

Calendar No. 203

116TH CONGRESS }
1st Session }

SENATE

{ REPORT
116-100

CONSTRUCTION CONSENSUS PROCUREMENT
IMPROVEMENT ACT OF 2019

—
R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1434

TO PROHIBIT THE USE OF REVERSE AUCTIONS FOR DESIGN AND
CONSTRUCTION SERVICES PROCUREMENTS, AND FOR OTHER
PURPOSES



SEPTEMBER 10, 2019.—Ordered to be printed

—
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SEPTEMBER 10, 2019.—Ordered to be printed

Mr. JOHNSON, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 1434]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1434) to prohibit the use of reverse auctions for design and construction services procurements, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

	Page
I. Purpose and Summary	1
II. Background and Need for the Legislation	2
III. Legislative History	3
IV. Section-by-Section Analysis	3
V. Evaluation of Regulatory Impact	3
VI. Congressional Budget Office Cost Estimate	3
VII. Changes in Existing Law Made by the Bill, as Reported	5

I. PURPOSE AND SUMMARY

S. 1434, the Construction Consensus Procurement Improvement Act of 2015, amends the Federal Acquisition Regulation (FAR) to prohibit Federal agencies from the use of reverse auctions for awarding design and construction services.¹

¹On November 9, 2017, the Committee approved S. 2113, the Construction Consensus Improvement Act of 2017. S. 1434 is identical to section 4 of that legislation. Accordingly, this re-

Continued

II. BACKGROUND AND THE NEED FOR LEGISLATION

The procedures outlined in statute and detailed in the FAR related to the award of design and construction services by Federal agencies lack guidance on how to determine a fair and reasonable price. Without this guidance, contracting officers may utilize a reverse auction to determine a fair and reasonable cost to the Government.² In a reverse auction, the sellers continually lower their prices in order to win the award, as opposed to a regular auction where buyers raise their offers until they win the item for sale.³ To win the auction, in most cases the company must be the low bidder at the end of the auction.⁴ While this procedure generally results in a low price for the item, the quality of the product, delivery terms, and other important features may be lacking.⁵ Therefore, reverse auctions are not appropriate for design-build contracts that require design concepts, key personnel, and technical solutions.⁶

In 2013, the Government Accountability Office (GAO) recommended that the Director of the Office of Management and Budget issue guidance on the appropriate use of reverse auctions.⁷ In 2015, the Office of Federal Procurement Policy (OFPP) issued a memorandum mentioning reverse auction guidance; however, OFPP has failed to include reverse auction policy within the FAR.⁸ Without a FAR provision, agencies may use reverse auctions to set prices for design-build contracts or to contract for building materials using the reverse auction process. For example, concerns with the use of reverse auctions were highlighted when the United States Army Corps of Engineers issued a policy to stop using reverse auctions for construction contracts after finding that the reverse-auction methodology did not work for construction contracts due to their high degree of variability, and that they did not deliver promised savings.⁹

S. 1434 simply requires the FAR to be amended to prohibit the use of reverse auctions for design and construction services. The legislation defines design and construction services and site planning, landscape design, architectural and engineering services, interior design, construction work for facility, infrastructure, and environmental restoration projects, deliver of construction materials, or construction or substantial alteration to public buildings or works. It defines the term reverse auction as a real-time auction through an electronic medium among two or more offerors who compete by submitting bids, with the ability to submit lower bids at any time before the closing of the auction.

port is in large part a reproduction of the information relevant to section 4 in Chairman Johnson's committee report for S. 2113, S. Rep. No. 115-231 (2018).

²FAR 36.303-2(b) (1997).

³*Reverse Auctions, What are Reverse Auctions?*, (2008), <http://reverseauctions.com/index.html>.

⁴Gov't Accountability Office, GAO-14-108, *Guidance is Needed to Maximize Competition and Achieve Cost Savings* 3 (2013), <http://gao.gov/assets/660/659530.pdf>.

