

COMMONSENSE CONSTRUCTION CONTRACTING ACT OF 2013

DECEMBER 11, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Small Business,
submitted the following

R E P O R T

[To accompany H.R. 2751]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 2751) to amend the Small Business Act to prohibit the use of reverse auctions for design and construction services procurements, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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I. AMENDMENT

The text of H.R. 2751 as consider by the Committee is as follows:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Commonsense Construction Contracting Act of 2013”.

SEC. 2. REVERSE AUCTIONS PROHIBITED FOR CONTRACTS FOR DESIGN AND CONSTRUCTION SERVICES.

The Small Business Act (15 U.S.C. 631 et seq.) is amended—

- (1) by redesignating section 47 as section 48; and
- (2) by inserting after section 46 the following:

“SEC. 47. REVERSE AUCTIONS PROHIBITED FOR CONTRACTS FOR DESIGN AND CONSTRUCTION SERVICES.

“(a) IN GENERAL.—In the case of any contract for design and construction services, reverse auction methods may not be used if the contract—

- “(1) is suitable for award to a small business concern; or
- “(2) if the award is to be made under—
 - “(A) section 8(a);
 - “(B) section 8(m);
 - “(C) section 15(a);
 - “(D) section 15(j);
 - “(E) section 31; or
 - “(F) section 36.

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

“(1) The term ‘reverse auction’ means, with respect to procurement by an agency, a real-time auction on the Internet between a group of offerors who compete against each other by submitting bids for a contract or task order with the ability to submit revised bids throughout the course of the auction, and the award being made to the offeror who submits the lowest bid.

“(2) The term ‘design and construction services’ means—

- “(A) site planning and landscape design;
- “(B) architectural and interior design;
- “(C) engineering system design;
- “(D) performance of construction work for facility, infrastructure, and environmental restoration projects;
- “(E) delivery and supply of construction materials to construction sites; and
- “(F) construction, alteration, or repair, including painting and decorating, of public buildings and public works.”.

II. PURPOSE AND BILL SUMMARY

The purpose of H.R. 2751, the “Commonsense Construction Contracting Act of 2013,” is to amend the Small Business Act (the Act)¹ to prohibit the use of reverse auctions when a design and construction services contract is suitable for award to a small business, or when the procurement is made using a small business program. Under a reverse auction, companies continue to underbid each other, usually through a digital portal, until one is declared the winner. The intention is to drive down prices to the lowest possible amount. However, the United States Army Corps of Engineers (USACE) found that this methodology did not work for construction contracts due to their high degree of variability and did not deliver the promised savings. Consequently, it issued a policy to stop using reverse auctions for construction contracts.

Despite this finding, the use of reverse auctions has continued at other agencies, especially the Department of Veterans Affairs (DVA) and the Department of the Interior (DOI). Small businesses

¹ Originally, title II of the Act of July 30, 1953, c. 282, 67 Stat. 232 was designated as the Small Business Act of 1953. A plethora of amendments in subsequent Congresses led to a rewrite in 1958. Pub. L. No. 85–536, § 1, 72 Stat. 384 (1958). The Act is codified at 15 U.S.C. §§ 631–657s.

have complained that the use of reverse auctions for design and construction continues, placing them at a competitive disadvantage. This bill directs the government to use better methods for choosing construction and design services so that taxpayers get the best value possible and small businesses, as well as the jobs they support, are protected from unscrupulous bidding behavior.

III. NEED FOR LEGISLATION

While construction and architect and engineering (A&E) contracting accounts for about eight percent of federal prime contract dollars, this segment accounts for over 17 percent of the awards to small businesses.² Therefore, issues affecting construction and A&E contracts have a disproportionate effect on small business opportunities. Over the last decade, reverse auctions have become an increasingly prevalent contracting methodology that poses special challenges for small businesses and construction contractors.

The term “reverse auction” is not defined by statute or regulation. However, a 2004 USACE study explained it thusly:

Under this reverse auction methodology, there is an ‘auction’ process whereby [contractors] offer multiple and consecutively lower bids on a rapid ‘auctioning’ basis to eventually arrive at the lowest bid-price of goods or services for the privilege of a standard contract award. In the case of government reverse auctions . . . [t]he government publicly solicits for specific goods and/or services from responsible and responsive contractors to provide these specific goods or services. The reverse auction process simply is the method by which contractors submit their bids and the lowest bid is received. The award is then executed through a standard firm fixed price contract.

