

## Union Calendar No. 535

114<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 5199

**[Report No. 114-691]**

To amend title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, and to prohibit the use of reverse auctions for design and construction services procurements.

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### IN THE HOUSE OF REPRESENTATIVES

MAY 11, 2016

Mr. MEADOWS introduced the following bill; which was referred to the  
Committee on Oversight and Government Reform

JULY 14, 2016

Additional sponsors: Mr. MULVANEY and Mr. GROTHMAN

JULY 14, 2016

Reported with an amendment, committed to the Committee of the Whole  
House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

# **A BILL**

To amend title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, and to prohibit the use of reverse auctions for design and construction services procurements.

1       *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4       (a) **SHORT TITLE.**—This Act may be cited as the  
5 “Construction Consensus Procurement Improvement Act  
6 of 2016”.

7       (b) **TABLE OF CONTENTS.**—The table of contents for  
8 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.

9 **SEC. 2. CONGRESSIONAL FINDINGS.**

10       Congress makes the following findings:

11           (1) The acquisition procedures that are often  
12 used effectively to procure products and other forms  
13 of services are not always appropriate for procure-  
14 ment of design and construction services.

15           (2) Federal procurement officials often adopt  
16 contracting techniques from the private sector and  
17 have used those techniques effectively to procure  
18 products and services.

19           (3) Design-build is a procurement technique  
20 Federal officials have adopted from the private sec-  
21 tor that has worked well for procurement of design  
22 and construction services.

1           (4) The current statutory framework for de-  
2           sign-build could benefit from legislative refinement.

3           (5) Reverse auctions are another procurement  
4           technique Federal officials have adopted from the  
5           private sector and used successfully to award con-  
6           tracts for the purchase of products that are commer-  
7           cially equivalent to commodities.

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

12 **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-**  
13 **MENT.**

14          (a) CIVILIAN CONTRACTS.—

15           (1) IN GENERAL.—Section 3309(b) of title 41,  
16          United States Code, is amended to read as follows:

17          “(b) CRITERIA FOR USE.—

18           “(1) CONTRACTS WITH A VALUE OF AT LEAST  
19          ~~\$750,000~~ \$3,000,000.—Two-phase selection procedures  
20          shall be used for entering into a contract for the de-  
21          sign and construction of a public building, facility,  
22          or work when a contracting officer determines that  
23          the project has a value of ~~\$750,000~~ \$3,000,000 or  
24          greater, as adjusted for inflation in accordance with  
25          section 1908 of this title.

1           “(2) CONTRACTS WITH A VALUE LESS THAN  
2           ~~\$750,000~~ \$3,000,000.—For projects that a contracting  
3           officer determines have a value of less than  
4           ~~\$750,000~~ \$3,000,000, the contracting officer shall  
5           make a determination whether two-phase selection  
6           procedures are appropriate for use for entering into  
7           a contract for the design and construction of a pub-  
8           lic building, facility, or work when—

9           “(A) the contracting officer anticipates  
10           that 3 or more offers will be received for the  
11           contract;

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

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

17           “(D) the contracting officer has considered  
18           information such as—

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

21           “(ii) the time constraints for delivery  
22           of the project;

23           “(iii) the capability and experience of  
24           potential contractors;

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

3 “(v) the capability of the agency to  
4 manage the two-phase selection process;  
5 and

6 “(vi) other criteria established by the  
7 agency.”.

8 (2) ANNUAL REPORTS.—

9 (A) IN GENERAL.—Not later than Novem-  
10 ber 30 of 2017, 2018, 2019, 2020, and 2021,  
11 the head of each agency shall compile an annual  
12 report of each instance in which the agency  
13 awarded a design-build contract pursuant to  
14 section 3309 of title 41, United States Code,  
15 during the fiscal year ending in such calendar  
16 year, in which—

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

19 (ii) the contract or order was awarded  
20 without using two-phase selection proce-  
21 dures.

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) GAO REPORTS.—Not later than 270 days after  
4 the deadline for the final reports required under sub-  
5 section (f) of section 3309 of title 41, United States Code,  
6 as added by subsection (a)(1), the Comptroller General of  
7 the United States shall issue a report analyzing the com-  
8 pliance of the various Federal agencies with the require-  
9 ments of such section.

10 **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**

11 **FOR THE AWARD OF A CONTRACT FOR DE-**  
12 **SIGN AND CONSTRUCTION SERVICES.**

13 (a) FINDING.—Congress finds that, in contrast to a  
14 traditional auction in which the buyers bid up the price,  
15 sellers bid down the price in a reverse auction.

16 (b) PROHIBITION.—Not later than 180 days after the  
17 date of the enactment of this Act, the Federal Acquisition  
18 Regulatory Council, in consultation with the Adminis-  
19 trator for Federal Procurement Policy, shall amend the  
20 Federal Acquisition Regulation to prohibit the use of re-  
21 verse auctions as part of the two-phase selection procedure  
22 for awarding contracts for construction and design serv-  
23 ices.

24 (c) DEFINITIONS.—For purposes of this section—

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

3           (A) site planning and landscape design;

4           (B) architectural and engineering services  
5 (including surveying and mapping defined in  
6 section 1101 of title 40, United States Code);

7           (C) interior design;

8           (D) performance of substantial construc-  
9 tion work for facility, infrastructure, and envi-  
10 ronmental restoration projects;

11           (E) delivery and supply of construction  
12 materials to construction sites; or

13           (F) construction or substantial alteration  
14 of public buildings or public works; and

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

17           (A) a real-time auction conducted through  
18 an electronic medium among 2 or more offerors  
19 who compete by submitting bids for a supply or  
20 service contract with the ability to submit re-  
21 vised lower bids at any time before the closing  
22 of the auction; and

23           (B) the award of the contract, delivery  
24 order, task order, or purchase order to the of-

- 1 feror, in whole or in part, based on the price
- 2 obtained through the auction process.

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