October 6, 2015.

The Act amends the Small Business Act to prohibit the use of reverse auctions for the procurement of covered contracts.

Senator Cardin offered an amendment to the bill to provide for an increase from 70 percent to 90 percent to the Small Business Administration's (SBA) guarantee to sureties in the Preferred Program which enables sureties to issue, monitor, and service bonds without prior approval by the SBA.

II. HISTORY (PURPOSE & NEED FOR LEGISLATION)

A reverse auction is an auction between a group of offerors who compete against each other by submitting offers for requirement when those offerors have the ability to submit revised offers with lower prices throughout the course of the auction. Reverse auctions

first gained popularity in the late 1990s, as Internet-based technologies allowed potential vendors to underbid each other in real time. Since then, they have grown to account for nearly 1 percent of federal prime contract dollars awarded each fiscal year. When used properly, reverse auctions are an important tool that may benefit taxpayers and contracting agencies. However, when used inappropriately, reverse auctions may place taxpayers, warfighters and small businesses at risk.

While the Office of Federal Procurement Policy (OFPP) has been promising guidance on the use of reverse auction procurements since 2000, to date no guidance or regulations have been forthcoming, meaning that over \$828 million in procurements are awarded using a methodology never mentioned in the Federal Acquisition Regulation or in Statute. Instead, OFPP and the Office of Management and Budget have encouraged the use of reverse auctions without offering guidance on how to best use this methodology.

III. HEARINGS & ROUNDTABLES

The House Committee on Small Business has held four hearings documenting abuses of reverse auctions, including a joint hearing with the House Committee on Veterans Affairs. These hearings documented that the misuse of reverse auctions put agency requirements at risk, denied small businesses the opportunity to fairly compete, and wasted taxpayer dollars. The GAO report titled “Reverse Auctions: Guidance is Needed to Maximize Competition and Achieve Cost Saving” published December 9, 2013 confirmed these findings.

IV. DESCRIPTION OF BILL

This bill creates a new section of the Small Business Act to limit the use of reverse auctions when using small business contracting authorities.

Specifically, the provision requires training of contracting officers, and prohibits the use of reverse auctions for sole source contracts or contracts with inadequate competition. It also states that when reverse auctions are used, technical acceptability of offers can be rated only either technically acceptable or unacceptable. This provision requires that the government communicate honestly with bidders regarding the ranking of offers, as some reverse auctions have misled offerors regarding the status of bids. The bill also makes it clear that when using a third-party reverse auction service, the government must still follow all of the normal procurement rules, as there are cases where a third party provider is excluding companies from competing or using third party data to inform responsibility determinations.

Finally, the provision states that reverse auctions may only be used for contracts other than contracts for construction, goods used to protect people from bodily harm, and technical goods and services.

The Cardin amendment provides for an increase from 70 percent to 90 percent to the SBA’s guarantee to sureties in the Preferred Program which enables sureties to issue, monitor, and service bonds without prior approval by the SBA.

V. COMMITTEE VOTE

In compliance with rule XXVI(7)(b) of the Standing Rules of the Senate, the following vote was recorded on October 7, 2015.

A motion to adopt the Small Contractors Improve Competition Act, a bill to amend the Small Business Act to prohibit the use of reverse auctions for the procurement of covered contracts as amended by the Cardin amendment, was approved unanimously by voice vote with the following Senators present: Vitter, Scott, Fischer, Gardner, Ernst, Enzi, Shaheen, Cantwell, Cardin, Booker, Hirono, and Peters.

VI. COST ESTIMATE

In compliance with rule XXVI(11)(a)(1) of the Standing Rules of the Senate, the Committee estimates the cost of the legislation will be equal to the amounts discussed in the following letter from the Congressional Budget Office:

FEBRUARY 16, 2016.

S. 2139 would change the collateral requirements for surety bonds on federal construction projects and allow the Small Business Administration (SBA) to guarantee a larger portion of certain surety bonds. Surety bonds provide financial guarantees that contracts will be completed according to mutual, agreed terms and that the bond will cover any loss if a contract is not completed. In addition, S. 2139 would prohibit the federal government from using reverse auctions to obtain design and construction services. In a reverse auction, a buyer seeking a good or service solicits bids, multiple sellers offer bids, and the seller with the lowest bid wins the competition.

Under current law, contractors working on federal construction projects are required to insure their performance using surety bonds. Based on information from the General Service Administration (GSA), private contractors, and bond providers, CBO expects that provisions of S. 2139 that would change some collateral requirements would not affect the cost of procuring construction services. CBO also estimates that provisions of the bill that would raise the portion of certain surety bonds that the SBA can guarantee from 70 percent to 90 percent would not have a significant effect on discretionary spending because we expect the agency would increase fees to cover any additional guarantee costs.

CBO also reviewed information on the use of reverse auctions in government procurement contracts by the Army Corps of Engineers, and GSA. Those agencies have found that using this type of reverse auction in complex procurements does not consistently result in lower procurement cost 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.

A memorandum from the Office of Management and Budget dated June 1, 2015, reviews the benefits of reverse auctions and builds on the guidance from the Office of Federal Procurement Policy to advise agencies and contracting officers on the use of reverse auctions. Consequently, CBO estimates that implementing S. 2139 would not result in agencies making significant changes in their typical contracting process and thus would not have a significant 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 increase in spending by those agencies would be negligible. Enacting S. 2139 would not affect revenues.