Yet, there is a major difference in the operational dynamics of the reverse auction methodology that is unlike anything available in the standard sealed bid process. In the standard sealed bid process, the contractor only gets only one chance to submit a bid. Additionally, the contractor does not know the relative ranking of his bid versus others during the bid process. Hence, in a standard sealed bid process, a contractor cannot bidgame, because he is forced to submit his best bid with only one chance to bid.³

Therefore, a reverse auction is a multi-round low-bid process where the lowest bids are disclosed. A typical reverse auction will be conducted for commodities—products that are standardized and where price is the primary differentiator.⁴

²Analysis based upon the Federal Procurement Data System, *available at* <https://www.fpds.gov> (last accessed March 6, 2012). Copies of reports are on file with the Committee.

³USACE, Final Report Regarding the USACE Pilot Program On Reverse Auctioning 11 (2004) (hereinafter USACE Study). Generally, the term “sealed bidding” is used to describe a process where bids are all submitted by a time certain, publicly opened and recorded, with immediate award to the lowest bidder; however, within the construction industry it is commonly preceded by a round when an offeror’s technical capability is evaluated. FAR Part 14.

⁴While the use of reverse auctions for commercial goods itself remains controversial, the legislation does not address reverse auctions for such goods.

The use of reverse auctions for construction services has been denounced by most of the construction-related trade associations.⁵ They allege that reverse auctions do not guarantee the lowest price, may encourage imprudent bidding, do not allow for a thorough evaluation of value, do not assure that the successful bidder is responsive and responsible, and may contravene federal procurement laws.⁶ When these auctions are conducted by third parties, work that should be reserved for small business is frequently awarded to large businesses, and pricing information that the FAR insists remain private is publicized.⁷ Indeed, even the chief legislative proponent of reverse auctions, former Congressman Tom Davis (R-VA), specifically exempted construction from any legislation he introduced promoting the use of reverse auctions.⁸

Industry's assertions are borne out by the only study on the use of reverse auctions for construction services. USACE spent a year studying the use of the procurement methodology and found that "it offered not even marginal edge in savings over the sealed bid process for construction service projects" and that construction was too variable to be considered a commodity.⁹ As a result, USACE no longer uses reverse auctions for construction contracts. Even though USACE has the most construction contracting experience of any federal agency, not all federal agencies have followed USACE's example and construction contracts continue to be awarded using reverse auctions.¹⁰ Specifically, they are being awarded as commercial item contracts, in direct contravention of Office of Management and Budget Guidance.¹¹ Given these factors, H.R. 2751 is necessary to ensure that small firms in the design and construction arena are able to effectively compete for federal contracts.

IV. HEARINGS

In the 113th Congress, the Subcommittee on Contracting and Workforce held a hearing on May 23, 2013, that examined the use of reverse auctions for construction and construction services for

⁵ See, e.g., Sheet Metal and Air Conditioning Contractors National Association, Reverse Auctions (2004), available at <http://www.smacna.org/pdf/ACF6BF7.pdf>; Chuck Scislo, *To the Lowest Bidder*, Professional Roofing, March 2006, available at <http://docserver.nrca.net/technical/8633.pdf> (National Roofing Contractors Association opposes reverse auctions); Associated General Contractors of America, White Paper on Reverse Auctions for Procurement of Construction 2005, available at <http://newsmanager.commpartners.com/agcleg/downloads/AGC%20Position%20on%20Reverse%20Auctions%20-%20FINAL.pdf> (hereinafter AGC White Paper).

⁶ AGC White Paper.

⁷ Small businesses win most contracts awarded using reverse auctions; however, given that all of the awards are under the statutory amount reserved exclusively for small businesses, these awards should be made exclusively to small companies. Likewise, pricing is frequently disclosed in contravention of FAR § 52.203-2.

⁸ H.R. 2067, 109th Cong. (2005).

⁹ USACE Study at 34-37.

¹⁰ See, e.g., *supra* note 3, DOI, *Solicitation P12PS25233* (Jun. 13, 2012), available at <https://www.fbo.gov/?s=opportunity&mode=form&tab=core&id=b55a55a0cc7346ab722e4c4b011c4911&cview=0> (supply and deliver flexible road base); DVA, *Solicitation VA24413Q0363*, (Jan. 31, 2013), available at <https://www.fbo.gov/?s=opportunity&mode=form&id=039ef8d115384d0cebef055c25934d07&tab=core&cview=1> (testing or poser distribution system); DVA, *Solicitation VA24312Q1952* (Jul. 30, 2012), available at <https://www.fbo.gov/?s=opportunity&mode=form&id=8a576e312880690d317f3fc78314f401&tab=core&cview=0> (complete overhaul of chiller).

¹¹ Memorandum From Angela Styles, Administrator, Office of Federal Procurement Policy, Applicability of FAR Part 12 to Construction Acquisitions (Jul. 3, 2003), available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/procurement/far/far_part12.pdf. This guidance has not been withdrawn.

small business contractors. During that hearing, which was titled “Building America: Challenges for Small Construction Contractors,” Mr. James Dalton, Chief of Construction and Engineering for the USACE discussed a pilot program run by USACE which concluded that for construction projects reverse auctions did not provide the government with substantial savings. Further witnesses from the Small Business Administration (SBA), Associated General Contractors, National Association of Surety Bond Producers, and the American Institute of Architects offered support for the Committee to prohibit the use of reverse auctions for construction services under the Act.