⁵*Id.*

⁶FAR 36.303-2(a) (1997).

⁷GAO-14-108, *supra* note 4.

⁸Office of Federal Procurement Policy, *Memorandum on Effective Use of Reverse Auctions* (June 1, 2015), <https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/effective-use-of-reverse-auctions.pdf>.

⁹Press Release, *Joint-Hearing Finds The Use Of Reverse Auction Contracts Limits Competition, Increases Costs For Taxpayer*, H. Comm. on Small Business, Subcomm. on Contracting & Workforce (Dec. 11, 2013), <http://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=364146>.

III. LEGISLATIVE HISTORY

S. 1434, the Construction Consensus Procurement Improvement Act of 2019, was introduced on May 13, 2019, by Senators Rob Portman (R–OH) and Mazie Hirono (D–HI). The bill was referred to the Committee on Homeland Security and Governmental Affairs.

The Committee considered S. 1434 at a business meeting on May 15, 2019. The Committee approved the bill *en bloc* by voice vote. Senators present for the vote were: Johnson, Paul, Lankford, Scott, Peters, Carper, Hassan, and Rosen.

III. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the “Construction Consensus Procurement Improvement Act of 2019.”

Section 2. Prohibition on the use of a reverse auction for the award of a contract for design and construction services

In this section, Congress finds that in a reverse auction, sellers bid down the price, in contrast to a traditional auction where buyers bid up the price.

This section also requires the FAR to be amended to prohibit the use of reverse auctions as part of procedure for awarding contracts for construction and design services. The section includes a definition of design and a construction service that is consistent and broadly covers all contracts for design and construction of a public building, facility, or work. This section also includes a definition for reverse auction.

IV. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this act and determined that the act will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill 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.

V. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 30, 2019.

Hon. RON JOHNSON,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1434, the Construction Consensus Procurement Improvement Act of 2019.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Aurora Swanson and Matthew Pickford.

Sincerely,

KEITH HALL,
Director.

Enclosure.

S. 1434, Construction Consensus Procurement Improvement Act of 2019			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on May 15, 2019			
By Fiscal Year, Millions of Dollars	2019	2019-2024	2019-2029
Direct Spending (Outlays)	0	*	*
Revenues	0	0	0
Deficit Effect	0	*	*
Spending Subject to Appropriation (Outlays)	0	*	n.e.
Pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2030?	No	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
n.e. = not estimated; * = between zero and \$500,000.			

S. 1434 would prohibit federal agencies from purchasing design or construction services using a specific type of reverse auction. Unlike a traditional auction where a buyer with the highest bid wins the right to purchase a good or service, in a reverse action a buyer seeking a good or service solicits bids, multiple sellers offer bids, and the seller with the lowest bid wins the competition. The legislation would prohibit federal agencies from using a specific type of reverse auction that allows sellers to submit revised bids during the auction.

CBO reviewed available information on the use of reverse auctions in government procurement contracts for the Army Corps of Engineers and the General Services Administration. In addition, CBO reviewed studies prepared by the Government Accountability Office on the use of reverse auctions. In general, reverse auctions have not been suitable for complex contracts like design and construction services because they do not consistently result in procurement costs that are lower than what would result from other contracting methods such as sealed bids or negotiated procurements. CBO estimates that implementing S. 1434 would not require agencies to significantly change their typical contracting process and thus would not have a significant effect on the federal budget.

Enacting S. 1434 could affect direct spending by some agencies (such as Tennessee Valley Authority) that are authorized to spend receipts from fees, the sale of goods, and other collections to cover their operating costs. Because most of those agencies can adjust the amounts they collect as operating costs change, CBO estimates that any net change on direct spending by those agencies would be negligible.

The CBO staff contacts for this estimate are Aurora Swanson and Matthew Pickford. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because S. 1434 would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph XXVI of the Standing Rules of the Senate.