CBO estimates that enacting S. 2139 would not increase direct spending or on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2027. S. 2139 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 A. Gullo, Assistant Director for Budget Analysis.

VII. EVALUATION OF REGULATORY IMPACT

In compliance with rule XXVI(11)(b) of the Standing Rules of the Senate, it is the opinion of the Committee that no significant additional regulatory impact will be incurred in carrying out the provisions of this legislation. There will be no additional impact on the personal privacy of companies or individuals who utilize the services provided.

VIII. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This bill may be call the Small Contractors Improve Competition Act of 2015.

Section 2. Limitation on reverse auctions

Section 2 provides a Sense of Congress and adds a section to the Small Business Act (the Act).

Section 2(a)—Sense of Congress

The Sense of Congress provides that reverse auctions for commercially available commodities are a useful tool in federal procurement and, when used appropriately, may increase competition, save money and increase opportunities for small business participation.

Section 2(b)—Limitations on reverse auctions

Section 2(b) creates a new section 47 of the Act which addresses the use of reverse auctions that conducted using the set aside or sole source authorities provided by the Act.

Section 47(a)—Definitions

The new section 47(a) provides definitions:

Paragraph (1) defines the term “contracting officer” to have the meaning typically provided in contracting, as found at 41 U.S.C. § 2101.

Paragraph (2) defines the term “covered contract” to mean one of three categories of contracts. The first is a contract for design and construction services, which is further defined in paragraph (3) to include a variety of design and construction activities derived from the Brooks Act, the Federal Property and Administrative Services

Act, and the Federal Acquisition Regulation. The second category of covered contracts is contracts for protective equipment, such as body armor, since price is not the only factor in the award of these goods. The third category of covered contracts are contracts for goods and services when the contract is awarded using a best value method of award, rather than contracts awarded simply based upon price. This recognizes that a reverse auction is well suited to obtaining the lowest price, but is not designed to help a contracting officer assess the technical advantages of one product versus another.

Paragraph (3) defines the term “design and construction services” to include a variety of design and construction activities derived from the Brooks Act, the Federal Property and Administrative Services Act, and the Federal Acquisition Regulation.

Paragraph (4) defines the term “responsible source” to have the meaning typically provided in contracting, as found in 41 U.S.C. §113.

Paragraph (5) defines the term “reverse auction” for purposes of federal procurement. In a normal auction, multiple potential buyers bid up the price of an item by competing against each other to obtain the item. In a reverse auction, multiple potential sellers bid down the price of a good or service by competing against each other to sell the good or service. Thus, the term is defined as an auction between a group of offerors who compete for a contract, task order or delivery order by submitting multiple, revised offers each with a lower price.

Section 47(b)—Prohibition on using reverse auctions

The new Section 47(b) provides that in the case of a covered contract, the contracting officer may not use a reverse auction if the award is made pursuant to one of six enumerated sections of the Act. These are: §8(a) (socially and economically disadvantaged business program); §8(m) (women-owned small businesses and economically disadvantaged women-owned small business program); §15(a) (small business set asides); §15(j) (small business reserve); §31 (HUBZone program); or §36 (service-disabled veteran-owned small business program).

Section 47(c)—Limitations on using reverse auctions

In cases where reverse auctions are not prohibited by section 47(b) but use §8(a), §8(m), §15(a), §15(j), §31, or §36 to make the award, the new section 47(c) institutes six limitations. These are as follows:

Paragraph (1) requires that the decision to use a reverse auction and determine the evaluation criteria for award, eligibility of vendors, and the selection of an awardee must all be made by a contracting officer, not a program officer or a contractor.

Paragraph (2) requires that a contracting officer using reverse auctions must have been trained on the use of reverse auctions. The required training should be similar to that already provided by the Department of Defense in response to §824 of the Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113–291; 127 Stat. 3436).

Paragraph (3) requires that federal agencies not award contracts using reverse auctions if only one offer is received or if offerors

aren't given the ability to revise their bids. GAO found that in over one third of reverse auctions, there is only one bidder or one round of bids, which effectively negates the benefits of a reverse auction. (GAO-14-108 Reverse Auctions at 22).

Paragraph (4) requires that agencies using reverse auctions determine that the item or service is technically acceptable, but not further differentiate between the technical capabilities of offerors. In cases where a contracting officer needs to differentiate technical capabilities of offerors, other procurement methods allow this to happen more transparently.

Paragraph (5) requires that agencies may not mislead contractors as to whether they have the lowest offer. As companies cannot mislead contractors on any element of a bid, the government should also not mislead offerors.

Paragraph (6) limits the use of third-party reverse auction providers to functions that are not inherently governmental. This means that the government may not use third-party past performance or financial responsibility information when making an award unless the information is collected and shared in accordance with current statutes, such as § 8(b) of the Act or 41 U.S.C. § 1126. It also means that disputes between offerors and third-party reverse auction providers must be settled privately, and that the reverse auction provider may not use access to government contracts as leverage. The provisions in paragraph (6) have been the subject of numerous bid protests, which have held that the government cannot contract around federal procurement laws.