On December 11, 2013, the Subcommittee on Contracting and Workforce of the Committee on Small Business and the Subcommittee on Oversight and Investigations of the Committee on Veterans’ Affairs held a joint hearing titled, “Contracting Away Accountability-Reverse Auctions in Federal Agency Acquisitions.” The hearing focused on whether reverse auctions provided adequate competition and adhered to the requirements of the Small Business Act, while also assessing the purported cost savings associated with this procurement methodology.

V. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on March 5, 2014 and ordered H.R. 2751 reported to the House by a voice vote at 2:35 p.m. During the markup, no amendments were offered.

VI. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto. There were no recorded votes on H.R. 2751.

VII. SECTION-BY-SECTION ANALYSIS OF H.R. 2751

Section 1. Short title

This Section designates the bill as the “Commonsense Construction Contracting Act of 2013.”

Section 2. Reverse auctions prohibited for contracts for design and construction services

This section amends the Act (15 U.S.C. §§ 631–657s) by § 47 as § 48 and creating a new § 47 of the Act.

Subsection (a)—In General

Currently, federal agencies may utilize reverse auctions as the procuring method for design and construction service contracts. Subsection (a) changes this practice to prohibit the use of reverse auctions for design and construction service contracts if specific contracting authorities in the Act are used. It forbids the use of a reverse auction if the contract is awarded pursuant the 8(a) business development program for socially and economically disadvantaged small businesses under section 8(a) of the Act. Agencies also cannot use reverse auction procurement methodologies if the con-

tract is awarded using the procurement program for women (section 8(m) of the Act); historically underutilized business zone (HUBZone) procurement program (section 31 of the Act); or service-disabled veterans (section 36 of the Act). Finally, the contracting officer may not use a reverse auction when the contract is set aside for small businesses, either because the procurement is less than \$150,000 (section 15(j) of the Act), or is suitable for award to small businesses (section 15(a) of the Act).¹² Given that in fiscal year 2012, 95 percent of reverse auctions were for less than \$150,000, the Committee believes that this definition should encompass the vast majority of reverse auctions for design and construction services.¹³

Subsection (b)—Definitions

Subsection (b)(1) addresses the term “reverse auction,” which is not defined by statute or regulation despite its frequent use within the federal procurement arena. Therefore, H.R. 2751 defines the term to mean a procurement by an agency that is conducted in real-time on the Internet between a group of offerors who compete against each other by submitting bids for a contract or task order with the ability to submit revised bids throughout the course of the auction, and the award being made to the offeror who submits the lowest bid. Several factors of this definition are important. First, there is the notion that this applies only to federal agency procurements, not to private sector transactions or subcontracts, even though some subcontracts use the procurement authorities mentioned in subsection (a). Second, there is the element that this is a real time procurement conducted through the Internet. This is important to distinguish reverse auctions from procurements that permit multiple offers as part of a negotiated procurement, such as one conducted pursuant to F.A.R. Part 15. Third, it requires that there be a group of offerors competing against each other—thus, contracts cannot be awarded to single bidders, which is currently happening in 27.1 percent of reverse auctions.¹⁴ Fourth, it clarifies that this applies to contracts and task orders, since 47 percent of reverse auctions are task order awards.¹⁵ Fifth, it requires that offerors be allowed to submit revised bids, since in 26.8 percent of reverse auctions only one round of bidding is conducted, which ne-

¹² Section 15(a), in pertinent part, states:

To effectuate the purposes of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns.

This provision was implemented by creating the so-called rule of two, which stated that, “[t]he contracting officer shall set aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that: (1) Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns . . . ; and (2) Award will be made at fair market prices.” F.A.R. part 19.502-2(b). For an in-depth discussion of the small business procurement programs, see Committee on Small Business, “*Small Business Act Programs for Small Federal Contractors*” (2013), available at http://smallbusiness.house.gov/uploadedfiles/small_business_act_programs_for_small_federal_contractors.pdf.

¹³ Government Accountability Office (GAO), *Reverse Auctions, Guidance Is Needed to Maximize Competition and Achieve Cost Savings* 10 GAO-14-108 (2013).

¹⁴ *Id.* at 22.

¹⁵ *Id.* at 12.

gates any benefit derived from reverse auction procurement over a sealed bid procurement.¹⁶ Finally, it requires that award be made on the basis of price, since in a quarter of reverse auctions award is made to someone other than the lowest bidder.¹⁷ Thus, the definition should provide clarity to both contracting officers and government contractors.

Subsection (b)(2) defines the term “design and construction services” to clarify which contract using reverse auctions are governed by H.R. 2751. Specifically, it lists six groups of activities that are considered design and construction services: (1) Site planning and landscape design; (2) architectural and interior design; (3) engineering system design; (4) performance of construction work for facility, infrastructure, and environmental restoration projects; (5) delivery and supply of construction materials to construction sites; and (6) construction, alteration, or repair, including painting and decorating, of public buildings and public works. Items (1)–(4) are derived from the definitions of “design and construction services” found at 41 C.F.R. § 102–76, which governs the construction of federal buildings. Item (5) is derived from the particular experiences of the USACE. Finally, item (6) is derived from the definition of construction services found in 40 U.S.C. § 3142. Together, the Committee believes these provide a comprehensive definition of design and construction services.

VIII. CONGRESSIONAL BUDGET COST ESTIMATE

H.R. 2751—Commonsense Construction Contracting Act of 2013

H.R. 2751 would prohibit federal agencies from purchasing design or construction services using online, dynamic auctions—often referred to as reverse auctions. In a traditional auction a buyer with the highest bid wins the right to purchase an object. 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. The legislation would prohibit a specific type of reverse auction for construction and design procurements, specifically those done in a real-time auction on the Internet among a group of sellers with the option to submit revised bids during the auction.

CBO reviewed information on the use of reverse auctions in government procurement contracts by the Army Corps of Engineers, the General Services Administration, and the Government Accountability Office. In general, those offices have found that reverse auctions are not suitable for complex contracts like design and constructive services. Those agencies have found that using this type of reverse auction in such complex procurements does not consistently result in lower procurement cost than would result from other methods such as sealed bids or negotiated procurements. CBO estimates that implementing H.R. 2751 would not require agencies to make a significant change 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

¹⁶*Id.* at 22. Information on sealed bid procurements may be found at F.A.R. Part 14.

¹⁷*Id.* at 14.

in spending by those agencies would be negligible. Enacting H.R. 2751 would not affect revenues.

H.R. 2751 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.

The CBO staff contact for this estimate is Matthew Pickford. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

IX. UNFUNDED MANDATES

H.R. 2751 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104–4, and would impose no costs on state, local or tribal governments.

X. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures. The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to § 402 of the Congressional Budget Act of 1974, which found that H.R. 2751 could affect direct spending by agencies not funded through annual appropriations, but that any net increase in spending by those agencies would be negligible so that enacting H.R. 2751 would not affect revenues.

XI. OVERSIGHT FINDINGS

In accordance with clause (2)(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R.2751 are incorporated into the descriptive portions of this report.

XII. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cl. 3 of the Constitution of the United States.

XIII. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 2751 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104–1.

XIV. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 2751 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

XV. STATEMENT OF NO EARMARKS

Pursuant to clause 9 of rule XXI, H.R. 2751 does not contain any Congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (d), (e) or (f) of clause 9 of Rule XXI of the Rules of the House.

XVI. STATEMENT OF DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c) of rule XIII of the Rules of the House, no provision of H.R. 2751 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 GAO 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.

XVII. DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to clause 3(c) of rule XIII of the Rules of the House, H.R. 2751 does not direct any rulemaking.

XVIII. PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House, the Committee establishes the following performance-related goals and objectives for this legislation:

H.R. 2751 prohibits the use of reverse auctions for design and construction services contracts if the contract is awarded pursuant to the Small Business Act.

XIX. 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):

SMALL BUSINESS ACT

* * * * *

SEC. 47. REVERSE AUCTIONS PROHIBITED FOR CONTRACTS FOR DESIGN AND CONSTRUCTION SERVICES.

(a) IN GENERAL.—In the case of any contract for design and construction services, reverse auction methods may not be used if the contract—

- (1) is suitable for award to a small business concern; or*
- (2) if the award is to be made under—*
 - (A) section 8(a);*
 - (B) section 8(m);*
 - (C) section 15(a);*
 - (D) section 15(j);*
 - (E) section 31; or*
 - (F) section 36.*

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

- (1) The term “reverse auction” means, with respect to procurement by an agency, a real-time auction on the Internet between*

a group of offerors who compete against each other by submitting bids for a contract or task order with the ability to submit revised bids throughout the course of the auction, and the award being made to the offeror who submits the lowest bid.

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

(A) site planning and landscape design;

(B) architectural and interior design;

(C) engineering system design;

(D) performance of construction work for facility, infrastructure, and environmental restoration projects;

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

(F) construction, alteration, or repair, including painting and decorating, of public buildings and public works.

SEC. [47.] 48. All laws and parts of laws inconsistent with this Act are hereby repealed to the extent of such inconsistency.

